



**2001 LAT
Decisions**
(released January 1 to December 31, 2001)

**LICENCE
APPEAL
TRIBUNAL**

LICENCE APPEAL TRIBUNAL

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LICENCE APPEAL TRIBUNAL
2001 LAT DECISIONS
(released January 1 to December 31, 2001)

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- Contains full decisions and reasons given

Made available pursuant to the

Licence Appeal Tribunal Act, 1999,

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

and the

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

INCIDES

CHILD AND FAMILY SERVICES ACT

CEMETERIES ACT

COLLECTION AGENCIES ACT

DAY NURSERIES ACT

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

HIGHWAY TRAFFIC ACT

MOTOR VEHICLE DEALERS ACT

ONTARIO NEW HOME WARRANTIES PLAN ACT

REAL ESTATE AND BUSINESS BROKERS ACT

TRAVEL INDUSTRY ACT

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

SECTION CODES:

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

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

APPEAL/DECISION CODES

Type	Code	Description
ADLS	ADJ	Adjournment
	ALLERGY	Allergy
	ASTHMA	Asthma
	BELLP	Bell's Palsy
	CHEST	Chest Pain
	CLEFT	Cleft Palate
	COLD	Cold
	COUGH	Coughing & Breathing
	FIBMG	Fibromyalgia
	GAG	Gagging
	HDTR	Head Trauma
	HYP	Hyperactive Airway Disease
	LUNG	Lungs
	MANC DEP	Manic Depressive
	MISTAKE	Mistaken Identity
	NOMC	No Medical Condition
	NOSHOW	No Show
	PAND	Panic Disorder
	PULD	Pulmonary Disorder
	RESP	Respiratory Problem

Type	Code	Description
MEDICAL	ADJ	Adjournment
	ALCL	Alcohol
	ANEU	Aneurysm
	CARD	Cardiac
	DOWN	Downgrade of Licence
	DRUG	Drugs/Medication
	EPIL	Epileptic
	MDIS	Mental Disorder
	MINF	Myocardial Infection
	PERC	Perceptual Problems
	SEIZ	Seizure
	SIGHT	Sight
	TUM	Tumor

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

LICENCE APPEAL TRIBUNAL

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2001 LAT DECISIONS

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

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

CHILD AND FAMILY SERVICES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
CFSA	<i>Canadian Wilderness Program</i>	Refuse to Renew Licence	May 10, 2001		Unsuccessful
CFSA	<i>Danny's Place Support Services A.K.A. Onyeka Ventures</i>	Revoke Registration	January 19, 2001	Order	
CFSA	<i>Danny's Place Support Services A.K.A. Onyeka Ventures</i>	Revoke Registration	February 23, 2001		Unsuccessful

CEMETERIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
CA	<i>The Ontario Historical Society</i>	To Close a Cemetery	October 3, 2001	Order	
CA	<i>The Ontario Historical Society</i>	To Close a Cemetery	December 17, 2001	Adjournment	

COLLECTION AGENCIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CAA	CANNON	Refuse Registration	October 24, 2001	Order	
CAA	CANNON	Refuse Registration	December 11, 2001	Order	Successful
CAA	DOHERTY	Refuse Registration	October 24, 2001	Order	
CAA	DOHERTY	Refuse Registration	December 11, 2001	Order	Unsuccessful
CAA	FLEWITT	Refuse Registration	September 21, 2001	Order	
CAA	FLEWITT	Refuse Registration	December 20, 2001		Successful

DAY NURSERIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
DNA	<i>Blue Ribbon Child Care Society carrying on business as Blue Ribbon Day Care Centre</i>	Suspend Licence & Not to Renew Licence	March 16, 2001	Order	
DNA	<i>Blue Ribbon Child Care Society carrying on business as Blue Ribbon Day Care Centre</i>	Suspend Licence & Not to Renew Licence	June 14, 2001		Unsuccessful
DNA	<i>St. James Day Care Services</i>	Notice of Intention/Direction	August 22, 2001	Order	

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
FDEA	BIGG	Claim	February 9, 2001	Order	Successful
FDEA	GIBSON	Claim	September 6, 2001	Adjournment	

HIGHWAY TRAFFIC ACT

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

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	388-RESP	Respiratory	January 10, 2001		Unsuccessful
ADLS	399-HEAR	Hearing Deficit	January 26, 2001		Unsuccessful
ADLS	419-ADJ		January 31, 2001	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	420		January 24, 2001	Order	
ADLS	420-RESP	Respiratory	January 31, 2001		Unsuccessful
ADLS	454-NOMC	No Medical Condition	March 1, 2001		Unsuccessful
ADLS	478-BRONCH	Bronch	January 24, 2001		Unsuccessful
ADLS	498-MISI	Mistaken Identity	April 4, 2001		Unsuccessful
ADLS	499-NOMC	No Medical Condition	March 22, 2001		Unsuccessful
ADLS	504-ASTHMA	Asthma	March 23, 2001		Unsuccessful
ADLS	538-CHEST	Chest Wall Injury	April 24, 2001		Successful
ADLS	587-NOMC	No Medical Condition	June 11, 2001		Unsuccessful
ADLS	609-PULD	Pulmonary Disorder	June 28, 2001		Unsuccessful
ADLS	628-PULD	Pulmonary Disorder	June 25, 2001		Unsuccessful
ADLS	630-NOMC	No Medical Condition	June 26, 2001		Unsuccessful
ADLS	643-NoShow	No Show	July 18, 2001		Unsuccessful
ADLS	664-ALCL	Alcohol	July 18, 2001		Unsuccessful
ADLS	690-NOMC	No Medical Condition	August 1, 2001		Unsuccessful
ADLS	744-RESP	Respiratory	August 29, 2001		Unsuccessful
ADLS	752-NOMC	No Medical Condition	September 6, 2001		Unsuccessful
ADLS	756-LUNGS	Lungs	September 7, 2001		Successful
ADLS	757	No Medical Condition	September 17, 2001	Interim Order	
ADLS	757-ADJ		September 27, 2001	Adjournment	
ADLS	757		October 2, 2001	Interim Order	
ADLS	757		October 5, 2001	Interim Order	
ADLS	757- FINAL		October 5 & 26, 2001		Unsuccessful
ADLS	761- HYP	Hyperactive Air Disease	September 19, 2001		Unsuccessful
ADLS	799-MANC DEP	Manic Depressive	November 1, 2001		Successful
ADLS	809-CHRON BRONC	Chronic Bronchitis	November 5, 2001		Unsuccessful
ADLS	813-NOMC	No Medical Condition	November 5, 2001		Unsuccessful
ADLS	843-NOMC	No Medical Condition	December 10, 2001		Unsuccessful
ADLS	847- MISTAKE	Mistaken Identity	November 27, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	859- SEV GAG	Severe Gagging	December 6, 2001		Unsuccessful
ADLS	880- HYPER	Hyperventilation	December 11, 2001		Successful
ADLS	890-ASTH	Asthma	December 20, 2001		Unsuccessful
ADLS	DIS-01	Dismiss	January 18, 2001	Dismissal Order	Unsuccessful
ADLS	DIS-02	Dismiss	January 18, 2001	Dismissal Order	Unsuccessful
ADLS	DIS-03	Dismiss	January 18, 2001	Dismissal Order	Unsuccessful
ADLS	K.J.J.	Dismiss	October 12, 2001	Dismissal Order	Unsuccessful
ADLS	J.O.	Dismiss	February 8, 2001	Dismissal Order	Unsuccessful
ADLS	J.P.	Dismiss	September 18, 2001	Dismissal Order	Unsuccessful
ADLS	M.P.F.	Dismiss	September 24, 2001	Dismissal Order	Unsuccessful
ADLS	M.S.	Dismiss	February 8, 2001	Dismissal Order	Unsuccessful
ADLS	S.M.	Dismiss	February 8, 2001	Dismissal Order	Unsuccessful

Highway Traffic Act – Commercial Vehicle Operator's Registration

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CARR	Anbel Bus Lines Inc.	Suspension and Seizure Order	February 22, 2001	Order	Unsuccessful
CARR	Ferrel Equipment Leasing Co. Ltd., 911136 Ontario Limited and 1027149 Ontario Ltd.	Suspension and Seizure Order	December 17, 2001	Order	
CARR	Georgina Equipment Inc.	Suspension and Seizure Order	August 23, 2001	Order	
CARR	Grand Pacific Transport Inc.	Suspension and Seizure Order	June 26, 2001	Order	
CARR	Grand Pacific Transport Inc.	Suspension and Seizure Order	August 22, 2001		Unsuccessful
CARR	Green Way Ltd.	Suspension and Seizure Order	December 13, 2001	Order	
CARR	JHAND	Refusal	August 29, 2001	Order	
CARR	SINGH	Suspension and Seizure	June 28, 2001		Unsuccessful

Highway Traffic Act – Commercial Vehicle/Trailer Impoundment and Suspension

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CVIS	<i>TCB Express Inc.</i>	Critical Defect	March 8, 2001		Unsuccessful
CVIS	<i>Bakke's Trucking Ltd.</i>	Impound and Suspend	June 15, 2001		Unsuccessful

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

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIS/ GARAGE	<i>1059294 Ontario Inc. and Al Pawluk</i>	Revoke Registration	September 11, 2001	Order	
MVIS/ GARAGE	<i>1059294 Ontario Inc. and Al Pawluk</i>	Revoke Registration	October 23, 2001		Unsuccessful
MVIS/ GARAGE	<i>1428791 Ontario Ltd.</i>	Refuse Registration	May 7, 2001	Order	Unsuccessful
MVIS/ GARAGE	<i>FOURNIER, Donald and Don Fournier Service Centre Inc.</i>	Revoke Registrations	May 23, 2001	Order	
MVIS/ GARAGE	<i>FOURNIER, Donald and Don Fournier Service Centre Inc.</i>	Revoke Registrations	September 20, 2001	Order	
MVIS/ GARAGE	<i>Leonard Sherwood and CPG Automotive</i>	Revoke Registrations	January 17, 2001		Unsuccessful
MVIS/ GARAGE	<i>Charles Meek dba Meek Motors and Charles Meek</i>	Revoke Registrations	December 11, 2001	Order	
MVIS/ GARAGE	<i>Merle's Auto Repairs and Merrill Thomas</i>	Revoke Registrations	January 18, 2001		Unsuccessful
MVIS/ GARAGE	<i>Mrozek Auto Service Ltd. and Kenneth E. Barber</i>	Refuse Registrations	June 26, 2001	Order	

Highway Traffic Act – Medical Suspension or Downgrade (MEDICAL)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MEDICAL	<i>C.D.</i>	Unperfected – Downgrade	September 18, 2001	Dismissal Order	Unsuccessful
MEDICAL	<i>G.E.</i>	Unperfected – Medical	November 26, 2001	Dismissal Order	Unsuccessful
MEDICAL	<i>G.J.P.</i>	Unperfected – Medical	November 16, 2001	Dismissal Order	Unsuccessful
MEDICAL	<i>L.A.A.</i>	Downgrade	November 19, 2001	Adjournment	
MEDICAL	<i>355-ALCL</i>	Alcohol	January 31, 2001		Successful
MEDICAL	<i>362-SEIZ</i>	Seizure	January 5, 2001		Unsuccessful
MEDICAL	<i>373-ALCL</i>	Alcohol	January 17, 2001		Successful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MEDICAL	397-ALCL	Alcohol	January 31, 2001		Unsuccessful
MEDICAL	407-ALCL	Alcohol	February 9, 2001		Successful
MEDICAL	416-DRUG	Drugs	February 19, 2001		Successful
MEDICAL	430 -DRUG	Drugs	February 20, 2001		Successful
MEDICAL	448- ALCL	Alcohol	February 26, 2001		Successful
MEDICAL	458-ALCL	Alcohol	March 2, 2001		Successful
MEDICAL	467-SIGHT	Sight	March 13, 2001		Unsuccessful
MEDICAL	478- MENT	Mental	February 20, 2001		Unsuccessful
MEDICAL	473-COG	Cognitive	April 3, 2001		Unsuccessful
MEDICAL	490-ADJ		March 15, 2001	Adjournment	
MEDICAL	512-ADJ		May 3, 2001	Adjournment	
MEDICAL	516- SEIZ	Seizure	April 17, 2001		Unsuccessful
MEDICAL	519-CARD	Downgrade – Cardiac	May 17, 2001		Unsuccessful
MEDICAL	522-ADJ		April 20, 2001	Adjournment	
MEDICAL	533-CARD	Downgrade- Cardiac	May 2, 2001		Unsuccessful
MEDICAL	534-ALCL	Alcohol	April 30, 2001		Unsuccessful
MEDICAL	549-CARD	Downgrade – Cardiac	May 10, 2001		Unsuccessful
MEDICAL	567-SEIZ	Seizure	May 29, 2001		Unsuccessful
MEDICAL	569-ADJ		May 24, 2001	Adjournment	
MEDICAL	575-MDIS	Mental Disorder	June 8, 2001		Unsuccessful
MEDICAL	598-MED	Medication	June 20, 2001		Successful
MEDICAL	644-SEIZ	Seizure	July 25, 2001		Unsuccessful
MEDICAL	649-TUM	Tumor	July 25, 2001		Successful
MEDICAL	660-EPIL	Epileptic	July 26, 2001		Unsuccessful
MEDICAL	663-ALCL	Alcohol	July 31, 2001		Successful
MEDICAL	694-SEI	Seizure	August 15, 2001		Successful
MEDICAL	704-Downgrade	Downgrade	August 17, 2001		Unsuccessful
MEDICAL	710-ALCL	Alcohol	August 30, 2001		Unsuccessful
MEDICAL	733-PSYCH	Psychiatric	September 6, 2001		Unsuccessful
MEDICAL	751-SEIZ	Seizure	September 26, 2001		Unsuccessful
MEDICAL	776-SEIZ	Seizure	October 1, 2001		Successful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MEDICAL	784-MENTAL	Mental Illness	October 24, 2001		Unsuccessful
MEDICAL	826- SEIZ	Seizure	November 21, 2001		Unsuccessful

Highway Traffic Act – Motor Vehicle Impoundment Order (MVIA)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	1245246 Ontario Ltd. o/a Trees by Nature	Stolen	June 28, 2001	Consent	Successful
MVIA	1282868 Ontario Ltd. (First Choice Rent A Car)	Due Diligence	September 21, 2001		Unsuccessful
MVIA	1311311 Ontario Limited o/a Performance Sales and Leasing	Due Diligence & Exceptional Hardship	September 11, 2001		Unsuccessful
MVIA	891990 Ontario Inc.	Due Diligence	September 6, 2001		Unsuccessful
MVIA	AFZAL	Stolen	April 11, 2001		Unsuccessful
MVIA	AIDE	Exceptional Hardship	April 4, 2001		Unsuccessful
MVIA	ALLAN	Exceptional Hardship	February 21, 2001		Unsuccessful
MVIA	ARMSTRONG	Due Diligence & Exceptional Hardship	June 28, 2001		Unsuccessful
MVIA	ASARE	Due Diligence & Exceptional Hardship	April 25, 2001		Unsuccessful
MVIA	Ash-Fab Roofing Systems Ltd.	Due Diligence	May 14, 2001		Unsuccessful
MVIA	FERGUSON-BAINS	Exceptional Hardship	January 24, 2001		Unsuccessful
MVIA	Balko Drywall Inc.	Exceptional Hardship	June 7, 2001		Unsuccessful
MVIA	BARNARD	Exceptional Hardship	September 17, 2001		Unsuccessful
MVIA	Bart-Pol Express Inc.	Due Diligence & Exceptional Hardship	June 29, 2001		Unsuccessful
MVIA	BATCHELOR	Exceptional Hardship	November 9, 2001		Unsuccessful
MVIA	BATTEN	Exceptional Hardship	March 21, 2001	Consent	Successful
MVIA	BLEWETT	Stolen	February 8, 2001	Order	Unsuccessful
MVIA	BOTELHO	Due Diligence & Exceptional Hardship	August 29, 2001		Unsuccessful
MVIA	Brampton Leasing and Rentals Ltd.	Due Diligence	September 17, 2001		Unsuccessful
MVIA	BRAR		January 29, 2001	Order	Unsuccessful
MVIA	BUCHHOLZ	Exceptional Hardship	October 1, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	CARPPI	Unperfected	July 12, 2001	Dismissal Order	Unsuccessful
MVIA	C.C. Contracting Inc. o/a 1400598 Ontario Ltd.	Due Diligence & Exceptional Hardship	May 2, 2001		Unsuccessful
MVIA	Centennial Construction and Contracting (Niagara) Inc.	Stolen	July 31, 2001		Unsuccessful
MVIA	Centennial Construction and Contracting (Niagara) Inc.		November 19, 2001	Consent	Successful
MVIA	CHRISTIANSEN	Extension of time to file	December 4, 2001	Order	Successful
MVIA	COPPARD.	Exceptional Hardship	June 6, 2001		Unsuccessful
MVIA	CROUGH	Stolen	January 16, 2001	Order	Unsuccessful
MVIA	CROWE	Extension of time to file	November 21, 2001	Order	Unsuccessful
MVIA	DAY	Exceptional Hardship	March 5, 2001		Unsuccessful
MVIA	DESROCHES	Exceptional Hardship	May 1, 2001		Unsuccessful
MVIA	DEVINE	Licence not under suspension/Due Diligence and Exceptional Hardship	September 27, 2001		Unsuccessful
MVIA	DERASP	Exceptional Hardship	November 22, 2001	Order	Unsuccessful
MVIA	DOLBER	Due Diligence & Exceptional Hardship	December 31, 2001		Unsuccessful
MVIA	DUNN		February 21, 2001	Consent	Successful
MVIA	DURETTE	Exceptional Hardship	May 4, 2001		Successful
MVIA	Enterprise Rent-a-Car	Stolen	May 23, 2001	Consent	Successful
MVIA	Enterprise Rent-a-Car		June 15, 2001	Adjournment	
MVIA	Enterprise Rent-a-Car	Due Diligence	June 25, 2001		Unsuccessful
MVIA	Enterprise Rent-a-Car	Stolen	November 29, 2001	Consent	Successful
MVIA	FLEMING	Exceptional Hardship	February 8, 2001	Order	Unsuccessful
MVIA	FOSTER	Exceptional Hardship	August 23, 2001		Unsuccessful
MVIA	FOX	Due Diligence & Exceptional Hardship	August 8, 2001		Unsuccessful
MVIA	FREITAS		October 26, 2001	Consent	Successful
MVIA	FRIZZELL	Exceptional Hardship	June 28, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	GARCIA	Exceptional Hardship	July 5, 2001		Unsuccessful
MVIA	GATES	Unperfected	July 27, 2001	Dismissal Order	Unsuccessful
MVIA	GAUTHIER	Stolen	July 13, 2001		Unsuccessful
MVIA	GILLARD	Exceptional Hardship	August 24, 2001		Unsuccessful
MVIA	HARDY	Exceptional Hardship	September 10, 2001		Unsuccessful
MVIA	HECIMOVICH	Extension of time to file	November 26, 2001	Order	Successful
MVIA	HECIMOVICH	Stolen and Exceptional Hardship	December 20, 2001		Unsuccessful
MVIA	HILLO, Andy Advertising Ltd.	Licence not under suspension	October 12, 2001		Successful
MVIA	HOBBS	Due Diligence & Exceptional Hardship	September 18, 2001		Unsuccessful
MVIA	IRWIN	Exceptional Hardship	October 12, 2001		Unsuccessful
MVIA	JACOBS	Exceptional Hardship	April 24, 2001		Unsuccessful
MVIA	JOYCE	Due Diligence & Exceptional Hardship	December 17, 2001		Unsuccessful
MVIA	JURGENS	Stolen	July 13, 2001	Consent	Successful
MVIA	Kelly's Ale House and Grill Inc	Dismissal	June 2, 2001	Order	Unsuccessful
MVIA	KHAN	Exceptional Hardship	March 7, 2001		Unsuccessful
MVIA	KISSICK	Due Diligence & Exceptional Hardship	July 23, 2001	Adjournment	
MVIA	KLASSEN	Exceptional Hardship	November 15, 2001		Unsuccessful
MVIA	KNORR	Exceptional Hardship & Stolen	October 12, 2001		Unsuccessful
MVIA	KOLDEN	Exceptional Hardship	April 9, 2001		Unsuccessful
MVIA	KONEFAL	Due Diligence	May 15, 2001	Consent	Successful
MVIA	KRYGER	Exceptional Hardship	August 21, 2001		Unsuccessful
MVIA	LATIMER	Extension of time to file	June 19, 2001	Order	Successful
MVIA	LATIMER	Exceptional Hardship	July 10, 2001		Unsuccessful
MVIA	LATOUR	Due Diligence & Exceptional Hardship	August 7, 2001		Successful
MVIA	LEFLER	Due Diligence & Exceptional Hardship	August 22, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	LEFORT	Due Diligence & Exceptional Hardship	June 6, 2001		Unsuccessful
MVIA	LEGARDE F.	Unperfected	February 28, 2001	Dismissal Order	Unsuccessful
MVIA	LENNON	Stolen	August 27, 2001		Unsuccessful
MVIA	LI	Exceptional Hardship	June 14, 2001		Unsuccessful
MVIA	LICKERS	Exceptional Hardship	April 27, 2001		Unsuccessful
MVIA	LIRETTE	Due Diligence	February 20, 2001		Unsuccessful
MVIA	LOOBY	Stolen	November 6, 2001		Unsuccessful
MVIA	LORENZ	Exceptional Hardship	February 21, 2001	Order	Unsuccessful
MVIA	MARSHALL	Stolen and Exceptional Hardship	August 22, 2001		Unsuccessful
MVIA	MARTENS	Stolen	June 20, 2001		Unsuccessful
MVIA	MATE	Exceptional Hardship	May 8, 2001	Consent	Successful
MVIA	MAXEY	Due Diligence and Exceptional Hardship	August 29, 2001		Successful
MVIA	McDONALD	Exceptional Hardship	February 16, 2001		Unsuccessful
MVIA	McDONALD A.	Exceptional Hardship	July 16, 2001		Unsuccessful
MVIA	McNAMARA	Due Diligence & Exceptional Hardship	May 16, 2001		Unsuccessful
MVIA	McWATERS	Unperfected	January 23, 2001	Dismissal Order	Unsuccessful
MVIA	MONIGHAN	Due Diligence & Exceptional Hardship	February 22, 2001		Unsuccessful
MVIA	MOORE	Stolen	September 24, 2001		Unsuccessful
MVIA	MORRIS	Stolen & Exceptional Hardship	June 14, 2001		Unsuccessful
MVIA	MULVIHILL		October 1, 2001	Consent	Successful
MVIA	Murdoch Group Inc.	Due Diligence	July 31, 2001	Adjournment	
MVIA	Murdoch Group Inc.	Due Diligence	August 13, 2001		Unsuccessful
MVIA	MURISON	Stolen	February 20, 2001		Unsuccessful
MVIA	NEEDHAM	Exceptional Hardship	April 24, 2001		Unsuccessful
MVIA	NGUYEN	Exceptional Hardship	October 22, 2001		Unsuccessful
MVIA	O'NEIL	Due Diligence & Exceptional Hardship	August 15, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	PAOLO	Stolen	August 23, 2001		Unsuccessful
MVIA	PELESHOK MOTORS (AJAX) LTD.	Not Under Suspension	December 13, 2001		Unsuccessful
MVIA	PITEK	Exceptional Hardship	February 2, 2001		Unsuccessful
MVIA	POLESZUK	Exceptional Hardship	September 4, 2001		Unsuccessful
MVIA	RAFUSE	Exceptional Hardship	August 29, 2001		Unsuccessful
MVIA	RICHARDS	Exceptional Hardship	October 24, 2001		Unsuccessful
MVIA	RILEY	Exceptional Hardship	June 19, 2001		Unsuccessful
MVIA	RITCHIE		March 1, 2001	Consent	Successful
MVIA	ROBILLIARD	Exceptional Hardship	March 29, 2001		Unsuccessful
MVIA	SALMON	Stolen & Exceptional Hardship	July 30, 2001		Successful
MVIA	SANTOS	Exceptional Hardship	November 8, 2001	Order	Unsuccessful
MVIA	SKOF	Exceptional Hardship	December 31, 2001		Successful
MVIA	SMITH	Exceptional Hardship	August 2, 2001		Unsuccessful
MVIA	SMITH, L. I.	Exceptional Hardship	October 31, 2001		Unsuccessful
MVIA	SHILLING		September 12, 2001	Consent	Successful
MVIA	SNIDER	Due Diligence & Exceptional Hardship	February 13, 2001		Unsuccessful
MVIA	SNOW	Due Diligence & Exceptional Hardship	October 22, 2001		Unsuccessful
MVIA	SOLOMAN	Exceptional Hardship	March 23, 2001		Unsuccessful
MVIA	SPEARS	Exceptional Hardship	April 17, 2001		Unsuccessful
MVIA	SUCCAR	Exceptional Hardship	November 30, 2001		Unsuccessful
MVIA	Superior Lawn Care Inc.	Due Diligence	September 6, 2001		Unsuccessful
MVIA	SWALM	Stolen	May 29, 2001		Unsuccessful
MVIA	TASSIE	Exceptional Hardship	August 29, 2001		Successful
MVIA	TERRY	Exceptional Hardship	June 26, 2001		Unsuccessful
MVIA	THINEL-BITTSCHWAN		November 20, 2001	Consent	Successful
MVIA	Thrifty Canada Ltd.	Due Diligence	January 5, 2001		Unsuccessful
MVIA	THOMSEN	Exceptional Hardship	August 28, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	TRAN	Exceptional Hardship	September 6, 2001		Unsuccessful
MVIA	<i>Tieco Manufacturing</i>	Due Diligence	January 2, 2001		Successful
MVIA	TOULOUSE	Exceptional Hardship	May 17, 2001		Unsuccessful
MVIA	VANDEKERCKHOVE	Due Diligence	April 25, 2001		Unsuccessful
MVIA	VANDEVENNE	Exceptional Hardship	March 20, 2001		Unsuccessful
MVIA	WALES	Exceptional Hardship	October 4, 2001		Unsuccessful
MVIA	WARNER	Due Diligence & Exceptional Hardship	December 17, 2001		Unsuccessful
MVIA	WHITE	Dismissal	June 15, 2001	Order	Unsuccessful
MVIA	WILSON	Stolen	August 7, 2001		Unsuccessful
MVIA	WINANT	Exceptional Hardship	September 11, 2001		Successful
MVIA	WONG	Exceptional Hardship	January 9, 2001		Unsuccessful
MVIA	WOOLSEY	Due Diligence & Exceptional Hardship	November 15, 2001		Successful
MVIA	YADRAM	Exceptional Hardship	January 24, 2001		Unsuccessful
MVIA	YIP	Exceptional Hardship	March 8, 2001		Unsuccessful
MVIA	ZWIERS	Exceptional Hardship	July 19, 2001		Unsuccessful

MOTOR VEHICLE DEALERS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	<i>1448833 Ontario Corporation o/a Power Auto and Thayabaran Jeyanathan</i>	Refuse Registrations	December 11, 2001	Consent	Successful
MVDA	<i>373503 Ontario Limited o/a Durable Car Truck Sales and Angelo Vellone</i>	Revoke Registrations	July 27, 2001	Order	Successful
MVDA	<i>ABC Auto Sales and Service and Ebrahim Javady Torabi</i>	Refuse Registrations	January 26, 2001	Consent	Successful
MVDA	<i>ABDUL-HUSSEIN, Ali o/a B & A Auto Sale</i>	Revoke Registration	April 30, 2001	Adjournment	
MVDA	<i>ABO, Jeannette</i>	Refuse Registration	January 23, 2001	Consent	Successful
MVDA	<i>ADIYAMAN</i>	Refuse Registration	November 7, 2001	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	ALDER	Refuse Registration	March 26, 2001	Consent	Successful
MVDA	Ali Abdul-Hussein o/a B & A Auto	Revoke Registration	January 25, 2001		Unsuccessful
MVDA	Ali Abdul-Hussein o/a B & A Auto	Revoke Registration	July 5, 2001	Ruling	Successful
MVDA	Andrewlene Farms Ltd.	Revoke Registrations	February 19, 2001	Adjournment	
MVDA	Auto Mart Sudbury Ltd. and Rick Toulouse	Revoke Registrations	December 11, 2001	Adjournment	
MVDA	BABES	Refuse Registration	March 14, 2001	Consent	Successful
MVDA	BALSASSARRE, A.	Refuse Registration	December 12, 2001	Order	Unsuccessful
MVDA	BALSASSARRE	Refuse Registration	August 23, 2001	Adjournment	
MVDA	BALSASSARRE, L.	Refuse Registration	October 22, 2001	Adjournment	
MVDA	BALSASSARRE, L.	Refuse Registration	November 2, 2001	Adjournment	
MVDA	BARAKAT	Refuse Registration	August 29, 2001	Consent	Successful
MVDA	BEHNAMY, Sam o/a Silver Auto	Refuse Registration	January 18, 2001		Unsuccessful
MVDA	Brian Clements o/a Eastons Corners Auto	Revoke Registration	January 18, 2001	Consent	Successful
MVDA	Buyrite Auto Sales S.K. Limited and Jihad Nazem Kadri	Revoke Registration	December 27, 2001		Unsuccessful
MVDA	Centre City Quality Cars Inc. and Evelyn May Watling	Refuse Registration	July 24, 2001		Unsuccessful
MVDA	COLE	Refuse Registration	January 11, 2001	Consent	Successful
MVDA	Collection Auto Inc.	Refuse Registration	March 15, 2001	Consent	Successful
MVDA	Continental Leasing Services Inc. and Peter Carl Verbeek	Extension of time to file	December 3, 2001	Order	Successful
MVDA	CONNOLLY	Claim - Compensation	January 8, 2001		Unsuccessful
MVDA	DARWISH	Revoke Registration	September 11, 2001	Consent	Successful
MVDA	EASTERBROOK	Refuse Registration	July 31, 2001	Consent	Successful
MVDA	EDWARDS	Refuse Registration	October 12, 2001	Adjournment	
MVDA	ELLIOTT	Refuse Registration	May 28, 2001	Adjournment	
MVDA	ELLIOTT	Refuse Registration	August 23, 2001		Unsuccessful
MVDA	ELLIOTT K.	Unperfected	February 8, 2001	Dismissal Order	Unsuccessful
MVDA	EL-KHOUDY	Unperfected	September 12, 2001	Dismissal Order	Unsuccessful
MVDA	FARRAR	Claim - Compensation	February 20, 2001		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	FIACCO	Revoke Registration	July 24, 2001	Order	
MVDA	FIACCO	Revoke Registration	November 26, 2001		Successful
MVDA	Formula Fine Cars Ltd. and Ahmad El Masri	Refuse Registration	December 27, 2001		Unsuccessful
MVDA	GABRIEL	Refuse Registration	September 14, 2001	Consent	Successful
MVDA	GERRIOR & EASTERN AUTO	Revoke Registrations	March 9, 2001		Unsuccessful
MVDA	GIBB	Refuse Registration	November 19, 2001	Consent	Successful
MVDA	GOPAUL	Refuse Registration	October 9, 2001	Consent	Unsuccessful
MVDA	GREGORCZYK	Refuse Registration	May 23, 2001		Unsuccessful
MVDA	HAINSWORTH	Refuse Registration	May 9, 2001		Unsuccessful
MVDA	Haji Medhi o/a Ultimate Auto Sale Parts & Service	Revoke Registration	January 31, 2001		Unsuccessful
MVDA	HAKIM	Refuse Registration	May 7, 2001	Consent	Successful
MVDA	HASSEN	Refuse Registration	July 12, 2001	Adjournment	
MVDA	HASSEN	Refuse Registration	November 9, 2001		Unsuccessful
MVDA	HEANEY	Refuse Registration	July 24, 2001	Consent	Successful
MVDA	Henley Motors Ltd. and Frederick Hurst and Donald Hurst	Revoke Registrations	May 11, 2001	Consent	Successful
MVDA	HIGGINS	Refuse Registration	April 5, 2001	Consent	Successful
MVDA	Hunt, Gary o/a Garys	Revoke Registration	November 29, 2001		Successful
MVDA	JACOBS	Refuse Registration	September 5, 2001		Successful
MVDA	JOHNSON	Claim	March 2, 2001	Order	
MVDA	JOHNSON	Claim	April 30, 2001	Adjournment	
MVDA	JOHNSON	Claim	July 27, 2001		Unsuccessful
MVDA	KAAFARANI	Refuse Registration	July 31, 2001	Adjournment	
MVDA	KALSATOS	Refuse Registration	August 7, 2001	Adjournment	
MVDA	KALSATOS	Refuse Registration	November 19, 2001		Unsuccessful
MVDA	KATZBERG	Refuse Registration	October 17, 2001	Consent	Successful
MVDA	KEMBER, Andrew and Andrewlene Farms Ltd.	Revoke Registrations	April 30, 2001	Adjournment	
MVDA	KENNY	Refuse Registration	February 22, 2001	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	<i>Khouloud Geha Kaadi o/a Kelly's Auto</i>	Refuse Registration	July 5, 2001	Adjournment	
MVDA	KINGO	Refuse Registration	January 26, 2001	Dismissal Order	Unsuccessful
MVDA	KOURNIOTIS	Revoke Registration	June 26, 2001	Order	Unsuccessful
MVDA	KUZYK	Refuse Registration	June 21, 2001		Unsuccessful
MVDA	<i>K.W. Used Car Sales Ltd. and Krzstof Wawryka</i>	Revoke Registration	July 6, 2001		Unsuccessful
MVDA	<i>Lefebvre, Stephane D. o/a S.L. Garage</i>	Refuse Registration	September 27, 2001	Consent	Successful
MVDA	LESANALSHARIYATI	Refuse Registration	October 11, 2001		Unsuccessful
MVDA	<i>MacDonald, Leanne and 2001530 Ontario Inc. o/a Mac Motors</i>	Refuse Registrations	November 20, 2001	Adjournment	
MVDA	MAHADEO	Claim	November 7, 2001		Unsuccessful
MVDA	MARTINAKIS	Claim	March 2, 2001	Order	
MVDA	MARTINAKIS	Claim	April 30, 2001	Order	
MVDA	MARTINAKIS	Claim	June 13, 2001	Adjournment	
MVDA	MAVROUDIS	Refuse Registration	December 17, 2001	Adjournment	
MVDA	MAYBEE	Refuse Registration	January 10, 2001		Unsuccessful
MVDA	<i>McCONNEL and FINCH</i>	Claim	November 16, 2001	Adjournment	
MVDA	<i>Mega City Car Sales</i>	Refuse Registrations	January 23, 2001	Consent	Successful
MVDA	MERCIER	Refuse Registration	June 7, 2001	Consent	Successful
MVDA	<i>Mideast Motors Inc. and Fadi Fahmi Darwish</i>	Refuse and Revoke Registration	July 5, 2001	Adjournment	
MVDA	<i>MILJKOVIC, Radomir and 1280953 Ontario Limited o/a Morato Cars</i>	Revoke Registrations	June 4, 2001		Unsuccessful
MVDA	<i>MOGHADDAM, Alireza and JKA Motors Ltd.</i>	Revoke Registrations	April 30, 2001	Adjournment	
MVDA	<i>MOGHADDAM, Alireza and JKA Motors Ltd.</i>	Revoke Registrations	May 22, 2001	Order	
MVDA	<i>MOGHADDAM, Alireza and JKA Motors Ltd.</i>	Revoke Registrations	May 25, 2001	Revised Order	
MVDA	<i>MOGHADDAM, Alireza and JKA Motors Ltd.</i>	Revoke Registrations	July 25, 2001		Unsuccessful
MVDA	<i>MOGHADDAM, Alireza and JKA Motors Ltd.</i>	Revoke Registrations	September 19, 2001	Ruling	Unsuccessful
MVDA	<i>MOSKVITIN, and Daugava Auto Sales Ltd.</i>	Revoke Registrations	November 15, 2001	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	NAJJAR	Revoke Registration	February 1, 2001	Consent	Successful
MVDA	NGO	Refuse Registration	October 22, 2001		Successful
MVDA	NGUYEN	Refuse Registration	May 9, 2001		Unsuccessful
MVDA	North York Auto and Ali Reza Safa	Refuse Registration	March 26, 2001	Adjournment	
MVDA	Ottawa Driveway Ltd. and Raymond Barrette	Unperfected	July 23, 2001	Dismissal Order	Unsuccessful
MVDA	PADAYACHEE	Refuse Registration	June 13, 2001	Consent	Successful
MVDA	POSTNIKOFF	Refuse Registration	September 24, 2001	Adjournment	
MVDA	POSTNIKOFF	Refuse Registration	December 17, 2001	Order	Unsuccessful
MVDA	POULIN	Refused Registration	January 30, 2001	Consent	Successful
MVDA	Pouraziz, Masoud o/a Stop 55 Auto Sales	Refuse Registration	January 29, 2001	Consent	Successful
MVDA	Profit Auto Sales Ltd., Provincial Used Car Sales and Brij Lal Badhan	Refuse Registrations	August 20, 2001	Adjournment	
MVDA	Profit Auto Sales Ltd., Provincial Used Car Sales and Brij Lal Badhan	Refuse Registrations	November 14, 2001	Order	Successful
MVDA	PROKOFIEW	Refuse Registration	December 24, 2001		Successful
MVDA	RANCE	Claim	August 14, 2001		Unsuccessful
MVDA	RAHIM, Omar Hassan and Shine Car Sales Inc.	Revoke Registrations	June 11, 2001	Order	
MVDA	Reliable Car Sales Ltd. and Daniel G. Rivard	Revoke Registrations	March 13, 2001	Adjournment	
MVDA	Reliable Car Sales Ltd. and Daniel G. Rivard	Revoke Registrations	June 28, 2001	Consent	Successful
MVDA	Reynolds, Edward and Harbourview Fleet and Leasing Inc.	Revoke Registration	October 2, 2001	Order	Unsuccessful
MVDA	RIZK	Refuse Registration	January 11, 2001		Unsuccessful
MVDA	RUNNING	Refuse Registration	July 24, 2001	Consent	Successful
MVDA	Singh, Gurnek o/a Sarwan Auto Sales	Revoke Registration	July 6, 2001	Order	
MVDA	Shahidi, Taghi Vahid o/a GTA Auto	Revoke Registration	July 24, 2001		Successful
MVDA	SHAH, Ahmad o/a Best Choice Auto Sale	Revoke Registration	May 11, 2001		Successful
MVDA	SHALFOROSHADEH	Refuse Registration	March 21, 2001		Unsuccessful
MVDA	Shine Car Sales Inc. and Omar Hassan Rahim	Revoke Registrations	July 27, 2001		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	SIMMONS	Refuse Registration	January 26, 2001	Consent	Successful
MVDA	SINGH, Gurnek o/a Sarwan Auto Sales	Revoke Registration	May 15, 2001	Adjournment	
MVDA	SINGH, Gurnek o/a Sarwan Auto Sales	Revoke Registration	November 19, 2001		Unsuccessful
MVDA	SOLTY	Refuse Registration	June 26, 2001	Adjournment	
MVDA	SOLTY	Refuse Registration	October 11, 2001		Unsuccessful
MVDA	SOURIAL	Claim	October 2, 2001	Adjournment	
MVDA	STANGE	Refuse Registration	June 18, 2001	Adjournment	
MVDA	STANGE	Refuse Registration	August 31, 2001		Unsuccessful
MVDA	STUART	Refuse Registration	June 13, 2001	Consent	Successful
MVDA	Tamara Koukova o/a T & V Auto Sales	Refuse Registration	August 7, 2001	Adjournment	
MVDA	Tehrani, Bijan o/a Friendly Auto	Revoke Registration	December 20, 2001		Unsuccessful
MVDA	Tomasz Wrzalka o/a Tomy Commission Auto Sales	Revoke Registration	February 23, 2001		Successful
MVDA	Gerald Bolton o/a Transtario Tours	Revoke Registration	August 30, 2001	Consent	Successful
MVDA	Trinity Sovereign Motors Inc. And Deo Narayan	Revoke Registrations	January 4, 2001	Consent	Successful
MVDA	Ultimate Fine Autos Inc. and Mohamad El Masri	Refuse Registrations	December 19, 2001	Consent	Successful
MVDA	VELLONE, Angelo and 373503 Ontario Limited o/a Durable Car And Truck Sales	Revoke Registrations	June 20, 2001	Order	
MVDA	VIOLA	Revoke Registration	September 14, 2001		Unsuccessful
MVDA	VITSENTZATOS	Refuse Registration	January 19, 2001	Consent	Successful
MVDA	VORKAPIC, Sasa o/a SGS Auto	Refuse Registration	June 13, 2001	Consent	Successful
MVDA	Walsh, Joanne May o/a Alpine Auto Sales	Revoke Registration	December 10, 2001	Consent	Successful
MVDA	WATT	Revoke Registration	January 11, 2001		Unsuccessful
MVDA	WILLIAMS	Refuse Registration	February 16, 2001	Consent	Successful
MVDA	YONECI, Mahmoud o/a A.R. Auto Wholesale Network	Revoke Registration	February 12, 2001	Adjournment	
MVDA	YONECI, Mahmoud o/a A.R. Auto Wholesale Network	Revoke Registration	June 6, 2001	Ruling	
MVDA	YONECI, Mahmoud o/a A.R. Auto Wholesale Network	Revoke Registration	November 16, 2001		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	<i>ZAYAT, Hassan and Cyrville Star Top Auto Sales Inc.</i>	Revoke Registrations	March 8, 2001	Adjournment	
MVDA	<i>ZAYAT, Hassan and Cyrville Star Top Auto Sales Inc.</i>	Revoke Registrations	May 22, 2001	Order	
MVDA	<i>ZAYAT</i>	Revoke Registration	July 12, 2001	Consent	Successful

ONTARIO NEW HOME WARRANTIES PLAN ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>1004670 Ontario Inc. o/a Turner Construction</i>	Revoke Registration	July 6, 2001	Order	
NHWP	<i>1032506 Ontario Ltd. o/a Forte Construction Corp.</i>	Refuse to Renew Registration	June 4, 2001	Order	
NHWP	<i>1032506 Ontario Ltd. o/a Forte Construction Corp.</i>	Refuse to Renew Registration	July 31, 2001		Unsuccessful
NHWP	<i>1270991 Ontario Inc. o/a Areia Finish Concrete</i>	Refuse Registration	June 4, 2001	Order	
NHWP	<i>1270991 Ontario Inc. o/a Areia Finish Concrete</i>	Refuse Registration	July 19, 2001	Order	Successful
NHWP	<i>1288847 Ontario Inc.</i>	Refuse Registration	March 21, 2001	Order	Successful
NHWP	<i>584745 Ontario Limited</i>	Refuse to Renew Registration	March 22, 2001	Order	Successful
NHWP	<i>627416 Ontario Limited o/a Rosedale Homes</i>	Refuse to Renew Registration	June 14, 2001	Ruling	
NHWP	<i>BANKS</i>	Claim	August 13, 2001	Order	
NHWP	<i>BANKS</i>	Claim	August 20, 2001	Revised Order	
NHWP	<i>BEIKO</i>	Claim	January 22, 2001	Claim	Unsuccessful
NHWP	<i>BOLEJSZO</i>	Claim	January 5, 2001	Order	
NHWP	<i>BOLEJSZO</i>	Claim	June 7, 2001	Order	
NHWP	<i>BOLEJSZO</i>	Claim	October 12, 2001	Adjournment	
NHWP	<i>Bridle Lane Homes Inc., Castlemark Developments Inc., Siper Construction Ltd., and Fairmount Homes Ltd.</i>	Refuse Registrations	January 26, 2001	Order	
NHWP	<i>CAMERON</i>	Unperfected	July 3, 2001	Dismissal Order	Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>Carmelo De Cicco Construction Co. Limited</i>	Proposal	January 19, 2001	Ruling	Successful
NHWP	<i>Carmelo De Cicco Construction Co. Limited</i>	Proposal	March 7, 2001	Ruling	Unsuccessful
NHWP	<i>Carmelo De Cicco Construction Co. Limited</i>	Extension of time to file appeal	May 23, 2001	Ruling & Order	Unsuccessful
NHWP	<i>Castleton Custom Homes Design & Build Ltd.</i>	Revoke Registration	May 23, 2001	Order	
NHWP	<i>Castleton Custom Homes Design & Build Ltd.</i>	Revoke Registration	August 1, 2001	Order	Successful
NHWP	<i>Craig Property Services Inc.</i>	Refuse to Renew Registration	April 6, 2001		Unsuccessful
NHWP	<i>Charles Bray and Deborah Bray o/a Chuck Bray Construction</i>	Refuse to Renew Registration	July 12, 2001	Adjournment	
NHWP	<i>Charles Bray and Deborah Bray o/a Chuck Bray Construction</i>	Refuse to Renew Registration	September 12, 2001	Order	Successful in Part
NHWP	<i>CHRISTO</i>	Claim	December 20, 2001	Adjournment	
NHWP	<i>DENIS and WARDEN</i>	Claim	March 1, 2001	Adjournment	
NHWP	<i>DENIS and WARDEN</i>	Claim	March 13, 2001	Adjournment	
NHWP	<i>DENIS and WARDEN</i>	Claim	March 28, 2001	Order	
NHWP	<i>DENIS and WARDEN</i>	Claim	June 7, 2001	Order	Successful
NHWP	<i>DEVLIN</i>	Claim	August 9, 2001	Adjournment	
NHWP	<i>DEVLIN</i>	Claim	September 12, 2001	Adjournment	
NHWP	<i>DEVLIN</i>	Claim	November 28, 2001	Order	
NHWP	<i>Dynasty Homes Ltd.</i>	Refuse to Renew Registration	June 25, 2001		Unsuccessful
NHWP	<i>EBORA</i>	Claim	April 9, 2001		Unsuccessful
NHWP	<i>ERLAND</i>	Claim	June 7, 2001	Adjournment	
NHWP	<i>ERLAND</i>	Claim	December 24, 2001	Order	
NHWP	<i>FALBO</i>	Claim	July 10, 2001	Adjournment	
NHWP	<i>FALBO</i>	Claim	August 13, 2001	Order	
NHWP	<i>FORBECK</i>	Claim	July 12, 2001	Order	
NHWP	<i>FORBECK</i>	Claim	July 31, 2001	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>FOBERT</i>	Extension of time to file appeal	April 4, 2001		Unsuccessful
NHWP	<i>FRATTAROLI</i>	Claim	February 16, 2001	Order	Unsuccessful
NHWP	<i>FREEMAN</i>	Claim	January 18, 2001	Ruling	Unsuccessful
NHWP	<i>FULLER and SWICK</i>	Claim	July 23, 2001	Order	
NHWP	<i>FULLER and SWICK</i>	Claim	October 1, 2001	Order	
NHWP	<i>GALLO</i>	Claim	June 26, 2001	Adjournment	
NHWP	<i>GALLO</i>	Claim	September 14, 2001	Adjournment	
NHWP	<i>GEOFFROY</i>	Claim	January 3, 2001		Unsuccessful
NHWP	<i>Headgate Homes (North) Inc.</i>	Refuse to Renew Registration	May 10, 2001	Order	
NHWP	<i>HUCKVALE</i>	Claim	January 4, 2001	Adjournment	
NHWP	<i>JANECZEK</i>	Claim	July 23, 2001	Adjournment	
NHWP	<i>JANECZEK</i>	Claim	August 10, 2001	Order	
NHWP	<i>JANECZEK</i>	Claim	December 5, 2001		Unsuccessful
NHWP	<i>JANKOVIC</i>	Claim	September 6, 2001	Order	
NHWP	<i>JANS</i>	Claim	January 18, 2001	Adjournment	
NHWP	<i>JANS</i>	Claim	April 3, 2001	Adjournment	
NHWP	<i>JOHNSTON</i>	Claim	March 22, 2001	Order	Successful
NHWP	<i>J.R. Diamond Homes Inc.</i>	Refuse to Renew Registration	October 1, 2001	Order	
NHWP	<i>KETER</i>	Claim	August 29, 2001		Unsuccessful
NHWP	<i>KIRK</i>	Claim	May 25, 2001		Successful, in Part
NHWP	<i>KLEIN and WEINSTEIN</i>	Claim	February 12, 2001	Adjournment	
NHWP	<i>KLEIN and WEINSTEIN</i>	Claim	May 8, 2001	Adjournment	
NHWP	<i>KLEIN and WEINSTEIN</i>	Claim	June 14, 2001	Order	Successful
NHWP	<i>KYMANTAS and KUSCHNERAIT</i>	Claim	September 17, 2001		Successful
NHWP	<i>LACIKA</i>	Claim	March 19, 2001		Unsuccessful
NHWP	<i>LATIPOW</i>	Claim	July 16, 2001	Order	Successful
NHWP	<i>Lillina Family Construction Ltd.</i>	Refuse to Renew Registration	November 19, 2001	Order	Successful
NHWP	<i>LUNNY</i>	Motion for extension of Time	March 2, 2001	Ruling	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	LUNNY	Claim	June 4, 2001	Order	
NHWP	Lurkan Homes Inc.	Refuse to Renew Registration	January 4, 2001	Ruling	Successful
NHWP	Lurkan Homes Inc.	Refuse to Renew Registration	March 26, 2001	Order	
NHWP	MacLELLAN, Damian and PAPROSKI, Peter	Claim	June 26, 2001	Adjournment	
NHWP	MacLELLAN, Damian and PAPROSKI, Peter	Claim	July 5, 2001	Order	
NHWP	MacLELLAN, Damian and PAPROSKI, Peter	Claim	August 1, 2001	Adjournment	
NHWP	MADORE	Claim	January 5, 2001	Order	
NHWP	MADORE	Claim	February 8, 2001	Order	Successful
NHWP	MAHADEO	Claim	August 7, 2001	Ruling	Successful
NHWP	MAIOLO	Claim	January 26, 2001	Order	
NHWP	MAIOLO	Claim	June 14, 2001		Unsuccessful
NHWP	MARASCO	Claim	July 23, 2001	Adjournment	
NHWP	MARASCO	Claim	October 1, 2001	Order	
NHWP	MARSHALL	Claim	June 15, 2001	Order	Unsuccessful
NHWP	MATTE and STOTYN	Claim	March 14, 2001	Order	
NHWP	MATTE and STOTYN	Claim	April 3, 2001	Order	Successful
NHWP	MATTE and STOTYN	Claim	April 17, 2001	Order	Unsuccessful
NHWP	McLAREN	Claim	April 5, 2001		Unsuccessful
NHWP	McLAREN	Claim	February 15, 2001	Adjournment	
NHWP	Metropolitan Condo Corp No. 1223	Claim	March 16, 2001		Unsuccessful
NHWP	MEHTA	Claim	July 5, 2001	Order	Successful
NHWP	NOEL PARE	Claim	September 12, 2001	Adjournment	
NHWP	NOEL PARE	Claim	October 23, 2001	Order	
NHWP	NICOLINI	Claim	February 20, 2001	Motion	Unsuccessful
NHWP	OLIVIERI, Peter and LEONARDO, Giuseppe (Joe) o/a Cherry Wood Park Development	Refuse to Renew Registration	June 21, 2001	Consent	Successful
NHWP	Peel Condominium Corporation No. 498	Claim	August 23, 2001	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>Peel Condominium Corporation No. 498</i>	Claim	September 14, 2001	Adjournment	
NHWP	<i>Peel Condominium Corporation No. 498</i>	Claim	October 3, 2001	Order	
NHWP	<i>Peel Condominium Corporation No. 498</i>	Claim	December 5, 2001	Order	
NHWP	<i>PERGUNAS</i>	Claim	August 23, 2001	Order	
NHWP	<i>PERGUNAS</i>	Claim	October 17, 2001	Adjournment	
NHWP	<i>PERGUNAS</i>	Claim	December 3, 2001	Adjournment	
NHWP	<i>PHELAN</i>	Claim	February 21, 2001	Order	Successful
NHWP	<i>PICCININ</i>	Claim	June 28, 2001	Adjournment	
NHWP	<i>PICCININ</i>	Claim	July 25, 2001	Adjournment	
NHWP	<i>PICCININ</i>	Claim	October 23, 2001	Order	Successful
NHWP	<i>POWELL</i>	Claim	April 12, 2001		Successful, in Part
NHWP	<i>Redpark Homes Ltd.</i>	Refuse to Renew Registration	September 20, 2001	Adjournment	
NHWP	<i>Redpark Homes Ltd.</i>	Refuse to Renew Registration	October 30, 2001	Order	
NHWP	<i>Renaud Homes Inc.</i>	Refuse to Renew Registration	March 7, 2001	Order	
NHWP	<i>Renaud Homes Inc.</i>	Refuse to Renew Registration	March 22, 2001	Order	
NHWP	<i>Renaud Homes Inc.</i>	Refuse to Renew Registration	July 6, 2001		Unsuccessful
NHWP	<i>RGC Design Builders Inc.</i>	Unperfected	September 5, 2001	Dismissal Order	Unsuccessful
NHWP	<i>Richmond Properties Inc.</i>	Refuse Registration	July 12, 2001	Adjournment	
NHWP	<i>Richmond Properties Inc.</i>	Refuse Registration	September 7, 2001	Adjournment	
NHWP	<i>Richmond Properties Inc.</i>	Refuse Registration	September 21, 2001	Order	
NHWP	<i>Rosedale Homes et al.</i>	Refuse to Renew Registration	February 26, 2001	Order	
NHWP	<i>Rosedale Homes (1996) Inc.</i>	Refuse to Renew Registration	June 14, 2001	Ruling	
NHWP	<i>SARKADI/SARAMO</i>	Claim	March 12, 2001	Adjournment	
NHWP	<i>SHARP</i>	Extension of time to file appeal	August 10, 2001	Ruling	Unsuccessful
NHWP	<i>SWERBRICK and MACINTYRE</i>	Claim	September 24, 2001	Interim Order	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>A. TOPPAZZINO CONSTRUCTION INC.</i>	Refuse to Renew Registration	March 1, 2001	Adjournment	
NHWP	<i>A. TOPPAZZINO CONSTRUCTION INC.</i>	Refuse to Renew Registration	March 14, 2001	Adjournment	
NHWP	<i>Tedros</i>	Claim	December 3, 2001	Order	
NHWP	<i>The Exidor Corporation o/a Summit Homes</i>	Revoke Registration	July 23, 2001	Order	Successful
NHWP	<i>THARMATHURAI</i>	Claim	September 26, 2001	Adjournment	
NHWP	<i>THARMATHURAI</i>	Claim	November 2, 2001	Adjournment	
NHWP	<i>THARMATHURAI</i>	Claim	December 11, 2001		Successful in part
NHWP	<i>T-Mag Marketing Inc. o/a Viscount Homes</i>	Refuse to Renew Registration	August 22, 2001		Unsuccessful
NHWP	<i>VALIANT</i>	Claim	April 12, 2001	Adjournment	
NHWP	<i>VALIANT</i>	Claim	June 19, 2001	Adjournment	
NHWP	<i>VOLL and FRANCO</i>	Claim	November 29, 2001		Unsuccessful
NHWP	<i>WEGG</i>	Proposal	January 17, 2001	Ruling	Successful
NHWP	<i>WEGG</i>	Proposal	March 7, 2001	Ruling	Unsuccessful
NHWP	<i>West Talbot Developments Ltd.</i>	Refuse to Renew Registration	April 2, 2001	Order	Successful
NHWP	<i>WILLIAMS and MAXAM</i>	Claim	May 17, 2001		Unsuccessful
NHWP	<i>YANG and TSUI</i>	Claim	October 31, 2001	Order	
NHWP	<i>YANG and TSUI</i>	Claim	November 14, 2001	Revised Order	

REAL ESTATE AND BUSINESS BROKERS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
REBBA	<i>EVANIUK, Oleksandr o/a Alex Evaniuk</i>	Refuse Registration	January 29, 2001	Adjournment	
REBBA	<i>EVANIUK, Oleksandr o/a Alex Evaniuk</i>	Refuse to Grant Registration	March 12, 2001	Order	
REBBA	<i>EVANIUK, Oleksandr o/a Alex Evaniuk</i>	Refuse to Grant Registration	June 12, 2001		Unsuccessful
REBBA	<i>OHRSTROM-COELHO</i>	Refuse Registration	January 31, 2001		Unsuccessful
REBBA	<i>McFADDEN</i>	Revoke Registration	March 16, 2001		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
REBBA	REID	Revoke Registration	January 16, 2001	Adjournment	
REBBA	REID	Revoke Registration	May 17, 2001		Unsuccessful
REBBA	TANDON	Refuse to Grant Registration	September 28, 2001	Order	
REBBA	TANDON	Refuse to Grant Registration	November 1, 2001	Order	Unsuccessful

TRAVEL INDUSTRY ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	1017864 Ontario Inc. o/a Comforts In Travel	Revoke Registration	December 11, 2001		Unsuccessful
TIA	1018369 Ontario Ltd. o/a Travel Mart	Revoke Registration	October 30, 2001	Consent	Successful
TIA	1146736 Ontario Ltd. o/a Hira Travel	Revoke Registration	March 1, 2001	Consent	Successful
TIA	1163954 Ontario Inc. o/a The Ultimate Travel Brokers	Revoke Registration	October 23, 2001	Consent	Successful
TIA	1221786 Ontario Inc. o/a Island Travel	Revoke Registration	January 16, 2001		Unsuccessful
TIA	1241757 Ontario Ltd. o/a Marlin Travel	Revoke Registration	January 8, 2001	Adjournment	
TIA	1308580 Ontario Corporation o/a Marlin Travel	Revoke Registration	January 22, 2001	Consent	Successful
TIA	1338904 Ontario Inc. o/a Northern International Travel	Revoke Registration	January 22, 2001	Consent	Successful
TIA	794658 Ontario Ltd. o/a Travel Media/Jet-A-Way Vacations	Revoke Registration	July 5, 2001	Order	
TIA	794658 Ontario Ltd. o/a Travel Media/Jet-A-Way Vacations	Revoke Registration	September 12, 2001	Consent	Successful
TIA	Ace Travel Agency	Claim	January 19, 2001	Adjournment	
TIA	Ace Travel Agency	Claim	March 5, 2001		Unsuccessful
TIA	Age of Travel Inc.	Revoke Registration	January 10, 2001	Consent	Successful
TIA	Alpha Club Travel	Claim	March 21, 2001		Unsuccessful
TIA	Amral's Travel Canada Ltd. o/a Amral's Travel Canada	Revoke Registration	December 17, 2001	Consent	Successful
TIA	Angie's All Seasons Travel Inc. o/a Worldwide Resorts Travel/Beaches and Dreams	Revoke Registration	March 7, 2001	Order	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	<i>Angie's All Seasons Travel Inc. o/a Worldwide Resorts Travel/Beaches and Dreams</i>	Revoke Registration	March 13, 2001	Order	Successful
TIA	<i>Blyth & Company Travel Limited</i>	Revoke Registration	March 13, 2001	Consent	Successful
TIA	<i>Caravan Imports & Travel Ltd.</i>	Revoke Registration	March 7, 2001	Consent	Successful
TIA	<i>Cynthia Burgher o/a Cynthia's Bus Charter</i>	Revoke Registration	September 4, 2001	Consent	Successful
TIA	<i>Eurosun Holidays Inc.</i>	Refuse to give consent to change ownership	September 11, 2001	Adjournment	
TIA	<i>Globe Travels Inc.</i>	Revoke Registration	April 18, 2001	Consent	Successful
TIA	<i>Nugget Travel and Tours Inc.</i>	Revoke Registration	October 23, 2001	Consent	Successful
TIA	<i>PADOVANI TRAVEL AGENCY</i>	Revoke Registration	January 23, 2001	Consent	Successful
TIA	<i>PARK, Shawna Yoo-Kyung o/a Hana Travel And Tours</i>	Revoke Registration	June 15, 2001	Consent	Successful
TIA	<i>POLSINELLI</i>	Claim	January 8, 2001	Adjournment	
TIA	<i>POLSINELLI</i>	Claim	May 2, 2001		Successful
TIA	<i>Simple Escapes Inc.</i>	Revoke Registration	July 16, 2001	Consent	Successful
TIA	<i>SIMPSON</i>	Claim	January 17, 2001		Unsuccessful
TIA	<i>Abdulkadir Salad Ali o/a Travel Route</i>	Revoke Registration	March 13, 2001	Consent	Successful
TIA	<i>Value Vacations Ltd.</i>	Revoke Registration with immediate suspension	July 27, 2001	Interim Order	Unsuccessful
TIA	<i>Value Vacations Ltd.</i>	Revoke Registration	August 22, 2001	Order	
TIA	<i>Value Vacations Ltd.</i>	Revoke Registration	September 24, 2001	Order	
TIA	<i>Voyages Encore Travel Inc.</i>	Revoke Registration	April 17, 2001	Consent	Successful
TIA	<i>Wings Of The World Inc. o/a Wings Of The World o/a Wings Of The World Travel</i>	Revoke Registration	April 3, 2001	Consent	Successful
TIA	<i>World-Wide Continental Travel Inc.</i>	Revoke Registration	March 2, 2001	Consent	Successful

WEST TALBOT DEVELOPMENTS LTD.

WEST TALBOT DEVELOPMENTS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair, Presiding

APPEARANCES:

JULIA COOK, Agent, representing the Applicant
KENNETH T. ROSENBERG, Counsel, representing the Registrar
of the Ontario New Home Warranty Program,

DATE OF

HEARING: March 29, 2001

Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, West Talbot Developments Ltd. (the "Applicant") appealed a Proposal of the Registrar of the Ontario New Home Warranty Program (the "Program") set out in a Notice of Proposal dated November 14, 2000 to refuse to renew registration of the Applicant;

WHEREAS, the Applicant filed an appeal with the Tribunal, requesting a hearing;

WHEREAS, the hearing was to be heard on March 29 and 30, 2001 at the Tribunal's Chambers;

AND WHEREAS, the hearing commenced on March 29, 2001 and Counsel for the Applicant advised the Tribunal that on consent of all parties they have concluded a settlement in terms of which the Applicant has withdrawn his appeal and that the Applicant's registration will continue.

AND WHEREAS, the terms of settlement are as follows:

1. The Applicant applies for registration for 2001 in the normal course. The Applicant is to file this registration by April 15, 2001.
2. The Applicant will pay to the Program the registration fee of \$321.00 when the Applicant submits its application for registration.
3. The Applicant will provide the Program with updated net worth statements of the two guarantors Bill Wrebenga and Mark Minor, with the appropriate backup material by April 15, 2001.

4. The Applicant will build or sell no more than eight homes in the 2001 registration period without prior consent of the Program.
5. Regarding the eight homes mentioned in # 4, the Applicant will provide the Program with five thousand dollars (\$5,000.00) security upon the enrolment of each home. The security will be provided by letter of credit or certified cheque.

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: April 2, 2001

JANS

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

IN THE MATTER OF a CLAIM by
JOHN AND MONICA JANS

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

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

JOHN AND MONICA JANS

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter
on March 1-2, 2001;

AND WHEREAS the matter was adjourned upon consent of the parties to April 11-12,
2001;

AND WHEREAS the Respondent has requested a further adjournment;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing
peremptory against the Respondent to commence at the Tribunal's Chambers, 1 St.
Clair, Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, June 14,
2001, and to continue June 15, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 3, 2001

MATTE and STOTYN

ELIZABETH MATTE AND CAL STOTYN

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

TO DISALLOW A CLAIM

TRIBUNAL: STEPHEN J. KELLY, Vice-Chair

APPEARANCES:

MARK HABIB, Counsel, representing the Applicants
MARK FRIEDMAN, Counsel, representing the Ontario New Home
Warranty Program
MARTIN BLACK, Counsel, representing the Added Party, 1189534
Ontario Inc.

DATES OF

HEARING: March 26, 27 & 28, 2001

Ottawa

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Elizabeth Matte and Cal Stotyn (the "Applicants") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated October 26, 2000;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

WHEREAS, the hearing was to held on March 26, 27, 28, 29, 30, and April 2 and 3, 2001, at Ottawa;

AND WHEREAS, the hearing commenced on March 26, 2001 and on March 28, 2001 Counsel for the Applicants advised the Tribunal that on consent of all parties they have concluded a settlement and that the Applicants therefore withdraw their appeal;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly, Vice-Chair

Released: April 3, 2001

AIDE-EXHP

SHAUN AIDE

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

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

TRIBUNAL: NIVES MONTANO, Presiding member
JOHN OOSTROM, Member
DINO BOTTERO, Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

SHAUN AIDE, Applicant

RICHARD STERN,
Counsel for Applicant

DATE OF HEARING: March 29, 2001

DECISION RELEASED: April 4, 2001 Toronto

REASONS FOR DECISION

A hearing was held on March 29, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Shaun Aide (the "Applicant")
Motor Vehicle:	1989 GMC Vandura, plate # 3131HV (the "Vehicle")
Date of Appeal:	March 14, 2001

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

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

This matter came before this Tribunal on March 29, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

OWNER'S POSITION

Mr. Aide is the owner/operator of Metropolitan Steam, an industrial carpet cleaning service. His truck has been fitted with specialized equipment that is instrumental to providing his company's services. It is Mr. Aide's only vehicle. He uses it on every job. Mr. Aide employs a driver to get the truck to and from customers' premises. Without the truck Mr. Aide cannot fulfil his obligations to his customers, he cannot continue to employ his driver and he cannot pay his creditors. Although Mr. Aide has work available to him (see copy of recent earnings statement from ADP for work done by Metro Steam for Sears Canada) he will certainly lose the work and future work should he be left without his truck for any significant period of time. Mr. Aide's financial situation is precarious at this time having recently seen a trustee in bankruptcy who has worked out a Consumer Proposal Agreement to satisfy his creditors (see copy of agreement). Clearly Mr. Aide is financially unable to replace the truck. Therefore he has no alternative to the impounded vehicle available, his loss is immediate, significant and lasting in that his business may not survive this setback and the impact of the loss will be felt by Mr. Aide, his driver, his customers and his creditors. Finally, Mr. Aide has never appealed an impoundment order on the ground of exceptional hardship before.

In his opening remarks, counsel for the Applicant, gave a quick and concise overview of the Owner's Position which was filed with the Tribunal (Exhibit 2).

The Applicant testified that he has owned his company for the past 5 years. His contractual obligations are for both residential and commercial clients. The Applicant has owned the impounded vehicle for the past 3 years. It has been retrofitted with special equipment utilized for carpet/upholstery cleaning.

In September 2000, the Applicant's licence was suspended and in his sworn testimony, advised the Tribunal that he had hired his driver that same month to drive the Applicant to each job site. This driver is remunerated on a percentage basis, approximately \$400 per week.

The Boar and Firkin, a pub on Bayview Avenue contracted the Applicant, on March 1, 2001 at approximately 1:30 a.m., to clean its carpets and upholstery after closing. His driver, who is married with children, refused to drive the Applicant and the impounded vehicle to the job site that evening.

Although the Applicant is aware that he has a suspended licence, he attempted to drive the impounded vehicle to the aforementioned pub. Unfortunately, the Toronto Police pulled him over for an unrelated *Highway Traffic Act* violation and was charged with '*driving while disqualified*'.

When the Applicant was questioned by the Tribunal regarding his loss of business during the impoundment period, his testimony regarding his gross loss of business from 45-50 private customers in addition to 3 commercial accounts (Sears, Crystal Clean and Dirt Busters) amounts to be about \$4,000 per month or a loss of net income after expenses of \$2,300 to \$2,600 per month.

During the impoundment period, the Applicant has been assisting a friend in the same line of business (Canadian Steam Co.) for a modest wage of 10% (gross). His hours of employment are Monday to Saturday from 8 a.m. to 6 p.m. and he is also on-call.

The Applicant also advised the Tribunal that:

- (1) he has not been seeking new contracts because he has been too occupied working for his friend;
- (2) clients calling for service are advised that he would not be in a position to provide service and/or would be unavailable until mid-April;
- (3) none of his private customers have indicated that he had lost their business;
- (4) he could not and did not estimate the number of contracts turned down to date;
- (5) there are trucks/vans available to rent as well as carpet cleaning equipment available to rent, but this equipment would not produce the same results; and
- (6) he faces severe repercussions due to a cut in income as he can no longer keep his contractual obligations to his creditors made to a trustee in bankruptcy in a recent Consumer Proposal Agreement. Therefore, the Applicant indicated that he would soon be looking for alternative employment, e.g. bartending, to supplement his income.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit 3):

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

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

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

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 8, 2001

At the hearing the Respondent provided the Tribunal with certified copies of Ministry of Transportation documents on file (Exhibit # 4).

In closing, the Respondent argued that the grounds for hardship were not met and requested the Tribunal to uphold the suspension.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal may not consider economic hardship as a ground of exceptional hardship unless the Applicant's appeal meets all of the criteria set out in section 22(3) of Regulation 574, R.R.O. 1990 as amended by Reg. 632/98. These include the criteria that no alternative to the impounded vehicle is available and that the loss is immediate, significant and lasting.

(a) "...no alternative to the impounded motor vehicle is available..."

The Applicant testified that alternatives were available in renting a truck with equipment at a high cost which would result in a loss to his company. The Applicant decided against this temporary course of action.

(b) "...the loss will be immediate, significant and lasting..."

The Applicant testified that he has found temporary employment with a friend in the same line of work, which mitigates the significance of Applicant's loss in his own company and his obligations to his creditors. The Tribunal recognizes that the Applicant incurred an immediate loss in his business, due to the impoundment. Certain factors and setbacks may cause irreparable damage to small businesses, but in this case, there is no evidence that the effect of the impoundment on the business will be irreparable. There is no evidence regarding the number of contractual obligations lost during this period.

(c) "...impact of the loss will be upon a person ordinarily transported by the motor vehicle..."

The evidence before the Tribunal does not include the impact of the loss on the driver who normally operates the motor vehicle for the Applicant.

(d) "...loss (i) will be upon a person other than the person where driving while his driver's licence was under suspension stated in the order to impound..."

The Applicant's licence was under suspension. The Applicant was the driver of the motor vehicle. The loss which the Applicant has submitted to the Tribunal is the Applicant's loss, which section 22(3)(d) of the Regulations excludes from this Tribunal's consideration under section 50.2(3) of the Act.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as required under section 50.2 of the Act.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

John Oostrom, Member

Dino Bottero, Member

RELEASED: April 4, 2001

FOBERT

NORMAN FOBERT

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: BEVERLEY J. READE, Vice-Chair

APPEARANCES:
NORMAN FOBERT, Applicant
NETANUS RUTHERFORD, Counsel, representing Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING: March 30, 2001 *By teleconference*

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Tribunal heard oral submissions from both parties regarding a Notice of Intent to Dismiss Proceedings ("the Notice") issued by the Registrar of this Tribunal on February 13, 2001.

The Notice was issued pursuant to the provisions of section 4.6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chapter S.22, as amended ("the S.P.P.A"), and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal ("the Rules"), which authorize the License Appeal Tribunal to dismiss a proceeding without a hearing.

The grounds for the Notice were:

- (1) that the Applicant had failed to commence an appeal within the 15-day period prescribed by section 16(2) of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31; and
- (2) that the Applicant had failed to pay the \$100.00 filing fee required pursuant to the *Licence Appeal Tribunal Act, 1999* to be paid to the Minister of Finance.

The Notice gave the Applicant until the February 28, 2001 to make written submissions and payment. The Tribunal received the filing fee, but did not deposit the cheque. The parties consented to oral submissions by way of teleconference on the issue of whether the proceedings should be dismissed without a hearing.

FACTS:

On February 15, 2000, the Registrar under the *Ontario New Home Warranties Plan Act* issued a Notice of Proposal to refuse to renew the Applicant's registration as a builder. The Notice clearly set forth the Applicant's right to an appeal and the process to follow. On February 29, 2000, the Program received a letter which could be interpreted to be a Notice of Appeal. Although it was addressed to the Program, a copy was indicated to have been sent to the attention of the Commercial Registration Appeal Tribunal, whose jurisdiction has been replaced by this Tribunal. No copy of the letter was sent by Mr. Fobert to the Tribunal.

On August 17, 2000, the Program provided a copy of the letter to the Tribunal and asked whether an appeal had been filed. The Registrar immediately wrote to Mr. Fobert, asking whether the letter was a notice requiring a hearing. Mr. Fobert was asked to respond by August 31, 2000.

On August 30, 2000, the Applicant called the Tribunal, advising he would be sending documentation and the filing fee "late". On August 31, 2000, the Applicant wrote to the Tribunal, "The information you will need to make your decision will be sent to you by Sept. 15, 2000."

The Applicant did not send anything to the Tribunal. The Registrar again wrote to him on September 15, 2000, asking for clarification. Considerable documentation was provided by the Applicant on September 20, 2000. It did not include the filing fee or a response to the Registrar's questions. The Registrar wrote the Applicant again on October 2, 2000, November 10, 2000, December 7, 2000 and January 5, 2001 asking for a completed Notice of Appeal form and the filing fee. No response was provided by the Applicant to any of the letters, although he admits receiving them.

It was only after the Notice of Intent to Dismiss Proceedings was issued that the Applicant provided the Tribunal with the filing fee. He stated that he could not afford the \$100.00 fee until then.

The only explanation he gave as to why he did not respond to the numerous letters from the Registrar was that he thought that everything had been resolved, because the Program did not have a case against him. It is clear that there was never any indication by the Program that it did not intend to proceed with the Notice of Proposal. It continued, pursuant to regulatory authority, to request reasonable financial information from the Applicant which he did not provide and which he indicated to the Tribunal he will not provide.

The Applicant also stated that he did not care if his licence as a builder was not renewed as he intended to continue to build or complete new homes but not sell them as new homes, regardless of the outcome of the proceedings.

ISSUE:

The issue in this matter is whether the proceedings should be dismissed without a hearing.

THE LAW:

Both Section 4.6(1) of the S.P.P.A. and Rule 2.10 of the Rules allow the Tribunal to dismiss a proceeding without a hearing if the proceeding is commenced in bad faith or some aspect of the statutory requirements for bringing the proceeding has not been met.

The *New Home Owner's Warranty Plan Act* provides that a notice of appeal must be served on both the Registrar under that act and on the Tribunal, within 15 days after receipt of a Notice of Proposal.

APPLICATION OF LAW TO FACTS:

It is not clear that the Applicant appealed the Notice of Proposal. He did not serve the Tribunal with notice of his appeal within 15 days as required by statute. He failed to respond when asked for clarification as to what he was actually trying to do. He repeatedly failed to provide the filing fee required under the Act. He did not meet the statutory requirements to proceed with an appeal. Accordingly, the proceeding will be dismissed without a hearing.

Because of this determination, it is not necessary to consider whether the Applicant acted in bad faith. However, the Tribunal is satisfied in any event that there are sufficient grounds in the Notice of Proposal which are admitted by the Applicant to justify the Registrar's decision to refuse to renew his license.

DECISION AND ORDER:

The proceeding herein is hereby dismissed. The Registrar is to return the filing fee provided by the Applicant on February 26, 2001.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair

Released: April 4, 2001

McLAREN

DAVID LARRY McLAREN

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

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, VICE-CHAIR

APPEARANCES:

JAMES R. MCINTOSH, Counsel representing the Applicant
KAREN JONES, Counsel representing the Ontario New Home
Warranty Program

DATES OF
HEARING:

March 19 and 20, 2001

Sudbury

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written Decision of the Ontario New Home Warranty Program (the "Program") dated August 8, 2000 and a Supplementary Decision Letter dated September 28, 2000.

The initial Decision Letter denied the Applicant's claim on the basis that the complaints of the Applicant did not meet the definition of a major structural defect. The Supplementary Decision Letter of September 28, 2000 relied upon the additional ground that the claim was not made within the warranty period and, therefore, was out of time.

The Program reserved its argument on the Motion to Dismiss until the conclusion of the hearing which proceeded in its entirety. At the conclusion of the hearing, the Program presented its Motion to Dismiss based upon the Program having received the required notification after the time limit prescribed by the *Ontario New Home Warranties Plan Act* (the "Act"). For the Motion, the longest notification period provided in the Act is assumed, namely, seven years for major structural defects.

FACTS:

The Certificate of Completion and Possession for the Applicant's home located at 3 Galahad Court, North Bay, Ontario, took effect on February 17, 1992. The Applicant was not the owner of the home at that time.

On August 23, 1995, the previous owner submitted a Proof of Claim indicating that the house had developed two major cracks in the basement walls, directly opposite each

other on what was agreed as the east and west walls. Cracking had also developed in the brick work, as well as the inside of the house on the walls and ceiling.

On September 12, 1995 the Program observed the two major cracks extending below grade, as well as extensive cracking in the brick above, hairline cracks and shifted windows above the damaged brick.

On September 27, 1995, the Program instructed the Builder to do repairs.

Because the prior owner was away from the home much of the time, repairs were completed in stages by the Builder on the inside and outside of the dwelling. The repairs were completed by February 1997.

The Applicant purchased the property by Agreement of Purchase and Sale dated February 26, 1997 and took possession in April 1997.

The Vendor had disclosed to the Applicant that there had been structural problems with the cracks on the east and west wall, which were corrected under HUDAC. The Applicant did not have a professional house inspection.

In the Fall of 1998, the Applicant was working on finishing the previously unfinished basement and noticed that the southeast corner of the basement floor was not level. He poured an estimated eight bags of concrete to raise the floor approximately three inches. He testified that he could have brought it up another one to two inches to make it level. He finished a bedroom in that corner of the basement.

The Applicant and his wife and children occupy and have full use of the house, including the basement.

In late 1998, the Applicant discovered other problems and became concerned about the extent of problems with the home. Subsequently, he met his Real Estate Agent and learned that the house may be covered by the *Ontario New Home Warranties Plan Act*.

By letter dated June 29, 1999, the Applicant made his first complaint to the Program. The Applicant's letter identified a number of problems with the house, which he associated with a re-occurrence of settlement on the southeast corner of the house.

ISSUES:

Was the Applicant's claim of major structural defect made within the period required under the Act?

THE LAW:

Under Section 13 of the *Ontario New Home Warranties Plan Act* states:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
.....

Section 13(4) of the Act states:

A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.
.....

Section 14(1)(c) of the Act states:

.....
the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,
.....

Section 16 of Regulation 892 states:

Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

APPLICATION OF LAW TO FACTS:

There is no dispute that February 17, 1992 is the date the commencement of the warranty under the Act.

Under the Regulations, the warranty for damages resulting from a major structural defect expired on February 17, 1999.

The Applicant did not make a claim to the Program until June 29, 1999, over four months past the expiry date of the warranty period.

However, the Applicant argued that his claims were a continuation of the previous home owner's claim which was reported in time.

The Applicant's expert witness, Mr. D.E. Netherton, gave evidence that according to his measurements of the re-cracking of the original cracks that were repaired in 1995, the southeast corner of the house had continued settling after the repairs were made. There was no evidence available by way of exact measurements or photographs of the width of the original cracks in 1995. By measuring the repaired portions and the expanded cracks, Mr. Netherton estimated that the width of the expanded cracks were approximately 35% of the width of the original cracks. In his opinion, this would mean that the southeast corner continued to settle since repairs were initially made on the

original cracks. He noted that there was no work done on the southeast corner itself and, therefore, he concluded that the problem of the differential shifting of the soil underneath the foundation had never been addressed and the repairs that were made in 1995 to 1997 were only cosmetic.

The Program's expert witness, Mr. Tibor Pal, did not entirely agree. There was some minor movement of the southeast corner resulting in small movements at the repaired cracks. However, he concluded that most of the movement occurred prior to 1996 and that the resulting damages were repaired. He did not measure the cracks but "eyeballed" the cracks and from that determined that the movement after repair was approximately 17%. Mr. Pal admitted that his measurements were only estimates and that Mr. Netherton's measurements would probably be more accurate. With respect to the measurement of the width of the cracks, the Tribunal accepted Mr. Netherton's detailed measurements as accurate.

The Applicant argued that since there had been further differential settling of the earth under the southeast corner of the house, the original problem complained of in 1995 had never been addressed. Therefore, the Applicant submitted, the complaint of major structural damage in 1995 was still alive, and the basis for his claim had been made within the seven year period.

The Applicant's argument assumes that the previous home owner's complaint was not satisfied by the Program's repairs and as such the Applicant is not barred by the expiry of the limitation period under the Act.

The original home owner's complaints were made in 1995 and were made in time. The Program acknowledged these complaints and effected repairs on the complaints that were made. There is no evidence to indicate that the original home owner was not satisfied with the repairs.

The Act does not provide specifically for any extended warranty to cover repair work. The Program's policy, however, is that such repairs are guaranteed for a period of one year. The repairs done on the Applicant's premises were completed by February 1997 and extending the one year policy guarantee from that time would make the expiry date for those repairs February 1998. The Applicant made no complaint during that time regarding the repairs. The Program's policy warranty on those repairs had, therefore, expired. Re: Bisal [1997] O.C.R.A.T.D. No. 117.

The owner has the obligation to monitor and report to the Program any problems with the repairs. The policy of the Program is to warrant repairs for one year after completed, and the Tribunal has no authority under the Act or its Regulations to require the Program to extend the warranty on the repairs. Re: Haddadi [1997] O.C.R.A.T.D. No. 106 and Re: Lichtenberg [1995] O.C.R.A.T.D. No. 99.

It has previously been held that the time limits prescribed in the Act and the Regulations are mandatory. The obligation is on the home owner to report complaints in writing to the Program in a timely fashion, and the Program's responsibility is to deal with the home owner's complaints. It is the duty of the home owner to raise any concern as to the repairs. Re: Goncalves [1995] O.C.R.A.T.D. No. 133 and Re: Lichtenberg [1995] O.C.R.A.T.D. No. 99

The specific complaints that were made in 1995 were repaired without complaint from the home owner. The one year policy warranty on those repairs had expired by the time the Applicant made this complaint in June of 1999. In the present case, the cracks and complaints of the Applicant were not reported within the time limit as prescribed by the Act and regulations and are, therefore, out of time.

DECISION:

The Program's Motion to dismiss the Applicant's appeal is granted.

Accordingly, by virtue of the authority vested in it under Section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal upholds the decision of the Ontario New Home Warranty Program to disallow the claims of the Applicant.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair

RELEASED: April 5, 2001

WINGS OF THE WORLD INC. o/a WINGS OF THE WORLD o/a WINGS OF THE
WORLD TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
WINGS OF THE WORLD INC. O/A WINGS OF THE WORLD
O/A WINGS OF THE WORLD TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 2, 2001

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

WINGS OF THE WORLD INC. O/A
WINGS OF THE WORLD O/A
WINGS OF THE WORLD TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Wings of the World Inc. o/a Wings of the World o/a Wings of the World Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 3, 2001

BETWEEN:

WINGS OF THE WORLD INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Wings Of The World Inc. operating as Wings Of The World Travel (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 1449980/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since September 13, 1983. The Registrant has also been registered as a travel wholesaler (registration number 1992146/W) since September 17, 1983. The Registrant's fiscal year end is August 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated August 10, 2000 the Registrant was requested by TICO to file financial statements for the fiscal year ending August 31, 2000 by November 30, 2000.
4. On December 8, 2000, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by December 22, 2000.

5. On January 11, 2001, a final request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by January 24, 2001, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
6. By February 2, 2001, the Registrant had failed to provide its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
7. On February 20, 2001, the Registrant filed its Notice of Appeal with the Licence Appeal Tribunal.
8. On March 9, 2001, the Registrant filed its financial statements for its fiscal year ended August 31, 2000, which were due by November 30, 2000.

COMPLIANCE HISTORY – PREVIOUS FILING OF FINANCIAL STATEMENTS

9. The Registrant has a history of late filing of its financial statements as summarized in paragraphs 10 through 14.
10. The Registrant filed its financial statements for its fiscal year ended August 31, 1995, which were due by November 30, 1995, on January 12, 1996.
11. The Registrant filed its financial statements for its fiscal year ended August 31, 1996, which were due by November 30, 1996, on December 30, 1996.
12. The Registrant filed its financial statements for its fiscal year ended August 31, 1997, which were due by November 30, 1997, on June 18, 1998.
13. The Registrant filed its financial statements for its fiscal year ended August 31, 1998, which were due by November 30, 1998, on December 15, 1998.
14. The Registrant filed its financial statements for its fiscal year ended August 31, 1999, which were due by November 30, 1999, on January 14, 2000.
15. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 2, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:

- (a) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending August 31, 2001, no later than November 30, 2001;
 - (b) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending August 31, 2002, no later than November 30, 2002;
 - (c) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (d) The Registrant shall establish a Travel Industry Act trust account and provide proof thereof to the Registrar by May 31, 2001. Thereafter, the Registrant shall maintain the trust account and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time.
- 3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
 - 4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2001

Mr. Bibhuti Khasnabish
Wings Of The World Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

CRAIG PROPERTY SERVICES INC.

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

IN THE MATTER OF a REGISTRATION by
CRAIG PROPERTY SERVICES INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 9 of the *Ontario New Home Warranties Plan Act*

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

CRAIG PROPERTY SERVICES INC.

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Craig Property Services Inc. (the "Applicant") initiated an appeal under section 9(4) of the proposal of the Registrar under the Act, dated February 12, 2001 in terms of which the Registrar proposed to refuse to renew registration of the Applicant as a builder;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 9 of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Registrar, Ontario New Home Warranty Program to carry out his proposal dated February 12, 2001 to refuse to renew the registration of Craig Property Services Inc.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: April 6, 2001

MED - 473

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 29, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Letter of Appeal from the Applicant, received on February 7, 2001, at the Tribunal.

Exhibit # 2 - Letter of Suspension from the Ministry, dated December 22, 1999.

Exhibit # 3 - Applicant's driving record from the Ministry, dated February 27, 2001.

Exhibit # 4 - Tabulated documents (1-18) from the Ministry, received at the Tribunal February 28, 2001.

Exhibit # 5 - Letter from the Applicant to the Bloorview MacMillan Centre, dated June 18, 2000.

FACTS:

The Applicant an eighty year old male, had his driver's licence suspended by the Ministry on January 22, 1999, under section 47(1) of the *Highway Traffic Act*, after receiving an unsolicited letter from the Applicant's family physician, Physician # 1, dated September 10, 1995. Physician # 1 stated the Applicant was an insulin dependant diabetic with a history of documented strokes. He and the Applicant's family had noted the Applicant had problems with memory, judgement and mental alertness that may impair his ability to drive.

The Applicant claimed he had pneumonia at that time and this was not taken into consideration. Never-the-less the Ministry suspended his driver's licence and recommended a neurologist's assessment referencing cognitive functions and a report from driving evaluation.

The Ministry received a letter from Physician # 2, a neurologist, on March 30, 1999. Physician # 2 stated he could not find any neurological reasons why the Applicant should not drive, if he was able to meet the standards set by a driving review centre, such as the Hugh MacMillan Centre.

Physician # 2 also sent a letter to the Applicant's new family physician, outlining his past history and the results of a CT scan in April, 1998. This disclosed multiple cerebral infarctions and periventricular hypodensities

The Applicant had a driving evaluation on June 7, 1999 at the Hugh MacMillan Centre. The instructor and the occupational therapist had concerns about the Applicant's competence to return to driving a motor vehicle. His problem solving abilities to make sound judgements and decisions for driving seemed to be impaired. The instructor felt something happened to affect his reaction time, judgement and the decision-making skills needed for driving.

The Applicant complained that he had to wait an extra hour for the driving test over the lunch period. His driving was affected because he is an insulin dependent diabetic and needs to eat on time.

A second test was carried out on June 13, 2000 at the same place, but by a different evaluator and occupational therapist. The results were very similar - although the Applicant has been driving for several years, it appears his cognitive deficits, and particularly impaired memory, attention, visual perceptual skills and judgement are interfering with his competency to drive a vehicle.

The Applicant's excuse was that it was a rainy day and the rain on the windshield interfered with his vision. He had requested an opportunity to wipe off the windows, but the evaluator refused. He felt a shattering injustice had occurred by someone with inadequate training to make a decision as devastating as this.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

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

APPLICATION OF THE LAW TO FACTS:

Section 47(1) of the *Highway Traffic Act* empowers the Registrar to ---“suspend or cancel” a driver’s licence for “any ---sufficient reason---”. The Registrar suspended the Applicant’s licence after receiving an unsolicited letter, dated September 10, 1998, from Physician # 1, advising that he and the family of the Applicant were concerned about the Applicant’s ability to drive safely, because of problems with memory, judgement and mental alertness.

The Tribunal finds the Registrar acted in accordance with the Regulation in suspending the Applicant’s driver’s licence.

The neurologist Physician # 2 could not find any neurological reason why he should not drive, if he could meet the standards set by a driving review centre. Two separate evaluations were done and both confirmed Physician # 1’s original concerns. His memory, judgement and cognitive skills had deteriorated to the point it would be dangerous for him to drive.

The Tribunal finds that on the evidence the Applicant suffers from disabilities as a result of a series of minor strokes likely to significantly interfere with his ability to drive a motor vehicle within the meaning of section 41 (a), Regulation 340/94.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 22, 1998, of the Registrar of Motor Vehicles (“Registrar”) to suspend his driver’s licence pursuant to Section 47(1) of the *Highway Traffic Act* (“HTA”), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: April 3, 2001

HIGGINS

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

IN THE MATTER OF
MARK OWEN HIGGINS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 6, 2001

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

MARK OWEN HIGGINS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 5, 2001

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

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Mark Owen Higgins
95 Pressed Brick Drive
Brampton, ON L6V 4K5

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Mark Owen Higgins (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, his registration is automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.

12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of March 2001.

Mark Owen Higgins (signature)

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

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

KOLDEN INVESTMENTS INC.

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

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

TRIBUNAL: NIVES MONTANO, Presiding member
DINO BOTTERO, Member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

KOLDEN INVESTMENTS INC., Applicant
unrepresented

JULIE HOLDEN, Agent for Applicant

DATE OF HEARING: April 6, 2001

DECISION RELEASED: April 9, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on April 6, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Kolden Investments Inc. (the “Applicant”)
Motor Vehicle: 2000 Chrysler Neon, plate # AAWA 492 (the “impounded vehicle”)
Date of Appeal: March 19, 2001

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

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

This matter came before this Tribunal on April 6, 2001 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

I am the owner of Budget Rent A Car. While this car is impounded we will suffer lost revenue.

Thank you
Owner Don Holden

The Applicant who carries on business as Budget Rent A Car is a solely-owned and operated by Don Holden. Mr. Holden has been in business for the past 3 years. This business is operating out of 581 N. Christina Street in Sarnia, Ontario. The Applicant's current fleet consists of approximately 35 to 40 vehicles. During the course of 1 week, 30 vehicles are rented on average.

On February 19, 2001, Ms. Nahmabin, a frequent customer, entered into a one-month rental agreement (Exhibit 6) with the Applicant. Ms. Nahmabin indicated there would be no other drivers having care and control of the impounded vehicle.

On March 15, 2001 the police advised the Applicant that the vehicle had been in an accident and had been impounded for 45 days. The driver was the son of Ms. Nahmabin and he had been drinking and driving. Ms. Nahmabin had also called the Applicant that morning to advise the same and that her son had taken the keys from her while she was sleeping the night before. She laid no charges against her son.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Terrence Nahmabin;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life for ability impaired.

The Respondent did not call any witnesses.

The Respondent wanted to point out to the Applicant that Ms. Nahmabin may have intentionally rented the vehicle for her son, because the Respondent had proof that Ms. Nahmabin owned 4 other plated vehicles.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for its claim to be considered under section 22(2), the Agent must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

With regard to section 22(3),

- (a) The Applicant is a car rental company. In the Agent's testimony, its fleet consists of approximately 35-40 vehicles. Therefore, there may be available vehicles to be rented and/or leased.
- (b) The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting. The vehicle is to be released from impoundment on April 29, 2001. The Applicant currently holds approximately \$1,300 in authorizations (being security deposit together with payment assurances) which have not yet been processed. Therefore, the Applicant in its sole discretion may have the right to apply these monies towards Ms. Nahmabin's obligations of approximately \$2,800.
- (c) The Applicant being a rental company is also not considered a person ordinarily transported by the vehicle.

Evidence was heard that the Applicant might have incurred some financial hardship as a result of the loss of the vehicle. The Applicant may pursue compensation from the suspended driver, Terrence Nahmabin, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

The Applicant and its Agent have not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation.

The Tribunal accordingly finds the Applicant has not established that it has or will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Dino Bottero, Member

RELEASED: April 9, 2001

EBORA

RENE AND EVELYN EBORA

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

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

RENE and EVELYN EBORA, appearing on their own behalf
TERRI HILBORN, Counsel, representing the Ontario New
Home Warranty Program
ARPAD SZINEGH, Agent for the Added Party, SUNDIAL HOMES
(MAPLE) LIMITED

DATE OF
HEARING: March 29, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from the decision of the Ontario New Home Warranty Program ("the Program") dated November 15, 2001, wherein the Applicants claim for damages for a breach of the Vendor's warranty was disallowed. As set out herein, the Tribunal found that there were no breaches of warranty. Accordingly, the Applicants are not entitled to succeed in their claim against the Program for the reasons hereinafter set out.

FACTS:

It is not disputed by the parties that the home is a detached single family home built by the Vendor, and sold to the Applicants with a closing date of September 10, 1999. The Applicants filed a Conciliation Request Form dated July 21, 2000 setting out 15 items. A Conciliation Inspection was made on October 11, 2000 by Mr. Warren Northcott who a Warranty Representative for the Program. On November 15, 2000 a Decision Letter was issued by Mr. Northcott, and the Applicants filed a Request for Hearing on November 27, 2000. On the hearing date, the parties agreed that there were 4 issues in dispute.

The first three issues involved the construction of the garage and the fourth issue involved the installation of two pot lights. The Applicants claimed that there were breaches of warranty because the right garage door opening was narrower than the left garage door opening, the construction of the right garage door frame was ugly, the

width of the garage was narrower than the plans, and the bulbs of two pot lights extended beyond the pots.

WITNESS FOR THE APPLICANT

Mr. Rene Eborá testified that there was a problem with the construction of the garage as he could not park his two vehicles in it at the same time. He is able to get his Ford Aerostar Van through the left garage door but is unable to get it through the door on the right side. His second vehicle is a Honda Accord Coupe, and although he is able to get it through the garage door on the right side it is a very tight fit and the car has been scratched. When he measured the distance from the inside of the left side of the frame on the left garage door opening to the inside of the frame on the right of the right garage door opening, he found it was 201 inches. When he was in the model home prior to the purchase, he found this distance to be 206 inches. The measurement of the left garage door opening at his home is 90 inches, and the opening on the right is only 88 inches. Mr. Eborá stated that the extra 2 inches means that he is not able to get his van into the garage. There is also the problem that within the garage the right side there is drywall extended beyond the foundation into the garage further reducing the parking area. As a result when the car is parked in the garage it must be turned and takes up some of the space for the other vehicle with the result that two vehicles cannot be parked in the garage at the same time. When he purchased the home, it was presented to him as a two-car garage, but he is now unable to park two vehicles in the garage as he expected.

Mr. Eborá testified that he paid \$200.00 each for 11 pot lights and that the bulbs in two of them extended beyond the pot. In his opinion, the bulb in a pot light should not extend beyond the pot, and in his opinion they must have been installed incorrectly. He is an electrical technician and could repair it, but he does not want to open the bulkhead to change the components and the casing. Instead, he wants a refund of his \$200.00 per light as he did not get what he was entitled to receive for his money.

In cross-examination, Mr. Eborá confirmed that photographs on pages 2 and 3 of Exhibit 6 at Tab 9 properly show the present condition of the garage door frame. He agreed that the right side garage door opening is only 1 inch per side narrower than the left side garage door opening. A specifications sheet for a Honda Accord Coupe was produced, and he agreed that the width was 70.3 inches and that this would leave 9 inches clearance on either side of the vehicle on the right side garage, however he mentioned that he did not know if this measurement included the two exterior rear view mirrors. He explained that if his Van is in the left side of the garage, he cannot get the car into the right side.

Mr. Eborá stated that the two pot lights in issue are functional and that his concern is that the lights protrude from the pots. When it was suggested to him that in some pot lights the light bulbs do protrude, he disagreed and stated that they were not pot lights. He was shown photographs (Exhibit 7, A, B) of a *recessed lighting* display at a building supplies store (Home Depot) which showed several styles of lights including one in which the bulb protruded from the pot; however, he stated that in his opinion this was not a pot light. When it was suggested that he could try smaller bulbs, he stated that he did and they still protruded. He wanted it to be recessed, but he did not want the repair done as he did not want the bulkhead to be torn apart.

Mr. Eborá was shown the Agreement of Purchase and Sale, and agreed that the builder might have to modify the plans, and agreed that there were no measurements on the drawings given to him; however, he stated that he still wanted what was offered to him and what he had paid for. When it was pointed out to him that the floor plan of his home (Exhibit 5) showed that the area for the curved staircase encroached into the area of the garage, he testified that he had been offered a 2 car garage, and this meant that he should receive a garage in which he could park his 2 vehicles.

WITNESSES FOR THE PROGRAM

Mr. Warren Northcott testified that he has been a Warranty Representative for the Program for 22 months, and prior to that in was a building inspector in Barrie, Ontario, for 10 years. He is also a certified Building Code official. He attended the Applicants' home for the Conciliation meeting and on two later occasions. When he first observed the right hand garage door frame, he saw that there was a 2 X 10 board nailed of the right side to cover a gap. As the bricks were 1 1/2 inches short of the door frame. This was found to be covered by warranty so the board was removed and a new frame was installed. In his opinion, the opening would be wide enough to accommodate a normal sized car, and he saw wear marks on the garage floor to indicate that a vehicle had parked there. The materials and workmanship were satisfactory, and he did not find that there was a Building Code breach. Although he did not measure the opening himself, he accepted Mr. Eborá's measurements and concluded that there was no breach of Warranty. Even though there was 1 1/2 to 2 inches difference in the garage door openings, he did not consider them to be physically different, as he considered the difference minor. Mr. Eborá had told him that he wanted the centre post removed and a single door installed. However, Mr. Northcott considered this to be a problem as it would require substantial structural alteration since it carries the weight of part of the second storey of the home. An application for a building permit would be needed and there might be problems getting the necessary approvals. In his opinion, there was no breach of warranty involving the garage. The Agreement of Purchase and Sale also allows for changes in dimensions as may be necessary for construction reasons or to comply with the Subdivision Agreement.

Mr. Northcott testified that there were different ways to install pot lights. Although the fixture is mounted inside the drywall, the bulb may protrude depending on the type of installation, the housing, and the size of the bulb. He considered this to be an issue of personal preference and explained that he attended at a Home Depot store where he took photographs(Exhibit 7 A, B) showing several styles of recessed lighting which includes one in which the bulb protrudes from the pot. In his opinion there is no breach of warranty as there is no defect in workmanship or materials, and he suggested that the homeowners use smaller bulbs. In this case, the homeowners have stated that they did not wish a repair, and the warranty would therefore be void in any event.

In cross-examination, Mr. Northcott was asked why he did not mention that the bulb in a pot light does not protrude from the pot, and he explained that it is because the bulb may protrude even though the rest of the assembly is recessed within the drywall. He agreed that the pot lights installed in the ceiling were totally recessed, but stated that the pot lights installed in the bulkheads were acceptable even though the bulbs protruded, and he saw no reason that the builder should carry out any repairs.

Mr. Northcott testified that he accepted Mr. Ebor's measurements, and did not measure the garage door openings for himself. He also did not have the Applicant demonstrate how his vehicles did or did not fit through the openings and into the garage. Based on his observations, there were 12 vertical bricks on the left side of the keystone above the right hand garage door opening, and only 11 vertical bricks to the right of the keystone. Mr. Northcott testified that he had been told that the car would fit into the right side of the garage, and he saw evidence of wear on the floor of the garage showing that the vehicle had parked there. When he was asked if it is normally intended to put 2 cars into a 2 car garage, he stated that it is a matter of personal preference. In his experience, garage doors commercially available vary in size, with the smallest being 84 inches (7 feet) wide. Mr. Northcott agreed that there are obstructions in the garage which could interfere with parking a vehicle depending on its size. Based on the home's drawings which were not to scale and had no measurements, it appeared to him that the curved staircase caused an encroachment into the garage. The witness did not know whether a vehicle could enter the right side of the garage if there was another vehicle parked on the left side.

Mr. Arpad Szinegh testified that he is the Director of Quality Control for Sundial Homes and at the time he attended the Conciliation meeting, he was the Director of Warranty Service for Sundial Homes. He stated that he did measure the garage door openings and accepted the measurements provided by the Applicants. In the winter of 1999 the Applicants reported a problem with the door frame for the garage door opening on the right side. A piece of lumber had been used to cover a gap in the door frame and he had it removed. He testified that the standard single door sizes were 7 feet, 7 ½ feet, and 8 feet in width. The standard door sizes for double doors were 14 feet, 15 feet, and 16 feet in width. In his experience the most common single doors were 7 ½ feet and 8 feet in width with the smaller 7 foot doors being used primarily in smaller townhouses. The right side garage opening at the Applicants' home was 88 inches which is only 2 inches less than a 7 ½ foot (90 inch) door. In his opinion it would be a tight fit to get a normal vehicle through the door, but there would be enough room. For a single door to be installed, the homeowner would have to obtain a building permit, and there could be problems with this due to restrictions in the Subdivision Agreement. If a building permit were issued, the change would require a major structural change to the building, as the centre pillar between the doors bears some of the weight of the second story of the home. This change would probably require the installation of steel beams to compensate for the loss of support in the middle, and in the opinion of the witness it would not produce a larger opening. It would still be no more than 201 inches, and there would be no extra room in the interior of the garage. The witness examined the floor plan from the brochure, and later in re-direct examination stated that even though there are no measurements given he would estimate that the encroachment into the garage caused by the curved staircase is approximately 2 feet. This brochure formed part of the promotional material and was included in the Applicants' Agreement of Purchase and Sale, so it was apparent that the design of house caused a loss of space in the garage. Mr. Szinegh testified that the bulkheads can accommodate pot lights as installed, and the homeowners should use smaller bulbs if that is their preference.

In cross-examination Mr. Szinegh was asked if two garage doors meant that two vehicles should be able to park in the garage, and he stated that it did not, and could mean that one side would be used for something else such as a workshop. In the plans for this home, he said that it would be apparent that there would be a problem parking two cars in the garage. He did not know the dimensions of the garage in the model

home, and did not personally attempt to park two cars in the garage. The witness agreed that the right side garage door opening was 2 inches narrower than the left side, but said that both openings are sufficient for a car to enter. In his opinion, most cars are approximately 6 feet wide, and most garage doors are approximately 7 feet wide so there was enough room. The witness agreed that the home was a "fair size" and was not a townhouse that would normally have a small sized garage door. When cross-examined about the pot lights, he agreed that no repair was attempted, and that the bulbs protruded but repeated that they were properly installed as the fixture was flush with the ceiling.

FACTS FOUND PROVEN:

The Applicants' home has a garage which is part of the structure of the building, and the centre pillar between the 2 garage doors supports some of the weight of the second storey of the house above it. On the floor plans to the home in the diagrams provided, there were no measurements, and the garage area was marked as *GARAGE* and was not referred to as a *double garage* or a *2 car garage*. There are 2 openings with separate garage doors. The right side garage opening is 88 inches wide and is 2 inches narrower than the 90 inch opening on the left side. If the centre pillar were removed, the opening would be 201 inches. The Applicants own an Aerostar Van and a Honda Accord. They are able to drive their Van into the left side of the garage and are able to drive their Honda Accord into the right side, but it is a tight fit. Due to the loss of interior space caused by the curved staircase, if the car is parked on the right side, it has to be turned to the left, and into the parking space for the vehicle on the left side. It is not possible to properly park the Applicants' two vehicles in the garage at the same time. To replace the two garage doors with one large door and remove the centre pillar would require a major structural change because an alternate method would have to be used to adequately support the structure above. If this were done, the overall width of the garage opening would still remain approximately 201 inches. The garage door frame has been repaired; is now functional, and the workmanship and materials are acceptable.

There are two pot lights installed on bulkheads in the home, and 9 pot lights installed in the ceiling. The bulbs in the two pot lights installed on the bulkheads protrude from the assembly, and the bulbs in the others installed in the ceiling are recessed. Evidence was produced showing a display of pot lights in which some of the lights were fully recessed and in one model the light protruded from the ceiling area. Two different sized bulbs were produced with one being shorter than the other. The Applicants do not want the bulkheads opened for a repair of the two pot lights. The Tribunal finds that a light is still a pot light if the assembly is recessed into the ceiling or bulkhead and the bulb protrudes.

ISSUES:

The legal issues in this case is whether there was a breach of warranty due to defects in workmanship or materials in the construction of the garage or installation of the two pot lights, or by not providing a garage suitable to park two vehicles at the same time.

APPLICABLE LAW:

Section 1 of the *Ontario New Home Warranties Plan Act* states:

"home means",

- (a) a self-contained one family dwelling, detached or attached to one or more others by a common wall,
- (b) a building composed of one or more than one and not more than two self-contained, one-family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

.....

Section 13 of the *Ontario New Home Warranties Plan Act* states:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;

- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 of the *Ontario New Home Warranties Plan Act* States:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and

the claim is made within four year after the warranty expires or such longer time under such conditions as are prescribed,

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

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in the mitigation of damages claimed under subsection (1).

Regulation 892, Section 1, *Ontario New Home Warranties Plan Act* states:

"major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended.

including significant damage due to soil movement, major cracks in basement walls collapse or serious distortion of joints or roof structure, and chemical failure of chemicals, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners, and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Regulation 892 of the *Ontario New Home Warranties Plan Act* states:

.....

4.(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

.....

Regulation 892, Section 6 of the Act states:

.....

6.(3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to the owner out of the guarantee fund in respect of a claim made after August 1, 1989 under clause 14 (1)(b) or (c) of the Act is \$100,000.00.

.....

CASELAW:

Re: ULUDAMAR [1997] O.C.R.A.T. No. 46

In that case, the Applicant claimed that the garage door was not properly centered, the roof of the garage was crooked, and the interior ceiling was crooked. The problems were caused by the design of the roof truss. The problem was partially repaired and the builder went bankrupt before it was completed. The garage door was 10 inches out on the right side of a window and was not possible to move the door to provide the facade as shown in the artists drawings. To move the door five inches to centre it would cost between \$6,000.00 and \$10,000.00. Otherwise the workmanship of the door was adequate, and the door otherwise was functional. The test applied was whether the Program was required to go to the expense of repairing the door to conform to the home's plan when it was otherwise constructed in a workmanlike manner and was free of defects. Although the door was found to be off centre, it did function as the garage door and no breach of warranty was found for that item.

Re: RUSSO [1999] O.C.R.A.T. No. 86

In that case, the Applicants made several claims including one involving the location of the fireplace which was 8 inches off centre because it was necessary to provide space for the required flue. When the problem was realized, the builder did not consult the purchaser to try to find alternatives. The complaint by the Applicant was about the appearance of the fireplace, and the fact they were unable to install bookcases along the wall as they had planned. The test used by the Tribunal at page 8 was:

"whether the consequences of the complaint where the actual item is otherwise constructed in a workmanlike manner and is free from defects in materials, are such as to warrant requiring the Program to go to the expense required to change the item to conform with plans or specifications."

The Tribunal found that the placement of the fireplace was not a warrantable defect under section 13(1)(a)(i) of the Act.

Re: BREEN [1999] O.C.R.A.T. No. 86

In this case, the Applicants claimed that there was a mark on a cupboard door, and that the original front door was defective. The Tribunal found that the mark on the cupboard door was only visible on extremely close inspection and the homeowners had refused the repairs offered by the builder. Similarly, the builder had offered to repair the front door even though they had already made a repair and the homeowners had refused a further repair. The Tribunal found that the mark on the cupboard door was trivial and that the front door had been properly repaired. Although aesthetics are a consideration, the standard is acceptability and not perfection. Even if the Applicants had proven their case, the Tribunal found that their refusal to allow repairs would disentitle them from compensation under the Act.

APPLICATION OF LAW TO FACTS:

The Tribunal finds that both garage doors permit the entry of a vehicle although the Applicants can not drive their van through the right garage door opening as it is 2 inches narrower than the left garage door opening. Due to the construction requirements for the curved staircase, interior space within the garage is lost with the result that the Applicants cannot park both of their vehicles in the garage at the same time although both sides are used separately. Both garage doors are standard sized commercially available garage doors, and the openings are sufficient to permit the entry of vehicles although it is tight. The floor plans for the home do not give measurements, although they clearly show the encroachment into the parking space within the garage caused by the curved staircase. In the documentation, there are no specifications for the garage and it is not referred to as a *two car garage* and is simply referred to as a *garage*. The garage was constructed in a workmanlike manner as set out in the floor plans provided, and it does function as a garage. There is no breach of warranty. Even if there had been a breach of warranty, the solution suggested by the Applicants would involve a major structural change at the substantial cost and would not produce any further interior space to allow the Applicants to park their two vehicles comfortably within the garage.

The Tribunal finds that the two pot lights were properly installed on the bulkheads and although the bulbs presently in the fixtures protrude, there is no defect in workmanship or materials and no breach of warranty. The Applicants have indicated that they did not want any repairs done and have thereby disentitled themselves from succeeding on his claim in any event.

DECISION:

Therefore, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

RELEASED: April 9, 2001

ADLS - 498

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

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

Applicant

Counsel for Applicant

DATE OF
HEARING: April 3, 2001

Toronto

DECISION

A hearing was held on April 3, 2001 at Toronto, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: April 4, 2001

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

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

Applicant

Counsel for Applicant

DATE OF
HEARING: April 3, 2001

DECISION
RELEASED: April 4, 2001 Toronto

REASONS FOR DECISION

A written hearing was held on April 3, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on April 4, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended,

chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 23, 2001, and was received by the Tribunal on February 28, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"This is a case of mistaken identity. I am not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken."

Preliminary Matters

Being a written hearing, there were no preliminary matters and the matter was heard without delay.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 2 Notice of Appeal Form dated February 23, 2001.
- b) Exhibit # 3a,b,c, Sworn Affidavits from Witness # 1, Witness # 2 and Witness # 3.

By the Respondent:

- a) Exhibit # 1 Notice to Registrar dated January 31, 2001.
- b) Exhibit # 4 MTO Submissions Received March 23, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(a) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Was the Applicant whose licence was suspended not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Tribunal considered all of the evidence presented. The only evidence presented by the Applicant were three sworn affidavits. One from himself, the others from Witness # 2 and one from Witness # 3. In summary, the Applicant contends that he was not the driver of the vehicle which had an accident nor had he care and control of the vehicle. He states that “this affidavit is made by me in support of an appeal of any administrative drives licence suspension on the first ground that there was a mistake made as to the identity of the driver and not for any other or improper purpose.”

However, the issue is not one of whether or not the Applicant was or was not the driver of the vehicle. The issue was whether the Applicant whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made or from whom a sample of breath or blood was taken? The facts are quite clear in this case. The Applicant was the individual who was given the breath demand and subsequently charged under Section 253(b) of the Criminal Code of Canada of Over 80mgs Alcohol.

The evidence presented by Police Officer # 1 and Police Officer # 2 and Police Officer # 3, is uncontested. The Applicant did provide two breath samples over the legal limit for which he was appropriately charged.

APPLICATION OF THE LAW TO FACTS:

The Applicant as stated above, has based his appeal of the fact that he claimed he was not the driver of the motor vehicle which was involved in the minor accident. At issue is not whether he was the driver of the vehicle but rather he is “the same individual to whom a demand for a sample of breath was made, or from whom a sample of breath or blood was taken. The Tribunal’s jurisdiction is not to determine whether the Applicant was or was not operating the vehicle. Rather the Tribunal’s jurisdiction is circumscribed

to the provisions set forth in Section 50.1 of the *Highway Traffic Act*. As stated above, the evidence is clear that in fact the Applicant was indeed the individual from whom a demand for a breath sample was requested.

Regulation 574 as amended, with particular attention to Section 13, provides that the Applicant has the onus of establishing the merit of the appeal. The Tribunal finds that the Applicant, has failed to do so. In fact, all of the written submissions presented by the Applicant do not address the issue at hand.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 31, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: April 10, 2001

AFZAL-STLN

MOHAMMAD AFZAL

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

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

TRIBUNAL: KENNETH W. KOPROWSKI,
Presiding member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

MOHAMMAD AFZAL, Applicant
unrepresented

DATE OF HEARING: April 10, 2001

DECISION RELEASED: April 11, 2001 Toronto

REASONS FOR DECISION

A written hearing was held on April 10, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Mohammad Afzal (the "Applicant")
Motor Vehicle: 1988 Olds CCA, Plate No. AKKH 478 (the "vehicle")
Date of Appeal: March 21, 2001

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 10, 2001 and proceeded as a written hearing.

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

ISSUE:

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

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

This case is self explanatory with the letter attached send to Police by my son Shayne. This fellow Art is charged with hitting Sharon Conlon. Police Officer, resistance arrest; convicted many times and spend Lots of time in Jail; He used unnecessary force to get the key and drive my car without my knowledge and my son's knowledge at that time. Police did not have enough information to charge him stealing this car. (Exhibit 2)

I Request a written hearing and request:

—

This case is self explanatory, after you read the letter attached. I was in Toronto, and this incident happened in Kitchener. So I do not feel to go in front of the Tribunal Board, because I am not the witness. Please get this information from the Police dept.

Thanks
Mohammad Afzal
(Exhibit 2)

From: Shayne Conlon
9 Connaught Place,
Kitchener, Ontario,
N2C 2P9
Tel: 519-894-0021

Attention: Cst. Stover 862
Occurrence # 25953

Waterloo Regional Police
P.O. Box 3070
200 Maple Grove Road,
Cambridge, Ontario,
N3H 5M1
Tel: 519-653-7700/499
Fax: 519-650-1793

Dear Cst Stover,

With regards to occurrence # 25953 dated March 14th 2001, I am a newly licensed Driver as a matter of fact I got my license on March 6th 2001, My Dad lives in Toronto Got me this 88 Olds. Calay.

On the day of March 14th 2001 My little sister Chantele's Birthday few people came in include Chentelle's Dad "Art" I was sleeping upstairs every one had few drinks and some arguments "Art" hit my Mom and my Mom through him out.

Mom send my sisters boyfriend Tim to buy some things from the store, along with Art's sister Heather that's where the whole thing begin, they found Art on the Road, Art ask Tim to move over he wants to drive the Car, Their are two people witness that Tim Said No I can not give you the key, Art pushed Tim to the back seat and took control of the car Tim being 16 years old small built kid cannot do any thing about it That's where you Caught Art Thomas driving.

Cst Stover I know the Law my Dad told me not to give this car to any one with no license, I was not there my Dad who owns the car was not there, my dad just spend \$945.00 on the car to fix, S&V Towing asking for \$15 p/day plus pick up from Brothers Towing + other charges, according to them if car stays there 45 days will cost from \$800 to \$1000. Believe me or not my Dad will not pay for the cost, my mother is on welfare she cannot afford to pay for it, So if this car stays there 45 days I will loose the car.

My Dad is willing to pay up to two hundred dollars if I will be able to take this car out in couple of weeks Right now no body can do any thing except you, Please charge Art for using force to get the keys.

I will call you on Thursday, if you are in the office before please get my car out soon.

Thanks.

Shayne.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Thomas Thomas;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 9, 2001.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

When all of the written submissions of the Applicant are read together, the essence of the argument of the Applicant seems to be as follows. The Applicant is the registered owner of the automobile that had been impounded. The Applicant lives in Etobicoke, Ontario.

The automobile was actually in the possession of one Shayne Conlon, whom the Applicant, in his letter of Appeal, describes as his “son.” Mr. Conlon had sent to the Tribunal an undated letter of explanation (Exhibit #4) in support of the Applicant’s appeal.

Mr. Conlon’s letter states that, on the night in question, he was in Kitchener, Ontario, at a house together with his mother and his sister. They were celebrating his sister’s birthday. Apparently, Thomas Thomas, who was also there, hit Mr. Conlon’s mother. The Applicant confirms this incident in his letter of Appeal when he states that Mr. Thomas hit one Sharon Conlon, who is presumably the “mom” referred to in Mr. Conlon’s letter. Ms. Conlon then had Mr. Thomas leave the house.

Mr. Thomas is the person who later drove the automobile in question, and whose driver’s licence it was that had been suspended, and the one whom Mr. Conlon refers to, in his letter, as “Art.”

While Shayne Conlon was sleeping, his mother asked another person, referred to in Mr. Conlon’s letter as “Tim”, to buy some things at a store. Although it is not crystal clear from Mr. Conlon’s letter, nevertheless, it appears that “Tim” had to use the Applicant’s car for this purpose. As he was setting out in the vehicle, Mr. Thomas again appeared on the scene and, even though “Tim” initially refused to surrender his position in the car, Mr. Thomas forced “Tim” out of the driver’s seat. Mr. Thomas then continued to drive the vehicle, with passengers inside. It was while he was driving, even though his driver’s licence had been suspended, that the police stopped him and impounded the vehicle.

The Applicant appealed on the ground that, under these circumstances, his vehicle had been stolen.

Considering the definition of “stolen” as recited above from Black’s Law Dictionary (Sixth Edition), there appears to be some element of a wrongful taking of the automobile in question by Mr. Thomas, and certainly there was a taking without any permission from the Applicant.

However, the evidence ends there, regrettably. There is no evidence that, in addition to the above elements of the definition of “stolen”, there was also the intent to deprive the owner of the benefit of ownership or possession **permanently**. (emphasis is the Tribunal’s)

Where was Mr. Thomas going with the automobile? What was he going to do with it? How long was he going to keep it? What were his ultimate intentions? Was he going to return it or abandon it? The answers to these questions, and no doubt others, would

have to be known before drawing a conclusion that Mr. Thomas was going to deprive the Applicant of possession of his automobile permanently.

It is noteworthy that, in the Applicant's letter of Appeal, he states that even the police themselves did not have "enough information to charge him stealing this car"(sic). Far be it from this Tribunal, on the evidence before it now, to make such a determination that the police investigators, who were much closer to the action, could not even themselves conclude.

It is the Applicant who has the onus to establish his case. The Tribunal does not find that the Applicant has done so, considering the evidence he has submitted.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Kenneth W. Koprowski,
Presiding Member

RELEASED: April 11, 2001

VALIANT

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

IN THE MATTER OF a CLAIM by
EDWARD AND SUZANNE VALIANT

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

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

EDWARD AND SUZANNE VALIANT

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 29-31, 2001 and to continue June 1, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, June 26, 2001, and to continue June 27, 28, and 29, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 12, 2001

POWELL

MARJORIE POWELL

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

TO DISALLOW A CLAIM

TRIBUNAL: SHEILA A. SPOTTON, Vice-Chair

APPEARANCES:

ROBERT R. REYNOLDS, Counsel representing the Applicant
ANDREW LEWIS, Counsel representing the Ontario New Home
Warranty Program
JAMIE BRAUER, Agent representing the Added Party, BRAUER
HOUSING DEVELOPMENTS INC.

DATES OF HEARING: February 28 and 29, 2000 & March 1, 2 and 3, 2000 &
April 3 and 4, 2000 & June 22 and 23, 2000 Belleville, Ontario

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal under the *Ontario New Home Warranties Plan Act* (the "Act") to the Commercial Registration Appeal Tribunal (which as of April 1, 2001, is known as Licence Appeal Tribunal) by Marjorie Powell (the "Applicant") from a written decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated June 17, 1999 and a supplemental decision letter dated July 26, 1999.

On or about June 26, 1996 the Applicant and the Added Party, Brauer Housing Developments Inc. ("Brauer") entered into a construction agreement (the "contract") wherein Brauer agreed to construct a single family home on the property owned by the Applicant, and legally described as Part Lot 5, Conc. 10, Township of Rawdon, County of Hastings being more particularly described as Part 1, Plan 21R-17546, and municipally described as 912 Bateman Road, Springbrook, Ontario.

The transaction of purchase and sale closed, and the Applicant took possession of her home on or about September 19, 1996.

The Applicant appeals the decision of the Program dated June 19, 1999 (the "Decision Letter") and the supplemental decision of the Program dated July 26, 1999. The decision letter dated June 19, 1999 addressed a total of 31 claims by the Applicant. The supplemental decision letter dated July 26, 1999 (the "Supplemental Decision") addressed a total of 5 claims by the Applicant. At the commencement of the hearing,

the parties advised the Tribunal that many of the claims had been withdrawn, and some had been conceded by the Program. Ultimately, the Tribunal was requested to determine the following claims:

- Claim No. 1. No sump pump as paid for
- Claim No. 2. No sludge well tank for clean-out
- Claim No. 3. No drainage tile and 3/4" clean stone around foundation
- Claim No. 4. No drainclad at the exterior below grade (including inadequate insulation on exterior walls)
- Claim No. 5. Only 380 stones delivered, not the 1050 as paid for
- Claim No. 6. Laundry room is not 27 1/2" deep and cannot put washing machine and dryer in
- Claim No. 9. Cracks in the foundation wall
- Claim No. 10. Cracks in the basement and garage floors
- Claim No. 11. Cracks in the porch
- Claim No. 12. Master Bathroom door not square
- Claim No. 13. Walls under the stairs not plumb
- Claim No. 14. Master bath toilet takes 2 or 3 flushes and has rust in the bowl
- Claim No. 18. Drywall downstairs is cracking and bowing
- Claim No. 19. Crack in drywall at ceiling and kitchen wall and at outside walls at ceiling level. Cracks in the drywall where the wall and ceiling meet which open and close during the year.
- Claim No. 21. I agreed to a Jenish House Plan B23585 on page 2 of the contract. The builder has no rights to their plans and my house is not built to the Plans I expected.
- Claim No. 23. Blocks have split under side door to the garage and at the front step.
- Claim No. 24. Garage ceiling poly on the wrong side.
- Claim No. 26. Exhaust vents not connected to the exterior.
- Claim No. 27. Ceiling insulation (roof area) not as per Code .
- Claim No. 30. Garage not completely gasproofed.
- Claim No. 31. Insulation in the garage ceiling not to Code

And in the Supplemental Decision letter dated July 26, 1999:

- Claim No. 1. HRV reimbursement
- Claim No. 2. Paint colour on trim after repairs (conceded by Program)

The claim numbers noted above are the claim numbers set out in the Decision Letter and the Supplemental Decision.

EVIDENCE:

The Applicant's case was based on documentary evidence and on the oral testimonies of the Applicant, James Tugnette, who has resided in the home with the Applicant since September 29, 1996, Irene Nicholl, a neighbour friend, and Mr. L. Robert McEwen, a Professional Engineer.

Mr. McEwen graduated with a Bachelor of Science in Engineering in 1972. He worked for the Department of National Defence as a military engineer for approximately 3 years. Mr. McEwen left the military, and, after a year of working as manager of engineering services for a major consulting engineering firm, established his own consulting engineering firm in 1978. Mr. McEwen is the President of Robert G. McEwen &

Associates. Mr. McEwen has acquired experience in building design and construction and specializes in forensic engineering investigation services. Mr. McEwen has provided expert testimony in the past regarding Ontario Building Code ("OBC") violations, problems with design for residences, and structural defects. Mr. McEwen has been retained by the Program in the past to provide expert testimony regarding warrantable defects. Mr. McEwen was declared an expert witness before the Tribunal, and the Applicant relied on the expert written opinion of Mr. McEwen in support of her case.

The case for the Program was based on documentary evidence and the oral testimonies of Mr. Philip Mayhew, Warranty Representative for the Program, Mr. Verhoog and Dr. Robert E. Tester.

Mr. Mayhew, a Certified Engineering Technician, has been employed by the Program for approximately 22 years. Mr. Mayhew had inspected the Applicant's home and was the author of the Decision Letter and the Supplemental Decision letter.

Mr. Jerome Verhoog, is a licensed carpenter and principal of Demill Construction. Mr. Verhoog had been retained by the Program to conduct repair work on the Applicant's home.

Mr. Jamie Brauer is owner and President of the Added Party, Brauer Housing Developments Inc. ("Brauer").

Dr. Robert E. Tester, a Professional Engineer. Dr. Tester graduated in 1979 in civil engineering, and received his doctorate in civil engineering in 1991. Frost heave mechanics was central to Dr. Tester's Ph.D. work. Dr. Tester has practiced civil engineering since 1979, and during the past 10 years has acquired expertise in soil mechanics and forensic engineering including geotechnical investigations, and structural failure investigations. Dr. Tester is currently President of Concord Engineering and lectures at St. Lawrence College in the civil engineering technology program. Dr. Tester has represented homeowners, builders and the Program in the past and has testified before this Tribunal. Dr. Tester was declared an expert witness before the Tribunal.

FACTS:

The Tribunal finds, pursuant to the evidence in these proceedings, the following as proven.

Claims in Decision Letter Numbers 1 through 4 and 21:

1. "No Sump Pump",
2. "No Sludge Well Tank",
3. "No Drainage Tile and 3/4" Stone Around Foundation",
4. "No Drainclad at the exterior below grade (Including inadequate insulation on exterior walls) which the Applicant cross references to claim 21. Jenish Home Plan".

The Tribunal heard extensive argument on the above four claims at the commencement of the hearing. The Program's position was that these four items were originally deemed warranted as "incomplete work" as reflected in the contract. However, the Program had subsequently reviewed the correspondence between Counsel for the Applicant and Counsel for Brauer and decided that these four items were included in the negotiations between Brauer and the Applicant that ultimately arrived at a final contract price taking into consideration these four items. The Program decided that these four items had been resolved and were therefore not warranted.

The Applicant's position was that these four items were required by the contract, and that Brauer had failed to deliver them. The Applicant argued that the final payment of \$607.00, following the negotiations prior to closing, and paid to Brauer, represented "full satisfaction of all claims for extras and allowances, but not, compensation for any "deficiencies".

Further, the Program submitted that regardless of whether or not a final agreement on purchase price was reached which included these items, or whether the Applicant released any claim for them, the Applicant received a benefit payable within the meaning of Section 14(2) of the *Act* which must be taken into account.

After hearing submissions, and reviewing Section 13(6) of the *Act* and the case law provided by both parties, the Tribunal ruled that the Applicant was entitled to lead evidence to prove that the four items were warrantable claims under section 13(1) of the *Act*, and that the Program was entitled to adduce evidence of any benefit or compensation payable to the Applicant pursuant to Section 14(2) of the *Act*.

The Applicant testified that there was no agreement whereby she accepted any compensation in respect of any deficiencies. The Applicant stated that she had spoken with Mr. LeBlanc, President of the Program, prior to closing, and he had advised her not to enter into any such agreement regarding deficiencies. The handwritten notes of the Applicant written at the time of the closing (Exhibit 12) do not make reference to any of the four items. In addition, the Applicant refused to execute the release for all claims, requested by Brauer's Counsel. A review of the correspondence between Counsel for the Applicant and Counsel for the Program reveals that no agreement was reached regarding compensation for deficiencies.

The Program submitted that the entire course of negotiations between the parties up to September 18, 1996 was aimed at a final contract price which took into account all outstanding items. The Program submitted that the Applicant did not waive her warranty rights, but that her contractual entitlement to these four items ceased when she agreed to accept the lower purchase price in exchange for not receiving these items. The Program's argued that the Applicant was no longer contractually entitled to these items.

Based on the evidence before the Tribunal, the Tribunal finds that the final payment of \$607.00 paid by the Applicant to Brauer, represented a final settlement for extras and allowances and did not take into consideration compensation for these four items that were not provided to the Applicant.

With respect to the issue of the substitution of these four items, Mr. Brauer testified that it was necessary to change to a better drainage system given the location of the home.

Mr. Brauer stated that the site plans were drawn assuming the home would be built on a knoll, however, the location had changed and the house was moved back 20 feet. Brauer needed to make the home higher to provide positive drain away. As a result, three extra courses of brick were necessary and extra fill was required to make the basement higher. Mr. Brauer stated that the Applicant received a better quality drainage system as a result of the changes, and the four items were no longer necessary.

The Applicant denied being consulted about the location of the house and the substitution of materials. It was clear at the hearing that there had been a breakdown in the communications between Brauer and the Applicant.

Other than the statement made by Mr. Brauer that, in his opinion, the Applicant received a better drainage system, there was no evidence before the Tribunal that the Applicant received substituted materials that were of equal or better value.

The Applicant submitted that the appropriate remedy is for the Tribunal to order the Program to install these four items as required in the original contract.

The Program submitted that, even if the Applicant were contractually entitled to these four items, the uncontradicted evidence before the Tribunal was that these items are not required by the *Ontario Building Code* (the "OBC") and, in fact, there is no purpose to their installation. The Program submitted that the best evidence of the value of these four items is the written estimate of value assigned to these four items contained in the correspondence from the Applicant's solicitor during the negotiations prior to closing:

Item 1-Sump Pump	\$ 69.82
Item 2-Sludge Tank & Pump	409.99
Item 3-Drainage Pipe/Clear Stone	107.97
	283.00
Item 4-Drainclad at exterior below grade	239.76
Total	\$1,110.54

With respect to the issue of insulation on the foundation, Counsel for the Applicant advised the Tribunal that the Applicant believed this to be included in Claim number 4, being, "no drainclad at the exterior below grade". The position of the Program was that, although the OBC required the foundation to be insulated, this complaint was not reported on time, and therefore the Tribunal has no jurisdiction to deal with this issue.

The date of possession was September 19, 1996. The Applicant submitted that this was included in her original letter of September 3, 1997 listing defects including:

"Page 3 Stud Walls: Dow Cladmate was R5 value insulation
"Insulation in walls was to be R20 Fibreglass. Mr. Brauer put R13 value in the walls. At this rate I have only a R18 insulation value. NOT the R5 + R20 value. This is an electric forced air heated home."

Subsequently, in a conciliation request form submitted to the Program in January, 1998, the Applicant stated:

“Paid for R20 got R13 fibreglass insulation all outside walls (this house is electrically heated); Building Spec. Pg. 3)”

Page 3 of the Building specifications contained the following:

"Insulation:

R-20 Fibreglass insulation in exterior walls"

In addition, the Applicant submitted that she had complained in her original letter, and the conciliation form that the builder had not constructed the home in accordance with the Jenish House Plan and that those plans required insulation in all exterior walls. Therefore, the Applicant submitted, the written complaint regarding non-compliance with the Jenish Plan was sufficient notice to cover the failure to properly insulate the exterior foundation walls.

The Program's position is that the Applicant's written complaints refer to lack of insulation in the stud walls where the contract called for R20 fibreglass insulation and that the complaint does not refer to the insulation in the foundation walls. The Program warranted and repaired this complaint regarding insufficient fiberglass insulation on the outside stud walls in the Fall of 1998. The Applicant admitted the repairs had been completed and did not raise the complaint regarding insulation on the foundation walls at that time. The Program states that the lack of insulation on the foundation was not, in fact, discovered until the investigation by the engineers of the foundation cracks in late 1999, and therefore the complaint was not timely and is not warrantable.

The Applicant submitted that the provisions of the *Act* that require the homeowner to give written notice within certain time periods should be liberally interpreted in order to provide the homeowner with protection from defects as intended by the *Act*. The Applicant states that the homeowner need only identify in writing the symptoms which the homeowner is aware of within the warranty period, she need not identify underlying cause of the symptoms.

The Applicant further argued that the cracks in the exterior foundation walls would not have occurred if the insulation had been installed, the lack of insulation caused at least some of the cracks, and by raising concerns about the insulation, the Applicant provided the Program with a timely written complaint of "cracks in the foundation".

The Program submits that there was no evidence on this point at the hearing. Neither Mr. McEwen nor Dr. Tester suggested that the lack of insulation in the foundation did or could contribute to adfreezing and consequently the foundation cracks.

The Tribunal agrees with the position of the Program. The Applicant did not prove on a balance of probabilities that the lack of insulation on the foundation was a cause of the cracking on the exterior foundation walls.

Further, the Tribunal accepts the Program's position that the written complaints made by the Applicant specifically referred to the lack of fiberglass insulation in the stud walls where the contract called for R20 fiberglass insulation on the outside walls.

The Applicant also argued that written notice covering the lack of insulation on the foundation walls was given in the written complaint regarding the failure of the home to conform to the Jenish Home Plan B23585. That Plan requires insulation on all exterior walls. Therefore, the Applicant submitted, written notice of non-compliance with the Jenish Plan is sufficient notice of defects in issue at the hearing.

The Jenish Home Plan (Claim Number 21 in Decision Letter)

The Applicant's claim with respect to the Jenish Home Plan was as follows:

"I agreed to a Jenish House Plan B23545 on page 2 of the contract. The builder has no rights to their plans and my house is not built to the Plans I expected".

Although there was some discussion at the beginning of the hearing that this claim had been withdrawn prior to the hearing, the Applicant continued to argue the legitimacy of this claim as it related to other claims, and the timely notice of claims, such as insulation on the foundation walls. Therefore, it is necessary for the Tribunal to make a determination regarding this claim.

Page 1 of the contract between the Applicant and Brauer, at paragraph 1, states as follows:

1. Construction

The Contractor agrees that it will construct on the property, a single family home (the "Building") in a good and workmanlike manner in accordance with the Plans and Specifications already examined or available for examination by the Owner and any amendments thereto.

In the specifications in Schedule "B" to the contract it states:

GENERAL:

1064 sf of finished space basement entry with a 400 sf garage Jenish House plan B23585

The Applicant submitted that the Tribunal should find that the Jenish Plan, including its requirements, should be found to have been incorporated into the contract by reference, and that a written complaint regarding non-compliance with the Jenish Plan was sufficient notice to cover the specific instance of failure to properly insulate the exterior foundation walls. The Program argued that this could not be notice of a specific deficiency, otherwise, a homeowner need only state "Agreement of Purchase & Sale not complied with" to make specific deficiency claims. The Tribunal agrees with the Program's position on this issue.

The Program submitted that the Applicant had withdrawn her claim regarding not receiving a Jenish home (referred to in the decision letter as claim number 21) prior to the hearing. Nevertheless, the Program argued that the reference to the Jenish Plan in the Contract was merely a reference to the layout of a home, depicted in Exhibits 8 and 13. Exhibit 8 depicts the layout of a two storey home of 1095 square feet. The actual plan approved by the Applicant was for a two storey home with several changes to this layout, including a reduction of 30 sq. ft. to 1064 square feet, two bedrooms instead of three, laundry room on main floor, no fireplace in livingroom, chimney finished to ground, changes to roof pitch, and other modifications.

During the hearing, the Tribunal heard conflicting evidence from the Applicant and Mr. Brauer regarding the events leading up to the execution of the contract and what each understood reference in the contract to the Jenish Plan meant. Based on the evidence before the Tribunal, the Tribunal finds the following respecting the Jenish Plan.

- (a) The Applicant requested Brauer to build her a home as depicted in the photocopy of the layout of a home designed by Jenish House Design Limited with some modifications (Exhibit 8). Exhibit 8 is a photocopy of a plan for a home that depicts a "total 1095 sq.ft.PLAN NO. B2-34-585 ...All Designs, plans and renderings @copyright Jenish House Design Limited". From this photocopy, and the Applicant's requests for modifications, Brauer's draughtsman drew up the mylar plans dated May 15, 1996 (Exhibit 15) based on the depiction of the layout of the home in Exhibit 8. The Applicant was not happy with the cost of the home depicted on the plans dated May 15, 1996 (Exhibit 15). Brauer suggested some changes that would reduce the cost of the home. The Applicant then drew two pages of sketches of her own (Exhibit 14) and submitted them to Brauer. These changes were incorporated into the revised plan dated June 20, 1996 (Exhibit 16). A blue print plan was drawn from these revisions and dated June 20, 1996 (Exhibit 9). The Applicant reviewed the plan dated June 20, 1996, (Exhibit 9) made some changes to it in "red ink" and approved this final plan (Exhibit 9). In Exhibit 9, there is no reference to "Jenish House Design Limited" on any of the plans provided by Brauer to the Applicant. In fact, the references on Exhibits 15, 16 and 9 state that the plans are the property of "Brauer Homes Ltd." and, further that they are "designed by Brauer/Turrall, drawn by Turrall".
- (b) After approving of the final plan (Exhibit 9), the Applicant and Brauer executed the contract on June 26, 1996 and construction commenced shortly thereafter.
- (c) The actual Jenish House Plan B23585 (Exhibit 7) copyright of Jenish House Design Limited and the specifications, was not obtained by the Applicant until approximately March of 1999, over two years after the home had been constructed.
- (d) The contract entered into by the Applicant and Brauer on June 26, 1996 contains only a reference to a Jenish plan: "1064 sf of finished space basement entry with a 400 sf garage Jenish House Plan B23585". The Applicant approved the final Brauer design and plans in Exhibit 9, and executed the contract on June 26, 1996 providing for a home to be constructed in accordance with the plans approved by the Applicant.

On the basis of the above evidence, the Tribunal finds that the contract between the Applicant and Brauer provided for building a home in accordance with the plans in Exhibit 9 approved by the Applicant that were drawn and designed by Brauer.

2. Decision Letter Claim Number 5. "Only 380 stones delivered not the 1050 as paid for"

The Applicant and the Program agreed that the construction contract provided for the supply and installation of 1050 bricks for an allowance of \$1,000. The Applicant submitted she had agreed to "Grey Smooth" brick, but Brauer supplied and installed 380 "Laurentian Blue" bricks. The Applicant argued that Brauer failed to perform the contract by not delivering the additional 670 bricks and that the Applicant has a valid warranty claim against the Program.

The Applicant did not adduce evidence that she was not satisfied with the substituted "Laurentian Blue" brick, nor did she provide any evidence regarding the nature of the materials or the value of the materials that Brauer had substituted for the brick that was not installed.

With respect to damages, the Applicant requests compensation for the value of the 670 bricks that Brauer failed to deliver as required by the original contract. The Applicant stated that the contract provided for 1050 installed bricks for a value of \$1,000. The Applicant submitted that the best source of evidence to assess the damages is the original contractual allowance of \$0.9524 per brick. The Applicant asked that the Tribunal order the Program to compensate her for 670 bricks @\$0.9524 per brick for a total of \$638.10.

The Program does not dispute that the contract required the supply and installation of 1,050 bricks, and that Brauer only supplied and installed 380 bricks. However, the Program argued that the bricks were taken into consideration in the negotiations arriving at a final purchase price of the home prior to closing, and that the Applicant had lost her contractual entitlement to the additional bricks. If the Applicant was contractually entitled to the additional bricks, the Program argued that the best evidence of the value of the bricks was found in Brauer's counsel's letter dated September 13, 1996. The total cost of delivering and installing the 380 bricks was \$922.88. The Program's position is that the value assigned as an allowance in the contract was \$1,000, and the Applicant received bricks valued at \$922.88, including installation, and that the proper measure of damages is \$77.13 being the difference between these two amounts.

3. Decision Letter Claim Number 6. "Laundry Room is too small"

The Applicant's complaint was that the laundry room was not deep enough to install a normal sized washer and dryer. It is undisputed that the Applicant asked Brauer to design the plans to include a main floor laundry room, and Brauer designed a plan to accommodate this. The laundry room that was built measures approximately 26 inches deep, while normal residential washers and dryers take up approximately 30 inches in depth. The Applicant is unable to close the doors to the laundry room. Further, with the placement of normal sized residential washers and dryers, the hallway width is reduced to 32 inches wide. The OBC requires an unobstructed hallway of 34 inches.

The Applicant submitted that the design and installation of the laundry room was the responsibility of Brauer, and since Brauer did not construct a laundry room that would accommodate normal laundry appliances, Brauer failed to construct the home in a workmanlike manner free from defects, and the Applicant's claim is warrantable pursuant to Section 13(1)(a)(i) of the *Act*. In addition, the Applicant argued that the hallway is a violation of the OBC and therefore a warrantable item pursuant to Section 13(1)(a)(iii) of the *Act*.

The Applicant submitted that the appropriate remedy is to move the rear wall of the laundry room back a few inches in order to provide adequate clearance for normal appliances.

The Program argued that the design of the laundry room was supplied by the Applicant, and was excluded under section 13(2)(a) of the *Act*. In support of this position, the Program argued that the Applicant admitted she had an "integral part in designing" the home, was knowledgeable and experienced in design and construction of homes, and had directed the location of the laundry room and relation of an entire bathroom to accommodate it. Further, the Program stated that the Applicant knew and approved of the size of the laundry closet, was aware of the space required to fit her things into the house and had made some changes accordingly.

Further, the Program argued that even if this item is not excluded from warranty, no breach of warranty occurred because the laundry room is acceptable for the purpose for which it was intended, and the Applicant can purchase apartment size appliances that will fit. In addition, the Program argued that the existence of an OBC violation is due to the Applicant's choice of normal sized appliances, not because of the laundry closet size.

Dr. Tester and Mr. McEwen, expert witnesses for the Program and the Applicant respectively, both confirmed that the OBC requires the hallway to have an unobstructed width of 34 inches, and the Tribunal therefore finds that this constitutes an OBC violation.

4. Decision Letter Claim Number 12. "Master Bathroom Door Not Square"

The Program has conceded that this is a warrantable item.

5. Decision Letter Claim Number 14. "Master Bath Toilet"

The Program has conceded that this is a warrantable item.

6. Decision Letter Claim Number 24. "Garage Ceiling Poly on the Wrong Side", and Claim Number 31. "Insulation in Garage Ceiling Not to OBC"

The Applicant's claim is that Brauer had installed the vapour barrier on the wrong side of the insulation in the ceiling of the garage. The OBC requires that the vapour barrier in the ceiling separating the garage from the above bedroom be placed on the warm side of the insulation. The Applicant stated that it has been installed on the cold side.

The Program conceded that the installation of the vapour barrier is on the wrong side and is an OBC violation but argued that the Applicant did not report this problem until an

inspection by the Program on November 12, 1998. The date of possession of the home was September 19th, 1996, and the time frame for reporting this type of defect is two years. As a result, the Program stated that the Applicant failed to report this defect to the Program in writing within the required two year time limit, and it is not covered by warranty.

Also, the Applicant's claim regarding the insulation in the garage ceiling is that it does not meet the required R25 insulation as required by the OBC. The Applicant stated that Brauer provided much less, ranging from R13, to R20.

The Program conceded that the insulation in the ceiling of the garage is an OBC violation, but the Program argued that the Applicant failed to report this defect to the Program in writing within the two year expiry period, and therefore was not covered by warranty. The Program argued that a previous, and timely complaint had been made in writing by the Applicant that dealt specifically with the exterior walls, had been deemed to be warranted by the Program and the Program proceeded to rectify this deficiency. However, the Program argued that this previous, specific complaint is not sufficient notice for a new complaint regarding inadequate insulation in the garage ceiling.

The Applicant further argued that these deficiencies have caused a buildup of moisture in the floor/ceiling space leading to growth of microorganisms, and that she is unable to use this bedroom because she is unable to maintain acceptable temperature levels in the bedroom. In addition to the Applicant's submission that timely notice of claim was given in her original written notice of deficiencies regarding the insulation, the Applicant further submitted that, in any event, these deficiencies are a major structural defect as defined under the Act, and notice was given to the Program within the longer time frame allowed in respect of such defects.

The Applicant relied on the original letters of complaint to the Program of September 3, 1997:

"Page 3 Stud Walls: Dow Cladmate was R5 value insulation
"Insulation in walls was to be R20 Fibreglass. Mr. Brauer put
R13 value in the walls. At this rate I have only a R18
insulation value. NOT the R5 + R20 value. This is an
electric forced air heated home."

Subsequently, in a conciliation request form submitted to the Program in January, 1998, the Applicant stated:

"Paid for R20 got R13 fibreglass insulation all outside walls (this house is electrically heated); Building Spec. Pg. 3)"

Page 3 of the Building specifications contained the following:

"Insulation:

R-20 Fibreglass insulation in exterior walls
R-32 blown cellulose in ceilings
Poly vapour barrier on exterior walls and ceilings"

The Applicant further relied on the original complaint that the home was not constructed in accordance with the Jenish Home Plan #B23585. Those plans, Exhibit #7 set out requirements for wall and ceiling insulation and vapour barriers.

The Program argued that the complaints in the letter of September 3, 1997 and the conciliation report in January, 1998 specifically refer to the lack of insulation in the stud walls where the contract called for R-20 fibreglass insulation, not the vapour barrier and blown cellulose insulation called for in the garage ceiling. The first complaint to the Program on this issue was made by the Applicant to Mr. Terry Kidd, Warranty Representative, during his inspection on November 12, 1998, more than two years after the date of occupancy. The first written complaint referring to the vapour barrier and the inadequate insulation in the ceiling of the garage was filed by the Applicant in her letter dated March 16, 1999, after the two year warranty period expired.

With respect to the reliance on the original complaint that the home was not constructed in accordance with the Jenish Home Plan B23545, the Tribunal repeats its previous finding, that the Applicant and Brauer did not contract to build a Jenish home. The Applicant and Brauer contracted to build a home in accordance with the plans approved by the Applicant that were designed and drawn by Brauer.

Based on the evidence, the Tribunal finds that the vapour barrier and insulation in the garage ceiling were not reported in writing, as required by the legislation, within the two year warranty period.

The Applicant further submitted that as a result of these deficiencies the Applicant was unable to use the bedroom above the garage because it is too cold and damp to be used for its intended purpose. When it was used as a computer room, warmer clothing was required. In colder weather, the only way of maintaining the temperature at normal levels was with a space heater. The Applicant stated that the dampness gives rise to moisture buildup which can lead to growth of microorganism, representing a hazard to health. The Applicant stated that since this room is one of two bedrooms in the home, and the Applicant is unable to use it for the purpose intended, this amounts to a major structural defect as defined under the Act and that notice was given within the longer time period of seven years in respect of such defects.

The Program argued that the evidence is clear that the Applicant is able to use the home in its entirety for the purpose of which it was intended; that is, a home for residential occupancy. The Program submitted that the evidence before the Tribunal is that the bedroom above the garage is used as a computer room by the Applicant and Mr. Tugnette, and may be continuously used as a bedroom in colder weather with the assistance of a space heater. The Applicant can use the bedroom all year. The Program adds that the Applicant did not find the room unuseable due to the cold because she did not complain in writing until her letter of March 16, 1999, over two years after the date of occupancy. In addition, the Program stated that there is no evidence that any dampness in the room arises from a failure of a load-bearing portion of the building, and there is no evidence of past or current growth of mould. Concerns for the future growth of mould do not constitute a major structural defect.

The Program submitted that the Applicant had not established a major structural defect because the problem arising from the alleged defect was not a continuous one which prevented use of an integral part of the home for the purpose of which was intended.

7. Decision Letter Claim Number 27. "Ceiling Insulation (Roof Area) not as per OBC"

The Applicant's claim is that the insulation in the ceiling is inadequate. The Program's initial decision was that the level of insulation in the attic was sufficient to comply with the OBC. The OBC requires R-35 insulation. A check with the local Building Official confirmed that R-40 had been installed on occupancy, and at the time of the inspection by Mr. Kidd, the Warranty Representative, the insulation had settled to R35.

At the hearing, the Program conceded that the insulation in the attic was insufficient and in violation of the OBC. However, the Program argued that this complaint was not made in writing within the two year warranty period. The first complaint to the Program on this issue was made orally during the inspection of November 12, 1998, more than two years after the date of occupancy.

The Applicant relied on the original letters of complaint to the Program of September 3, 1997:

"Page 3 Stud Walls: Dow Cladmate was R5 value insulation
 "Insulation in walls was to be R20 Fibreglass. Mr. Brauer put
 R13 value in the walls. At this rate I have only a R18
 insulation value. NOT the R5 + R20 value. This is an
 electric forced air heated home."

Subsequently, in a conciliation request form submitted to the Program in January, 1998, the Applicant stated:

"Paid for R20 got R13 fibreglass insulation all outside walls (this house is electrically heated); Building Spec. Pg. 3)"

Page 3 of the Building specifications contained the following:

"Insulation:
R-20 Fibreglass insulation in exterior walls
R-32 blown cellulose in ceilings
Poly vapour barrier on exterior walls and ceilings"

The Applicant replied that even if the Tribunal were to find that the above complaints did not provide adequate notice of the complaint within the warranty period, the Applicant had filed a written complaint of cracking in the ceiling. The Applicant submits that any defect found to contribute to that cracking is covered by the written complaint about the cracking. The Applicant stated that Dr. Tester, the Program's expert witness asserted that the deficient insulation in the attic is probably a contributing cause to the cracking in the ceiling of the upper floor of the home, which he attributes to truss uplift. At page 12 and 13 of Dr. Tester's report he advances the view that the inadequate and uneven insulation in the attic may be contributing to the excessive moisture conditions in the attic to which he relates the truss uplift. The Applicant submits that Dr. Tester indicated that the inadequate and uneven insulation contributed to the cracking.

The Program argued that Dr. Tester never directly connected truss uplift with the attic insulation issue in his report, let alone that it was a "probable" contributing cause to truss uplift. On page 13 of Dr. Tester's report he states:

The attic space ventilation is unsatisfactory and vapour barrier performance is suspect or may be compromised. The uneven insulation in the attic may also be a contributing factor with respect to condensation.

The Program stated that Dr. Tester did not consider the attic insulation deficiency to be a contributing factor to the cracks since he did not include it with the items (ventilation and vapour barrier) which he thought could have that effect. The Program submitted that even if Dr. Tester's report can be construed as stating there may be a relationship between the deficient attic insulation and the drywall cracks, this is insufficient evidence for the Applicant to discharge her onus of proving on a balance of probabilities that such a cause-effect relationship exists.

8. Decision Letter Claim Number 30 and (being also Claim Number 4 in Supplementary Decision Letter). "Garage Not Completely Gasproofed"

The Program conceded that this is a warranted issue and will arrange for it to be completed at a time satisfactory to the Applicant.

9. Decision Letter Claim Number 26. "Exhaust Vents not connected to exterior"

The Applicant's claimed that the exhaust vent remedial work was inadequate. During remedial work conducted by the Program, it was discovered that the exhaust vent from the bathroom was not connected to the outside as required by the OBC. The Program admitted it was a warrantable defect and arranged for a contractor to repair it. The Applicant's complaint is that the repair was not effective. The Applicant stated that the Program's contractor connected the ducting leading from the bathroom exhaust to the soffit of the home. The soffit is a perforated type, allowing free movement of the air into and out of the attic space. The Applicant testified that the air coming out of the bathroom exhaust vent could be seen being pulled back into the attic space through the perforated soffit. The buildup of water still remained on the siding. The Applicant added that it is evident from Dr. Tester's report that he had found excessive moisture present in the attic during his inspection in late 1999.

The Applicant argued that the connection of the exhaust duct by the Program's contractor does not comply with the OBC and relies on clauses 9.19.1.1(1) and s.s.9.32.3.12(1) of the Code to argue that the bathroom exhaust must be located away from the perforated soffit:

9.19.1.1(1)...every roof space or attic above an insulated ceiling shall be ventilated with openings to the exterior to provide unobstructed vent area of not less than 1/300 of insulated ceiling area.

9.32.3.12(1) Separate air intake and exhaust outlet openings, when located on the same wall or roof, shall be installed so as to avoid contamination of the ventilation air by the exhaust air.

The Applicant submitted that the perforated soffits constitute one large vent for the intake and exhaust of air from the attic space. The bathroom exhaust had been installed by the Program's contractor in the soffit. The Applicant stated that she observed exhaust from the bathroom reentering the attic through the soffit, and therefore the placement of the vent contravenes the OBC.

The Program argued that it was a warranted item and that the repair contractor had already completed repairs. Mr. Mayhew's testimony rejected the Applicant's interpretation of the OBC. He testified that locating the exhaust vent from the bathroom under the perforated soffit was common and an accepted practice within the industry and that more than 90% of vents are ducted in this manner. Mr. Verhoog, a licenced carpenter for over 10 years was retained by the Program to do the repair work. He stated that this is standard practice and the way he always installs the exhaust vent where there is a perforated soffit. Mr. Verhoog added that no one has ever complained of a problem before. The Program argued that the Applicant did not meet the burden of proof on this issue, and the conclusion that the exhaust caused moisture in the attic was not proven by the Applicant but based on conjecture. The evidence was not that the exhaust location was actually causing problems in the attic but that the air from the exhaust was entering the attic.

The Applicant reached her conclusions that bathroom exhaust was causing dampness in the attic. She did not call any other witnesses with knowledge of the OBC to support her position that this was an OBC violation. Her expert witness, Mr. McEwen did not give evidence on this issue.

10. Supplementary Decision Claim Number 1. "HRV Reimbursement"

The Applicant claimed that the contract called for her to receive two heat recovery units (HRV's), she paid for two, but she only received one. The Program originally warranted this issue in a conciliation report dated April 20, 1998. The supplementary decision letter states that:

"A thorough review of the documents indicated that one HRV was to be installed in the home".

The Program stated that the issue "was beyond the scope of the Act and therefore this item is no longer covered" on the basis that if the Applicant had paid twice, this was an overpayment and not incomplete work specific to the contract.

The Applicant submitted that the issue is whether or not the contract called for the installation of two HRV's or one HRV. If the contract called for two, then provision of one is a warrantable item, and the Applicant claims compensation from the Program.

The Tribunal finds that the contract provided for the installation of one HRV. Nowhere in the contract does it state that two HRV's are to be provided. The total contract price agreed to by the parties was \$90,711.22. It is clear that the cost of the HRV was included in the contract price of \$90,711.22.

11. Supplementary Decision Claim Number 2. "Paint Colour on Trim After Repairs Does Not Match"

The Program conceded that the paint on the window trim varies in colour, and it will arrange for the repair contractor to return and repaint the trim to match the existing wall colour as closely as possible.

12. Decision Letter Claim Number 13. "Wall Under Stairs Not Plumb"

The Applicant claims that the wall on the ground floor under the stairs was out of plumb. The Applicant filed a written complaint on this item in her letter of September 3, 1997, and it appears in the conciliation form of January, 1998.

Dr. Tester's written report indicates that the drywall was bowed approximately 3/8" in the horizontal plane over two stud spans and at page 9 Dr. Tester states:

"Alignment problems of this nature are not uncommon in wood framed construction. The bow is due to the warping of the studs as the moisture content of the wood changes. The periodic appearance of cracks is likely environment controlled as a response to variations in temperature and moisture content".

A photograph of deformed candles contained in Dr. Tester's written report was, in his opinion, evidence of the results from the heat from the wood stove. Mr. Mayhew testified that the drywall bowing was caused from the heat generated from the wood stove. Mr. Mayhew added that the bowing was not readily noticeable, and in his opinion there was no defect in workmanship or materials.

The Program argued that the evidence of Dr. Tester and Mr. Mayhew is uncontroverted and that the only evidence before the Tribunal is that the bowing is caused by normal shrinkage of materials, which is an exclusion from warranty in Section 13(2)(d) of the Act.

While the Applicant disagreed with the explanation of the Program, and submitted in her closing arguments that "it was apparent that the deviation was readily observable", the Applicant did not adduce any evidence to contradict the evidence of the witnesses called by the Program to provide any other explanation for the bowing. The Applicant did not call her expert witness, Mr. McEwen to provide an explanation.

13. Cracks in Foundation Walls, Floor Slab, and Interior Drywall

The Program's decision to deny these claims was based on the following reasons:

(a) Decision Letter Claim Number 9. "Cracks In Foundation Walls"

The foundation consists of a slab on grade with an exterior block wall. Some minor cracks are visible in the block below the slab level but no large cracks are visible in the foundation wall, which would indicate some movement. According to the owner the footings are sitting on rock. The cracks are consistent with the normal shrinkage of materials when drying

after construction and is strictly excluded from warranty by section 13(2)(d) of the Act.

(b) Decision Letter Claim Number 10. "Cracks in Basement and Garage Floors"

Minor cracks are visible in the basement and garage concrete floor. This complaint is consistent with normal shrinkage and settlement of materials associated with residential home construction, and is specifically excluded from warranty under Section 13(2)(d) of the Act.

(c) Decision Letter Claim Number 11. "Cracks in the Porch"

The porch slab was replaced by an ONHWP contractor because of its slope which was causing water leakage and is therefore no longer an issue.

(d) Decision Letter Claim Number 18. "Drywall Downstairs is cracking and bowing"

The drywall cracks are visible. This complaint is consistent with normal shrinkage and settlement of materials associated with residential home construction, and is specifically excluded from warranty under Section 13(2)(d) of the Act.

(e) Decision Letter Claim Number 19. " Crack in Drywall at ceiling and kitchen wall and at outside walls at ceiling level. Also there are cracks in the drywall where the wall and ceiling meet which open and close during the year"

This has been caused by some minor truss uplift and shrinkage of material. This complaint is consistent with normal shrinkage and settlement of materials associated with residential home construction, and is specifically excluded from warranty under section 13(2)(d) of the Act.

(f) Decision Letter Claim Number 23. "Blocks have split under side door to the garage and at front step"

The top course of block was removed at the front step in order to obtain slope for new slab. Therefore this is no longer an issue. There are minor cracks in the block near the small garage door at the right side of the home. This home has a slab on grade and according to the owner the footings are sitting on rock. Some shrinkage of materials has caused the minor cracks in the block. These minor cracks do not constitute a Major Structural Defect but the foundation is covered under the 7 year warranty period, if a MSD develops. Out position on the warrantability of these cracks remains the same, not warranted. (See also item 9 above).

The Applicant's position with respect to the foregoing claims was that the cracking would fit the definition of a "major structural defect". The Applicant's expert witness, Mr. McEwen, was of the opinion that movement of the foundation was the cause of all the cracks and other issues. In addition, in closing arguments, the Applicant submitted that she complained of the cracks within the first year of warranty. Having met the requirement of making her claim during that initial year for any warrantable defect under

the Act, the Applicant submitted that to succeed in her claim, she need only prove that a defect exists and she need not prove "major structural defect".

In support of the Applicant's claim of a major structural defect, the Applicant relied on the written report of expert witness, Mr. McEwen. Mr. McEwen was of the opinion that movement of the foundation was the cause of cracking in the foundation walls, floor slab and interior drywall. On page 3 of Mr. McEwen's written report, he states:

The writer notes that movement of the masonry block foundation has occurred along the west foundation wall and the east foundation wall. Diagonal cracking of the west foundation masonry block wall from differential movement is visible, as is lateral movement of the foundation. In the writer's opinion, this is a major structural problem which indicates that the foundation is unstable...

The east foundation wall has also moved but to a lesser degree than the west wall....

The foundation movement discussed above has caused the west end of the house, and to some extent, the east end of the Powell home to lift. This has caused the roof trusses to lift off their north and south wall. The writer observed cracks on the wall/ceiling joints along the north and south walls in confirmation of the foundation movement. This bending effect has caused the truss roof, which is triangular in shape, to lift en masse, creating separation of roof trusses from the support walls...

The lifting actions of the two ends of the house have also caused some compression of the roof deck causing visible ripples of the roof shingles at deck sheeting joints....

This lifting has also caused compression of the kitchen window opening above the sink. The valance above the kitchen sink was removed when all the windows in the house were reset due to the lack of wall insulation. Although the overhead cupboards were not removed, the valance is now 1/8 inch too wide for the space it originally occupied.

In examination in chief, Mr. McEwen confirmed his opinion that the cracks and other issues in the house were caused by the movement of the foundation. Mr. McEwen stated that the cracks were "structurally significant" because there was no evidence that they would not continue. It was his opinion, the cracking was not merely a defect but a major structural defect because the movement was ongoing and it would ultimately lead to structural failure, if not remedied. Mr. McEwen testified that he did not know what was causing the foundation to move. He could not determine the actual cause of the movement on the available evidence. He stated that Dr. Tester had done a far more extensive job than he was able to do but without excavation and soil examination, in his opinion, there was no way to determine the cause. Mr. McEwen stated that he could only speculate as to the cause of the movement of the foundation. Mr. McEwen recommended a geotechnical investigation to ascertain the cause of the movement.

On cross-examination, Mr. McEwen admitted that he had conducted a brief visual inspection of the home and that, in his opinion, the cracks were not major. Although it

was his practice to photograph evidence of structural defects, he had run out of film and was unable to photograph all of the evidence. He further admitted that there was no present major structural defect, but the cracks indicated potential for a major structural problem. Mr. McEwen stated that he did not disagree with Dr. Tester's observations, however, he did not agree with them. He agreed that the cracking in the foundation under the man door of the garage floor was probably caused from shrinkage of materials, something he had not considered at the time of his investigation and report. Mr. McEwen also admitted that there was no evidence of failure of the walls yet but that they "could" fail in the future.

In support of Mr. McEwen's single theory of continuing movement of the foundation, the Applicant submitted that the foundation cracks are expanding over time. The Applicant relied on Mr. McEwen's evidence on his inspection that the cracks ranged from hairline to 3/8" in width and that Dr. Tester testified that on December 21, 1999 they were hairline to 1/16" wide "a change of as much as 50%". The Applicant argued that this is evidence that the cracks are moving. Further, the Applicant submitted that the cracks in the slab on ground open and close over time and this is evidence of continuing movement of the foundation.

In support of the Applicant's theory that the foundation was moving, the Applicant stated that the front door and interior doors would pop open and stick in response to temperature changes. In addition, the Applicant submitted that the cracking in the drywall would expand and contract over time. With respect to the cracking in the upper floor and ceiling joints, the Applicant, Mr. Tugnette and Ms. Nicholl testified that the cracks expand and contract on a seasonal basis in response to temperature changes. The Applicant further argued that Mr. McEwen's theory that the ends of the house are lifting as a result of movement of the foundation was supported by the valance ceasing to fit between the cupboards and the roof rippling at the seams.

With respect to the existence of a major structural defect, the Program argued that the Applicant's evidence falls far short of establishing the existence of a major structural defect.

Dr. Tester disagreed with Mr. McEwen's opinion that the foundation was moving. Dr. Tester's investigation was more extensive and involved excavation of the soil surrounding the foundation. Dr. Tester's opinion was that the home was structurally sound and there was no evidence of a major structural defect. Dr. Tester clearly stated he had no concern that the structural integrity of the building was compromised by the cracks or their causes now or would be in the future. He stated that walls were in "pristine condition" with minor cracks and no evidence of structural failure. Dr. Tester provided the Tribunal with the following evidence to prove Mr. McEwen was incorrect in his theory of continuing movement of the foundation:

- (a) Dr. Tester stated that if the east and west walls were moving, one would see evidence of some cracking on the south wall, and there was none. There was no magnitude of cracking on the east wall, except for one minor and isolated crack under the patio door. The evidence of the pattern of cracking on the west wall, was, in his opinion, proof beyond a reasonable doubt that the cracks were due to minor settlement, and that no vertical cycling had occurred. The diagonal crack on the west wall at the corner was wider at the top and narrower at the bottom with no corresponding diagonal crack. Dr. Tester stated that the absence of the

corresponding diagonal crack is totally inconsistent with vertical movement of the east and west walls. If Mr. McEwen were correct, Dr. Tester stated that one would see a totally different pattern of cracking, and signs of significant permanent damage.

- (b) Dr. Tester added that the bearing conditions of the soil are good at the home and therefore the settlement that has occurred is minor. If Mr. McEwen were correct, you would see substantial, permanent damage and not the cyclical opening and closing of cracks.
- (c) Dr. Tester further stated that given the age of the home and the fact that it had gone through three cycles, if the foundation were moving, one would see large cracks with chips and chunks falling out, filled with debris and soil. Instead, Dr. Tester found crisp cracks, with perfectly logical and simple explanations. Dr. Tester stated that there was no evidence to indicate vertical cycling and no sign of movement associated with structural failure, now or in the future.
- (d) With respect to the interior drywall cracks and the Applicant's evidence that they were opening and closing, Dr. Tester stated that it was extremely clear these were not the result of movement of the foundation, because one would have seen massive, permanent cracks, and not the minor cracks that open and close. The interior cracks, were, in his opinion, the result of truss uplift. Dr. Tester stated that the timing of the opening and closing of the cracks, together with the magnitude of the cracks were consistent with the theory of truss uplift. In addition,
- (e) Dr. Tester stated that all of the cracks had stabilized except for the cracks which he attributed to localized problems that could be dealt with.

Dr. Tester's written and oral evidence was that there were numerous mechanisms causing what he observed in the house. He gave the following additional evidence as to the cause of the cracking and other issues.

Cracks on West Foundation Wall Towards the South End

The step cracks on the west foundation wall towards the south end were caused by minor settlement of the foundation. In Dr. Tester's opinion, these were not structural, but minor cracks caused by minor settlement.

The Program submitted that no defect in materials/workmanship or damages have been proven in respect of this item, and therefore it is not a warrantable item.

Crack on West Foundation Wall at Northwest Corner

Dr. Tester stated that this crack was caused by localized adfreeze. The adfreeze was caused because there was a downspout above that, and the water from the downspout was saturating the soil. Dr. Tester stated that adfreeze occurs where water in the soil freezes and the soil adheres to the wall. He stated this was not a structural problem. The remedy would be to deal with the drainage from the downspout to prevent the adfreeze from occurring.

The Program agreed that the problem with the drainage from the downspout was warrantable and that the remedy for this situation is to deal with drainage from the downspout to prevent the adfreeze from occurring.

Crack on West Foundation Wall Under Man Door

The crack under the man door to the garage was, in Dr. Tester's opinion, caused by normal shrinkage of the floor slab pulling the block under the man door. Dr. Tester testified that this is the result of normal shrinkage of materials caused by drying after construction, and not indicative of a structural problem. Mr. McEwen agreed, on cross examination, that this could be caused by shrinkage of materials.

The Program submitted that this is normal shrinkage of materials and is excluded from the warranties, in Section 13(2)(d) of the Act, and therefore not warrantable.

Cracks On Slab on Ground

Dr. Tester and Mr. Mayhew testified that these cracks are due to normal shrinkage of materials after construction and that this is a common occurrence.

The Program submitted that these cracks are caused by normal shrinkage of materials and excluded from the warranties under Section 13(2)(d) of the Act and are not warrantable.

Crack at Front

In Dr. Tester's opinion, the cracking at the front of the house was caused by adfreeze as a result of water coming off of the driveway and being trapped by the patio stones in that location.

The Program agreed that this is a warrantable item. The Program submitted that since the evidence before the Tribunal is that this is caused by adfreeze as a result of water being trapped by patio stones, the Program should simply be ordered to take the appropriate measures to alleviate the problem.

Cracks In Upper Level Drywall

Mr. McEwen's opinion was that some of the cracks could be explained by truss uplift, but not the cracks in the second floor ceiling and outside walls. Mr. McEwen stated that the cracks in the second floor ceiling and outside walls were caused by the movement of the foundation. The Applicant complained that the cracks would open periodically on the inside and outside walls.

At the time of Dr. Tester's inspection, only hairline cracks could be discerned at the intersection of the wall and ceiling. In Dr. Tester's opinion, truss uplift caused the cracks in the upper level drywall that he observed and the cracks verbally reported by the Applicant. Dr. Tester explained that truss uplift has long been recognized as a mechanism that results in minor cracking of ceiling drywall.

The Program submitted that Dr. Tester's evidence indicated that a number of things could or may have contributed to truss uplift, but the Applicant cannot rely upon this as

proof on a balance of probabilities. Dr. Tester stated that truss uplift is common and that no matter what one does, no matter how good construction is, truss uplift can and does occur because the trusses are wood and react to their environment. The Program submitted that the cracks are minor, that no defect in workmanship or materials has been established, and that this item is not warrantable.

Drywall Cracks Downstairs and Bowing

Dr. Tester stated that these cracks were not evident at the time of his inspection. However, the Applicant had indicated that the cracks would open periodically at the joint between the ceiling and the wall. In Dr. Tester's opinion, the periodic drywall cracking in the lower level hallway was likely a response to environmental variations in temperature and moisture content. He noted that the Applicant heated with a wood stove and that wood structures respond to environmental conditions. Dr. Tester stated that he saw no evidence of doors sticking on the lower level during his visit, but that doors commonly stick in houses due to environmental changes. Dr. Tester added that the Applicant's use of the woodburning stove might be related. Mr. Mayhew agreed. Further, Mr. Mayhew stated that the sticking and opening of downstairs doors had never been brought to his attention at anytime.

No Ducting In Floor Slab

The Applicant submitted that heating ducts were required to be installed in the floor slab pursuant to the OBC, and failure to install the heating ducts caused cracking in the foundation and the floor slab. The Program agreed that failure to install this item was an OBC violation, but argued that this issue was not dealt with in the Decision Letter and therefore the Tribunal does not have jurisdiction to consider or make an order on this claim.

The Applicant conceded that this specific complaint was not made within the applicable warranty period, but argued that the defect was a contributing cause of the symptom of "foundation and floor slab cracks" which complaint was made in writing by the Applicant on a timely basis.

The Tribunal finds that the Applicant did not lead any evidence that would connect the absence of ducting to the cracking. The Applicant attempted to have Dr. Tester agree to this assertion on cross-examination, however Dr. Tester stated he disagreed. Dr. Tester stated that there could be a relationship between frost heave and floor slab cracks, if frost heave had occurred, but he clearly stated that this is not the case here because the cracks are minor, crisp, and there is no evidence that frost heave had occurred. Dr. Tester stated that if frost heave had occurred, one would have seen a change in the dimension of the cracks, and one would see the cracks throughout.

The Applicant stated that the cracks in the slab on ground would open and close. The Program submitted that the opening and closing of these cracks was never brought to the attention of the Program prior to the hearing. In addition, Dr. Tester stated that the only mechanism that would cause these cracks to open and close would be frost heave and that frost heave had not occurred; if it had, the cracks would be on a vertical plane and not a horizontal plane.

With respect to the cracking on the west wall, Dr. Tester stated that the evidence of adfreeze at this particular location was adjacent to the unheated garage where the floor slab would not be heated, and the absence of ducting would not have affected that wall.

The Applicant in closing submissions, stated that there is “undisturbed evidence that the lack of ducting would have contributed to the adfreeze cracking on the front wall”. However, the Program’s position was that Dr. Tester ‘s evidence was that there could be a relationship between the duct absence and frost action, but this falls short of discharging the Applicant’s onus of proof. The Program stated that the Applicant did not question Dr. Tester about this specific area, however, since the cracking is located adjacent to the unheated garage where the floor slab would not be heated in any case, the lack of heating would not have been a contributory factor to this cracking.

The Program submitted that even if the Tribunal determines that it has jurisdiction to consider this claim, the Applicant has not proven on a balance of probabilities that the absence of ducting caused the “cracking in the foundation and floor slab” as reported within the one year warranty period.

THE LAW:

Section 13 of the *Ontario New Home Warranties Plan Act* states:

13.(1) Every vendor of a home warrants to the owner,

(d) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

(e) that the home is free of major structural defects as defined by the regulations; and

(f) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

(m) defects in materials, design and work supplied by the owner;

(n) secondary damage caused by defects, such as property damage and personal injury;

(o) normal wear and tear;

(p) normal shrinkage of materials caused by drying after construction;

- (q) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
 - (r) damage resulting from improper maintenance;
 - (s) alterations, deletions or additions made by the owner;
 - (t) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
 - (u) damage resulting from an act of God;
 - (v) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
 - (w) damage caused by municipal services or other utilities;
 - (x) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.
- (3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.
- (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.
- (5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.
- (6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 of the *Ontario New Home Warranties Plan Act* States:

14.(1) Where,

- (d) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (e) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- (f) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and

the claim is made within four year after the warranty expires or such longer time under such conditions as are prescribed,

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

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in the mitigation of damages claimed under subsection (1).

Regulation 892 of the *Ontario New Home Warranties Plan Act* states:

14. Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the home is completed for possession.

.....

15.(1) In this section,

"building envelope" means the wall and roof assemblies that contain the building space, and includes all those elements of the assembly that contribute to the separation of the outdoor and indoor environments so that the indoor environment can be controlled within acceptable limits;

"delivery and distribution systems" include all wires, conduits, pipes, junctions, switches, receptacles and seals, but does not include appliances, fittings and fixtures;

"exterior cladding" means all exterior wall coverings and includes siding and above-grade masonry as required and detailed in the relevant sections of the Ontario Building Code under which the Building Permit was issued.

(2) Every vendor of a new home warrants to the owner,

(a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;

(b) that the electrical, plumbing and heating delivery and distribution systems are free from defects in material and work;

- (c) that all exterior cladding of the home is free from defects in material and work resulting in detachment, displacement or physical deterioration;
- (d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and
- (e) that the home is free of major structural defects.

(3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession, in respect of homes that were enrolled, or should have been enrolled, after the 31st day of December, 1990.

(4) The warranties described in subsection (2) are prescribed under clause 13(1)(c) of the Act.

.....

16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

APPLICATION OF LAW TO FACTS:

The onus of proof in this hearing rests upon the Applicant to prove her allegations on a balance of probabilities. The Applicant must prove that a breach of warranty has occurred and that damages have resulted from the breach of warranty.

1. Claims in Decision Letter Numbers 1 through 4:

- 1. No Sump Pump,
- 2. No Sludge Well Tank,
- 3. No Drainage Tile and 3/4" Stone Around Foundation,
- 4. No Drainclad at the exterior below grade, lack of Insulation on Foundation Walls (referencing Claim Number 21-Jenish House Plan Number B23585)

The Tribunal finds that the negotiations prior to closing resulted in a settlement of the extras and allowances, but not the "deficiencies".

The Applicant submitted that she has a valid claim against the Program for breach of warranty because she has established that the builder failed to perform the contract by not delivering and installing the first four items, and that the appropriate remedy is for the Tribunal to order the Program to install them.

The Program submitted that the Applicant still must prove damages flowed from that breach even if she was contractually entitled to the four items.

There was no evidence before the Tribunal of the value of the materials substituted by Brauer for these four items.

The Applicant requested that the Tribunal order the items to be installed so that she is put in the same position as if the contract had been performed. The Tribunal agrees with the position of the Applicant. Accordingly, the Tribunal will allow the four items claimed in numbers 1 through 4.

With respect to the issue of lack of insulation on the foundation walls, the Tribunal finds that this complaint was not made in writing within the required two year warranty period, and it is disallowed.

With respect to the claim that the Applicant did not get a Jenish house, the Tribunal finds that the contract that the Applicant and Brauer entered into was not for a Jenish home, but a contract to build a home in accordance with the plans approved by the Applicant. Accordingly, the Applicant's claim number 21 in the Decision Letter is disallowed.

2. Decision Letter Claim Number 5. "Only 380 stones delivered, not the 1050 as paid for"

The Tribunal finds on the evidence that Brauer failed to install and deliver 670 bricks as required by the contract.

The Tribunal has not been assisted by the Applicant with evidence of what materials Brauer substituted instead of the 670 bricks that were not installed. The Applicant submits that the best source of evidence to assess the damages is the original contractual allowance of \$0.9524 per brick. The Applicant claims 670 bricks @\$0.9524 per brick for a total of \$638.10.

Also, the Tribunal has not been assisted by the Program with evidence that the substituted materials were of equal or better value. Instead, the Program's position is that the best evidence available to the Tribunal is Brauer's solicitor's letter sent during the negotiations prior to closing stating that the actual cost of delivering and installing the 380 bricks was \$922.88, and therefore the proper measure of damages is \$77.13 being the difference between these two amounts.

In order to put the Applicant in the same position as if the contract had been performed, the Tribunal could order the Program to install the 670 bricks, but the parties have only provided submissions relating to the appropriate amount of compensation. The Tribunal accepts the Applicant's submissions on the appropriate amount of compensation. There was insufficient evidence before the Tribunal to make a determination that the Applicant had received a benefit, or compensation under Section 14(2) of the *Act* with respect to this claim.

3. Decision Letter Claim Number 6. "Laundry room is not 27 1/2" deep and cannot put washing machine and dryer in"

The Applicant argued that the construction of the laundry room does not accommodate normal size appliances, that the builder failed to perform the work in a workmanlike

manner and that this is a breach of warranty pursuant to Section 13(1)(a)(i) of the Act. Also, the use of normal size appliances has resulted in an violation because the appliances obstruct the hallway, and the Applicant is entitled to relief under Section 13(a)(iii) of the Act.

The Program submitted that the design of the laundry room was supplied by the Applicant, and would therefore be excluded under Section 13(2)(a) of the Act. Further, even if the laundry room is not excluded from warranty, it does not amount to a breach of warranty under the Act.

The Applicant asked Brauer to design a plan with a laundry room on the main floor. The plans approved by the Applicant prior to construction are in Exhibit 9. These plans show the dimensions of the laundry room to be 27 ½ inches. The Applicant did not instruct Brauer to construct the laundry room with specific dimension. Although the Applicant did make some changes in red to the final plan (Exhibit 9), she did not alter Brauer's design of the laundry room. Brauer did not advise her that the dimensions would not accommodate normal appliances. In fact, the Applicant did not know that normal appliances would not fit, until she moved in and tried to install them.

The Tribunal finds that the Applicant is not responsible for the design of the laundry room given to her by Brauer. Further, the Tribunal agrees with the position of the Applicant, that it is reasonable for a homeowner to rely on the builder to provide construction of a laundry room that would accommodate normal appliances. If this is not possible, the builder ought to inform the homeowner so that the appropriate changes can be made to the design. On cross-examination, Mr. Mayhew admitted that it would not be good practice not to inform a homeowner in this situation. In this case, the workmanship has also resulted in an violation because the appliances obstruct the hallway. The Applicant has proven on a balance of probabilities that a breach of warranty has occurred and that the Applicant is entitled to an appropriate remedy. The Applicant has submitted that the appropriate remedy is to move the rear wall of the laundry room back a few inches in order to provide adequate clearance for normal appliances.

Accordingly, the Tribunal allows this claim and orders the Program to have the rear wall of the laundry room moved back support to provide adequate clearance for normal appliances.

4. Decision Letter Claim Number 12. "Master Bathroom Door not square"

The Program has conceded this issue is warrantable. Accordingly, the Tribunal finds that the Applicant's claim is warrantable and orders the Program to carry out the appropriate repairs.

5. Decision Letter Claim Number 14. "Master bath toilet takes 2 or 3 flushes and has rust in the bowl"

The Program has conceded that this is a warrantable item. Accordingly, the Tribunal finds that the Applicants claim is warrantable and orders the Program to replace the master bath toilet with a toilet of reasonable quality consistent with the contract specifications.

6. Decision Letter Claim Number 24. "Garage ceiling poly on the wrong side" and Claim Number 31. "Insulation in the garage ceiling not to OBC"

The Tribunal finds that the Applicant has not proven that there is a major structural defect under the Act. The evidence before the Tribunal is that the Applicant has been using the room above the garage continuously since she occupied the home in 1996.

In addition, the Tribunal finds that the vapour barrier and insulation in the garage ceiling were not reported in writing as required by the legislation within the required two year warranty period. Accordingly, the Tribunal disallows these claims.

7. Decision Letter Claim Number 27. "Ceiling insulation (roof area) not as per OBC"

The Program conceded that the insulation in the attic was insufficient and in violation of the OBC but the Applicant's complaint was not made in writing within the required two year warranty period. The first complaint to the Program on this issue was an oral complaint during an inspection in November, 1998, more than two years after the date of occupancy.

The Applicant submits that this particular complaint was a contributing cause of the cracking in the ceiling, which written complaint had been filed on a timely basis within the one year warranty period. However, the Applicant did not lead any evidence to connect the lack of ceiling insulation with the cracking in the ceiling.

The onus of proof is on the Applicant to prove on a balance of probabilities that the insufficient insulation in the ceiling is a cause of the cracking in the ceiling. The Applicant relies on the evidence of the Program's expert witness, Dr. Tester. The Program submits that Dr. Tester never directly connected truss uplift with the attic insulation issue in his report.

The Tribunal agrees with the position of the Program on this issue. The Applicant has not proven, on a balance of probabilities, that the deficient attic insulation was a contributing cause of the cracking in the ceiling. Accordingly, the Applicant cannot rely on the written complaint of "cracking in the ceiling".

The Tribunal finds that the Applicant has not reported this complaint in writing within the required two year warranty period as prescribed by the legislation, and this claim is disallowed.

8. Decision Letter Claim Number 30, and in Supplementary Decision Number 4. "Garage not completely gasproofed"

The Program has conceded this item. Accordingly, the Tribunal finds that this claim is warrantable and orders the Program to complete the gasproofing of the garage.

9. Decision Letter Claim Number 26. "Exhaust vents not connected to the exterior"

The Program had two experienced witnesses to testify that there was no defect in workmanship or materials or a violation of the OBC. The Tribunal finds that the Applicant did not lead sufficient evidence to prove, on a balance of probabilities, that the remedial work done by the Program has resulted in a defect in workmanship or

materials or a violation of the OBC. The Applicant relied on her opinion, but this was not sufficient to discharge her burden of proof.

Accordingly, the Tribunal disallows this claim.

10. Supplementary Decision Claim Number 1. "HRV reimbursement"

Brauer delivered only one HRV. Based on the evidence before the Tribunal, the Applicant has not proven on a balance of probabilities that the contract provided for two HRV's, that Brauer charged for two, and that the Applicant paid for two. The Applicant has not discharged her burden of proof to show a failure to comply with a contractual obligation within Section 14(1)(a)(i) of the *Act*.

Therefore, the Tribunal disallows this claim.

11. Supplementary Decision Claim Number 2. "Paint colour on trim after repairs"

The Program has conceded this issue. Accordingly, the Tribunal finds this to be a warrantable claim and orders the Program to repaint the trim around the windows to match the paint colour of the existing walls as closely as possible.

12. Decision Letter Claim Number 13. "Walls under the stairs not plumb"

The Applicant did not lead sufficient evidence to discharge her burden of proof that the bowing of the wall was a defect in workmanship and materials and therefore a breach of warranty. The Applicant did not adduce evidence to contradict the Program's evidence that the bowing in the wall was caused by normal shrinkage of materials, which is an exclusion from warranty in Section 13(2)(d) of the *Act*. The Tribunal disallows this claim.

13. Decision Letter Claim Numbers 9, 10, 11, 18, 19 and 23:

- Cracks in Foundation Walls

- Cracks in the basement and garage floors

- Cracks in the porch

- Drywall downstairs is cracking and bowing

- Crack in drywall at ceiling and kitchen wall and at outside walls at ceiling level.

- Cracks in the drywall where the wall and ceiling meet which open and close during the year.

- Blocks have split under side door to the garage and at the front step.

- No Ducting in Floor Slab

The Applicant has relied on the single theory of causation of her expert witness, Mr. McEwen, that the cracking and the above claims are the result of movement of the foundation. The thrust of Mr. McEwen's written opinion and evidence is that the cracking would fit the definition of a "major structural defect" because of its serious implications for the structural integrity of the home.

The Applicant alleged that there was evidence of a major structural defect as a result of the movement of the foundation. The Applicant did not adduce any other evidence as to the cause of these claims, or defects in workmanship and/or materials, or damages arising from those defects.

Mr. McEwen testified that he had conducted a visual inspection only, that it was done hastily, and that the cracks were not major. Mr. McEwen also testified that there was no present major structural defect, and no evidence of failure of the walls, but that there could in the future. Mr. McEwen also stated that the cracking in the foundation under the main door in the garage could be caused by shrinking, which he had not considered at the time of his report. The Tribunal prefers the evidence of Dr. Tester with respect to these issues. Mr. McEwen's oral testimony was inconsistent with the opinions expressed in his written report. On the contrary, Dr. Tester was consistent, clear and provided the Tribunal with cogent evidence. His knowledge of the subject matter provided the Tribunal with convincing proof that there were different causes for different phenomena and that the foundation was not moving as opined by Mr. McEwen.

The Tribunal finds that the Applicant has not met her onus of proof to establish that a major structural defect exists within the meaning of Section 1 of Regulation 892.

The Applicant further argued that she need not prove that the cracks fit the definition of "major structural defect" to succeed but only needed to prove that the cracking represented a defect, and having made the "cracking complaint" within the one year of occupancy, it is a claim for a valid warranty item, and the Program is required to remedy the defect.

The difficulty with this argument made in the Applicant's closing submissions, is that the Applicant did not lead other evidence at the hearing to prove the cause of the cracking complaints is to permit the Tribunal to draw a connection with a warranty specified under the Act. A crack in a wall may be undisputed but the Tribunal must have evidence to establish if the crack is warranted under the Act. (e.g. major structural defect) or not warranted under the Act (e.g. normal shrinkage). The Applicant must prove that the defect complained of is the type of defect for which the Act provides the type of defect for which the Act provides a warranty. Dr. Tester provided the Tribunal with different causes for different things and his evidence did not support the Applicant's claim for warranty coverage under the Act. In the absence of any other evidence to contradict Dr. Tester's theories, the Applicant's claim fails since she has not adduced sufficient evidence to prove the cause of the complaints are those for which the Act provides a warranty.

Cracks in Foundation Walls

The Applicant has not proven, on a balance of probabilities that the cracks on the foundation walls are a major structural defect, and did not adduce sufficient evidence to prove that the cracks are a defect in workmanship or materials. The Tribunal finds that the cracks on the west foundation wall towards the south end were caused by settlement of the foundation, that they are minor, not structural, and they do not amount to a breach of warranty under section 13(2)(i) of the *Act*. Accordingly, this claim is disallowed.

The Tribunal finds that the crack on the west foundation wall was caused by localized adfreeze because of the downspout above. The Program agrees that this is a warrantable claim, and the Tribunal orders the Program to remedy the drainage from the downspout to prevent the adfreeze from occurring.

With respect to the crack on the west foundation wall under the man door, the Applicant has not proven, on a balance of probabilities that the crack is a major structural defect, and did not adduce sufficient evidence to prove that the crack is a defect in workmanship or materials.

The Tribunal finds that this crack was caused by normal shrinkage of materials caused by drying after construction. Accordingly, this claim is excluded from warranties pursuant to Section 13(2) of the Act.

Cracks in Slab on Ground

The Applicant has not proven, on a balance of probabilities that the cracks are a major structural defect, and did not adduce sufficient evidence to prove that the cracks amount to a defect in workmanship or materials.

The Tribunal finds that the cracks in the slab on ground are due to normal shrinkage of materials after construction and this is excluded from warranty pursuant to Section 13(2) of the Act. The Tribunal disallows this claim.

Cracks at Front

The Tribunal finds that the cracking at the front of the house was caused by adfreeze as a result of water coming off of the driveway and being trapped by the patio stones in that location. The Program has conceded that this is a warrantable item and should be alleviated. Accordingly, the Tribunal orders the Program to undertake remedial work to correct the problem of water being trapped by the patio stones in that location.

Cracks in Upper Level Drywall

There was no evidence produced by the Applicant to dispute or contradict the Program's position that the cracks are minor in nature and not a major structural defect. The Applicant has not proven, on a balance of probabilities that the cracks are a major structural defect and did not adduce sufficient evidence to prove that these cracks amount to a defect in workmanship or materials. The Tribunal finds that the cracks in the upper level drywall are minor and not a defect in workmanship or materials. Accordingly, the Tribunal disallows this claim.

Drywall Downstairs is Cracking and Bowing

The Applicant's evidence in support of these claims is the continuing movement of the foundation. However, this theory was proved incorrect by Dr. Tester. The Applicant did not adduce any evidence to prove the cracks amounts to a defect in workmanship or materials to contradict the Program's evidence that the above issues were the result of environmental changes. As no defect in workmanship or materials has been proven, the Tribunal disallows this claim.

No Ducting in Floor Slab

The Tribunal finds that the Applicant did not file this claim within the required warranty period of two years, as required by the legislation, and that it is not included in any of the other complaints filed on a timely basis. In addition, the Program did not make a

decision with respect to this specific issue, and, consequently, the Tribunal has no jurisdiction to make a determination with respect to the absence of ducting in the floor slab.

ORDER:

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Act, the Tribunal directs the Program:

1. To install the sump pump, sludge well tank for clean-out, drainage tile and $\frac{3}{4}$ " clear stone around the foundation and the drainclad below grade as provided for in the contract;
2. To have 670 bricks delivered and installed within 90 days of the date of this Order, or, at the option of the Program, pay the Applicant the sum of \$638.10 in full satisfaction of any obligations with respect to this claim;
3. To move the rear wall of the laundry room back the appropriate amount of inches to provide clearance for a normal sized washer and dryer;
4. To carry out the appropriate repairs to the master bathroom door to make it square;
5. To replace the master bath toilet with a toilet of reasonable quality consistent with the contract specifications;
6. To complete the gasproofing of the garage;
7. To repaint the trim around the windows to match the paint colour of the existing walls as closely as possible;
8. To remedy the drainage from the downspout at the northwest corner of the home to prevent the adfreeze from occurring; and
9. To undertake remedial work at the front of the home to correct the problem of water being trapped by the patio stones and causing the localized adfreeze.

The above noted work is to be completed within 90 days of the date of this Order. All other claims of the Applicant in the Decision Letter and the Supplemental Decision are disallowed.

LICENCE APPEAL TRIBUNAL

Sheila A. Spotton, Vice-Chair

RELEASED: April 12, 2001

PAULA M. SPEARS

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

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

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

PAULA M. SPEARS, Applicant
unrepresented

DATE OF HEARING: April 12, 2001

DECISION RELEASED: April 17, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on April 12, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Paula M. Spears (the "Applicant")
Motor Vehicle: 1999 GMC SIE, plate no. 3917CZ (the "vehicle")
Date of Appeal: March 20, 2001

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

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

This matter came before this Tribunal on April 12, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals, which were entered into evidence as exhibit #3.

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

The Applicant stated that she had intended to file her appeal only under the grounds of Exceptional Hardship as per 50.2(3)(d) of the Act, and that the bottom of the form had been cut off by her fax machine when it was submitted to the Tribunal. She had handwritten in "Exceptional Hardship" on the form, yet placed a check mark beside the box marked for Due Diligence. The representative for the Respondent agreed to proceed with the hearing under the grounds of Exceptional Hardship only.

The hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

- I was not aware that the truck was going to be used until my mother-in-law came out to get it on the 2nd.
- I was in Cuba from Mar 2-9. 2001.
- It was lent to her so she was able to get my children where they needed to go. (school, sports).
- The truck was impounded before she was able to get to the farm.
- a two wheel vehicle is not always able to get down my 3/4 mile long lane way.

To Whom it may Concern.

I (Paula Spears) was on holidays from Mar 2nd to Mar 9th. My mother-in-law was coming up to the farm on the 2nd to help look after the children and drive them where they needed to go (school & sports). The children were late getting ready for the bus and missed it so Gerry drove them in. I realize that is not any excuse for him to be driving, but he was pressured by the kids wanting to get to school on time. He has never drove any vehicles to my knowledge since his last charge.

My mother-in-law arrived that afternoon of the 2nd, to find out that the truck had been impounded. My biggest concern is that I have 20 horses that are needing hay and other farm work needs to be done and it is very difficult to do it without my truck. Also my lane, to the house is about 3/4 of a mile long and a two wheel vehicle cannot always make it in. At this point the Kids and I are having to walk in and out because the car can't make it in for the snow. Once the snow melts it's a whole new ball game with the mud. If we have an emergency with the kids or livestock, I don't know how we would get them out.

This new law that has been enforced was all new to me and has been a hard lesson learned. I depend on a reliable vehicle for everyday and now I don't have it.

It has taken me 2 years to save up for my holiday and I have no idea how I am going to pay to get my truck back.

Yours truly
P. Spears

The Applicant testified that her husband, whose licence was then under suspension, had taken her vehicle to drive their children to school. The children had missed their daily school bus, and the Applicant's mother in law, who was to assist in the driving of the family, arrived at the Applicant's residence later that afternoon. The Applicant was out of town at the time, and returned some seven days later.

The Applicant resides on a farm that has a lengthy lane way from the road to her house. Her vehicle is a four wheel drive pick up truck that she relies upon to drive this lane way during the winter when it is often covered by snow drifts, and in the spring when it is very muddy. The Applicant also relies upon her vehicle to transport feed to the horses that she raises on her farm, as well as tow a horse trailer when the horses are taken to be sold.

The Applicant testified that since her vehicle was impounded, she has had to rely upon outside sources for delivery of feed for her horses, and at added expense. The feed is then distributed to her animals with the use of her farm tractor. The Applicant has a

second vehicle, a 1987 Toyota that is currently used for basic transportation. Since it is a two wheel drive vehicle, it must be parked at the end of the lane way at the road side, and the Applicant and her family must walk into their house from the road.

The Applicant has not looked into any other alternatives to the impounded vehicle as she believed that none would be affordable.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Gerald L. Spears;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 27, 2001.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). In this case, the Applicant's horse farm has not been shown to be suffering any significant financial or employment loss, as an alternative delivery method for the horse feed had been arranged, and the horses did not yet need to be taken in their trailer to be sold.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. In fact, the testimony of the Applicant was that she had not pursued any alternatives to the impounded vehicle, since she believed that none were affordable. However, no evidence was presented that would support that claim.

The Applicant has been able to maintain the daily activities of her business and her family through the use of various alternatives that she had at hand. These include the school bus for taking her children to school, her mother in law and her vehicle, the Applicant's 1987 Toyota, and the out side delivery services for feed for her horses. The Tribunal recognizes that the Applicant and her family has been inconvenienced by the loss of her vehicle, however no evidence was heard that would support a finding of exceptional hardship, nor a loss that was significant or lasting, as required by the Act.

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: April 17, 2001

VOYAGES ENCORE TRAVEL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
VOYAGES ENCORE TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 2, 2001

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

VOYAGES ENCORE TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Voyages Encore Travel Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 17, 2001

BETWEEN:

VOYAGES ENCORE TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Voyages Encore Travel Inc. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 4361184/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since July 13, 1995. The Registrant's fiscal year end is August 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated August 10, 2000 the Registrant was requested by TICO to file financial statements for the fiscal year ending August 31, 2000 by November 30, 2000.
4. On December 8, 2000, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by December 22, 2000.
5. On January 11, 2001, a final request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by January 24, 2001, failing which the Registrant was advised that a proposal to revoke its registration would be issued.

6. By February 2, 2001, the Registrant had failed to provide its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
7. On February 6, 2001, the Registrant filed its Notice of Appeal with the Licence Appeal Tribunal.
8. On February 6, 2001, the Registrant filed its financial statements for its fiscal year ended August 31, 2000, which were due by November 30, 2000.

COMPLIANCE HISTORY – PREVIOUS FILING OF FINANCIAL STATEMENTS

9. The Registrant has a history of late filing of its financial statements as summarized in paragraphs 10 through 13.
10. The Registrant filed its financial statements for its fiscal year ended August 31, 1996, which were due by November 30, 1996, on December 23, 1996.
11. The Registrant filed its financial statements for its fiscal year ended August 31, 1997, which were due by November 30, 1997, on April 9, 1998.
12. The Registrant filed its financial statements for its fiscal year ended August 31, 1998, which were due by November 30, 1998, on December 1, 1998.
13. The Registrant filed its financial statements for its fiscal year ended August 31, 1999, which were due by November 30, 1999, on December 2, 1999.
14. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 2, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending August 31, 2001, no later than November 30, 2001;
 - (b) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending August 31, 2002, no later than November 30, 2002;

- (c) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of April, 2001

Ms Georgina Wyton
Voyages Encore Travel Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

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

IN THE MATTER OF a CLAIM by
ELIZABETH MATTE AND CAL STOTYN

AND IN THE MATTER OF the DECISION of the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 16(1) of the Act

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

ELIZABETH MATTE AND CAL STOTYN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Elizabeth Matte and Cal Stotyn (the "Applicants") initiated an appeal under section 16(2) of the *Ontario New Home Warranties Plan Act* from a Supplemental Decision Letter issued by the Program dated March 8, 2001 in terms of which the Program denied the Applicants claims;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

3. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal respecting the Program's Supplemental Decision Letter dated March 8, 2001, is dismissed;

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: April 17, 2001

MED - 516

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Kyle M. Biel,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: April 12, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of *The Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1- Notice of Appeal filed by the Applicant March 13, 2001.

Exhibit # 2- Notice of Suspension from the Ministry dated November 14, 2000.

Exhibit # 3- Tabulated documents (1-12) received from the Ministry April 2, 2001.

Exhibit # 4- Applicant's driving record dated March 19, 2001.

FACTS:

The Applicant, a 53 year old construction site supervisor, had his driver's licence suspended November 14, 2000, after the Ministry received an unsolicited letter, dated October 11, 2000, from Physician # 1 an emergency physician at the Credit Valley

Hospital. Physician # 1 advised the Ministry that the Applicant had suffered an alcohol related seizure on that date and there was a history of two previous seizures.

The Applicant, in evidence, stated that he had been drinking beer with some friends the previous evening and when he got up to go to work in the morning, he drank a shot of brandy that had been left on the table. Shortly after arriving at his job site the Applicant collapsed and was taken to the hospital. He awoke in the ambulance after about ten minutes, but was not confused, did not void and did not bite his tongue.

On examination, Physician # 1 detected an enlarged liver. He told him that he should stop drinking immediately and should not drive until he has been thoroughly examined by his family physician.

The Applicant has not had a drink of alcohol since October 11, 2000. He saw his family physician, had multiple blood tests, a CT scan and an EEG, which were all reported normal. He had a psychiatric assessment by Physician # 2, who stated "other than a mild anxiety tension there is no other psychopathology".

The Applicant's family doctor recommended he attend the Vitanova Foundation, which provides a continuum of health services relating to the treatment and rehabilitation from alcohol and drug abuse. The Applicant attended a two week introductory treatment course and has continued to attend an evening each week since November 28, 2000. The Executive Director wrote two letters and his Addiction Therapist wrote one to the Ministry supporting him in his endeavours.

The Applicant's poor command of the English language created problems giving evidence, but a son in law attended with him and helped by interpreting and also giving evidence. It was impossible to elicit any information regarding the two other seizures mentioned by Physician # 1 in his initial report.

ISSUE:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

Section 50 of the Act states:

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

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

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar of Motor Vehicles to "-----suspend or cancel" a driver's licence for "any---sufficient reason---". The Registrar originally suspended the Applicant's licence after receiving an unsolicited letter dated October 11, 2000 from Physician # 1, advising that the Applicant had a seizure on that date, which he attributed to alcohol withdrawal.

The Tribunal finds the Registrar acted in accordance with the Regulation in suspending the Applicant's licence.

The language problems and the lack of an eye witness made it difficult to determine precisely whether he had a true seizure, because several features were not present. However, the fact he was unconscious for approximately ten minutes would suggest it was. There is a long history of continuous drinking with resultant liver damage, which is no doubt cirrhosis.

The Canadian Medical Association's "Guide for Physicians in Determining Medical Fitness to Drive," recommends- "patients with a diagnosis of alcohol dependence, including those with alcohol withdrawal induced seizures, should not be allowed to drive any type of motor vehicle until they remain alcohol free and seizure free for 12 months".

Although the Applicant is certain he will not drink again, the combination of a seizure, alcoholism and liver damage is threatening and he has only been abstinent for a six months period.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 14, 2000, by the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: April 17, 2001

FILE NAME: 0516.med

GLOBE TRAVELS INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
GLOBE TRAVELS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: January 8, 2001

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

GLOBE TRAVELS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Globe Travels Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 18, 2001

BETWEEN:

GLOBE TRAVELS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Globe Travels Inc. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 4385456/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since November 20, 1995. The Registrant's fiscal year end is December 31st.

GROUND FOR THE PROPOSAL

2. On June 14, 2000, the Registrant filed its financial statements for its fiscal year-ended December 31, 1999, which were due by March 31, 2000.
3. The Registrant's gross sales reported in its December 31, 1999 financial statements were \$2,220,291.00, which required the Registrant to have a minimum working capital of \$25,000.00. The Travel Industry Council of Ontario's ("TICO") review of those financial statements revealed a working capital of \$20,533.00.
4. By letter dated November 6, 2000, TICO advised the Registrant that it had a working capital shortfall of \$4,467.00 and asked the Registrant to provide information regarding the steps it was taking to address the shortfall by November 22, 2000.
5. An inspection of the Registrant in April of 2000 revealed that the Registrant's *Travel Industry Act* trust account was overdrawn on several occasions. In its

November 6, 2000 letter, TICO asked the Registrant to provide customer deposit reconciliations for the months of September and October 2000 and its *Travel Industry Act* trust account bank statements for those periods to show that it was maintaining proper trust accounting. This information was to be submitted by November 22, 2000.

6. By January 8, 2001, the Registrant had failed to provide evidence that it had corrected its working capital and the requested trust account statements and reconciliations. On that date, the Registrar issued the Proposal to Revoke the Registrant's Registration.

EVENTS AFTER THE ISSUANCE OF THE PROPOSAL

7. On February 1, 2001, the Registrant provided TICO with a CIBC deposit slip showing a \$5,000.00 deposit to correct the Registrant's working capital shortfall.
8. On February 6, 2001, the Registrant provided TICO with copies of its trust account bank statements for the months of September and October 2000. The statements revealed that the trust account was overdrawn on several occasions. The Registrant has not provided a customer deposit reconciliation showing the customer obligations for that period, as TICO required it to do.
9. The Registrant has not yet filed its financial statements for its fiscal year-ended December 31, 2000, which were due by March 31, 2001. By letter dated April 10, 2001, TICO informed the Registrant that it must file its financial statements on or before April 30, 2001.

COMPLIANCE HISTORY

10. The Registrant has a history of late filing and working capital shortages as summarized in paragraphs 11 through 14.
11. The Registrant filed its financial statements for its fiscal year ended December 31, 1995, which were due by March 31, 1996, on June 25, 1996. TICO's review of these financial statements revealed a working capital shortfall of \$1,242.00. On July 9, 1996, the Registrant provided TICO with evidence of a shareholder injection of \$1,250.00 to correct the shortfall.
12. The Registrant filed its financial statements for its fiscal year ended December 31, 1996, which were due by March 31, 1997, on June 13, 1997. TICO's review of these financial statements revealed a working capital shortfall of \$10,737.00. On August 8, 1996, the Registrant provided TICO with evidence of a shareholder injection of \$11,000.00 to correct the shortfall.
13. By June 30, 1997, the Registrant had failed to file its financial statements for its fiscal year ended December 31, 1997, which were due by March 31, 1998. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration. On August 14, 1998, the Registrant filed its financial statements. TICO's review of these financial statements revealed a working capital shortfall of \$12,119.00. On September 23, 1998, the Registrant provided TICO with evidence of a

shareholder injection of \$12,500.00 to correct the shortfall. On September 25, 1998, the Registrar withdrew the Proposal.

14. The Registrant filed its financial statements for its fiscal year ended December 31, 1998, which were due by March 31, 1999, on June 28, 1999. TICO's review of these financial statements revealed a working capital shortfall of \$11,386.00. On September 29, 1999, the Registrant provided TICO with evidence of a shareholder injection of \$11,450.00 to correct the shortfall.

15. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated January 8, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall maintain a properly designated "Travel Industry Act Trust Account" and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time and as explained in the Travel Industry Council of Ontario Trust Accounting Guidelines, a copy of which is attached as Appendix "A";
 - (b) The Registrant shall not disburse or withdraw any money held in a trust account designated as a "Travel Industry Act Trust Account" pursuant to section 36 of the Regulation until payment is made to the supplier of the travel services for which the money was received, except to provide a refund to the customer from whom the money was received;
 - (c) The Registrant shall submit a monthly trust account reconciliation to the Registrar beginning with the month of March, 2001, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (d) If the above-noted trust account reconciliations as filed according to paragraph (2)(l) are incomplete or reveal a customer deposit deficiency, the Registrant will have ten (10) days from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail;
 - (e) The Registrant shall file complete financial statements as required by section 24 of the Regulation for its fiscal year ended December 31, 2000, no later than April 30, 2001;

- (f) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant. At all times thereafter, the Registrant shall maintain minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (g) The Registrant shall ensure that any shareholder or related party loans shall be repaid only at such time and in such amounts as will allow the Registrant to remain in compliance with working capital requirements of the Act and the Regulation;
 - (h) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2001, no later than March 31, 2002;
 - (i) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2002, no later than March 31, 2003;
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (i) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of April, 2001

Mr. Harish Sharma
Globe Travels Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

JACOBS-EXHP

BRIAN JACOBS

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

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

TRIBUNAL: ALAN HOLBROOK,
Presiding member

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

BRIAN JACOBS, Applicant
unrepresented

DATE OF HEARING: April 18, 2001

DECISION RELEASED: April 24, 2001

Hamilton

REASONS FOR DECISION

A hearing was held on April 18, 2001 at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Brian Jacobs (the “Applicant”)
Motor Vehicle: 1985 GMC S15, plate no. 7813HT (the “vehicle”)
Date of Appeal: March 22, 2001

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

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

This matter came before this Tribunal on April 18, 2001 and proceeded as an oral hearing.

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

PRELIMINARY ISSUES:

A request was made by Mr. Brian Jacobs (the Applicant) to submit additional evidence in the form of a letter from his Mother dated April 18, 2001, which also had on the same page a photocopy of a reminder of his next appointment with his Doctor. The Tribunal ruled to accept the documents as evidence and marked it as Exhibit 4 upon agreement by both parties.

Mr. Kyle Biel (representative for the respondent) indicated at this time he had additional evidence to present but would wait until his cross-examination to introduce it. The Tribunal asked the nature of the evidence and agreed that it could be submitted later with agreement from Mr. Jacobs.

The hearing then proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

I am having reconstructive shoulder surgery on March 21/01. I need my vehicle in order to get back and forth to my physiotherapy appointments to rehabilitate my left arm or it could result in the loss of my arm. If the procedure isn't done it could result in the loss of my arm anyway. Both my parents work, I live on my own in Welland, and I have no other way to get to my appointments. I am disabled and on disability which only pays enough to cover my bills and I have no money to pay for towing and impound which means I will lose my truck. Estimates from Peter and Paul Towing Company from Brantford are \$1000.00 or more for 45 days impound and towing. I would like to go back to College but I have to save money first which means I need a job. I can't work because of my injury so I need surgery and rehabilitation.

Thank-you for taking the time to read over my appeal.

Mr. Jacobs testified he had gone out for drinks and to play pool with Mr. James (Jay) Mitchell prior to having surgery on his shoulder March 21, 2001. Having consumed too much beer, to legally drive, he allowed Mr. Mitchell to drive his vehicle. Assuming he had a licence, Mr. Jacobs did not investigate or ask to see Mr. Mitchell's licence. On their way home, police stopped them and it was found that Mr. Mitchell's licence was under suspension and Mr. Jacobs's truck was impounded.

Mr. Jacobs testified he had injured his shoulder several years ago two or three times playing hockey and as a result had not been able to work in two years. Mr. Jacobs stated he has been undergoing treatment for four years for ligament and muscle damage and for a broken collarbone.

He attends school in Welland but not this year due to a lack of funds. He is presently living with his parents in Port Dover, Ontario.

He stated, he doubts he will be able to raise the money to pay the impound and towing fees associated with this impoundment.

Both his parents work and need their vehicles to get to their jobs. He is most concerned about getting to his physiotherapy treatments in Brantford.

Cross-Examination:

Under cross-examination by Mr. Biel, Mr. Jacobs stated he has one up coming appointment with his surgeon and physiotherapy to commence on April 19, 2001 in Brantford, Ontario. He is within walking distance of his family doctor in Port Dover. At this point, approximately 32 days of the 45 day impound have expired leaving 13 days.

Mr. Jacobs is not presently employed or attending school, nor had he been immediately prior to the Order to Impound.

His physiotherapy is scheduled to start, at the Brantford Hospital on April 19, 2001 and Mr. Jacobs stated there is neither taxi service nor bus service to Brantford.

He had not priced a rental car but felt it would not be an option because it would be too expensive for him. Financial assistance from his parents is not an option due to the seasonal nature of their employment.

Mr. Jacobs has made only casual inquiries of neighbours regarding riding with them to Brantford for his treatment.

At this point, Mr. Beil submitted, with the agreement of Mr. Jacobs, copies of registrations for three vehicles owned by Mr. Jacobs parents, one 1984 Honda motorcycle owned by his father, a 1993 Chrysler owned by his mother, and a 1986 Dodge van owned by his father (Exhibit 5 a, b, and c).

Mr. Jacobs stated he did not have a motorcycle licence nor could he ride with his medical condition and that his father needed the van to carry his tools for work.

Mr. Biel then suggested three scenarios to Mr. Jacobs for consideration;

1. That one of his parents drive him to Brantford for his therapy then go to work and then return to pick him up after work.
2. That his parents share a ride to their place of employment and lend a vehicle to Mr. Jacobs; or
3. That Mr. Jacobs speak to his Doctor to see if his treatments can be delayed for two weeks until the impoundment period has expired.

A fourth possibility was discussed during cross-examination. Mr. Jacobs stated he had been offered a job as a supervisor for a landscaping business, in Welland, but had not enquired as to whether a company vehicle would be supplied with the job.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Jay Mitchell;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Blood or Breath Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 6, 2002.

Collectively these documents were marked as Exhibit 3.

The respondent relied only on Exhibit 3, and Exhibit 5 a, b, and c, and cross-examination for their case.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

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

APPLICATION OF LAW TO FACTS:

As to whether the impoundment will cause exceptional hardship to the Applicant, the evidence established that the Applicant had not examined all possible alternatives to the impounded motor vehicle, as required under section 55.1HTA. Reg 632/98 section 22(1). In fact, even if the Applicant had established that there was no alternative to the impounded motor vehicle, there was no evidence presented to suggest that there is a threat to Mr. Jacob's health, as set out in section 22.(1)(a). He did not establish that his physiotherapy had to start on April 19, 2001, or that delaying the start of treatment would compromise his chances of recovery. Accordingly, the Applicant has failed to meet the onus required of him to establish exceptional hardship as stipulated in section 50.2(3)(d) of the Act as circumscribed by section 22 of Ontario Regulation 574, as amended.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: April 24, 2001

MOGHADDAM, ALIREZA and JKA MOTORS LTD.

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

IN THE MATTER OF
JKA MOTORS LTD. AND ALIREZA MOGHADDAM

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: December 28, 2000

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

JKA MOTORS LTD. AND ALIREZA MOGHADDAM

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 25, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, May 18, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 30, 2001

FERN NEEDHAM

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

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

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

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

FERN NEEDHAM, Applicant
unrepresented

DATE OF HEARING: April 20, 2001

DECISION RELEASED: April 24, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on April 20, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner: Fern Needham (the "Applicant")
Motor Vehicle: 1985 Chevrolet C30, plate no. FW1325 (the "vehicle")
Date of Appeal: March 30, 2001

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

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

This matter came before this Tribunal on April 20, 2001 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

March 27, 2001
V. Fern Needham
R.R. # 3 Ilderton ON
14078 9 Mile Rd.
N0M 2A0

Dear Sir or Madam

I am 75 years old. I need my truck to hand hay to my horses every day.
I remain,
Sincerely
Fern Needham

Dear Sir/Madame

My name is Greg Stilson. I am the person that was charged for driving Fern Needhams truck. I am sorry to say, that I lied to Mr. Needham about having a license. I showed her a false or should I say, an expired license.

I write this letter in hope's that my honesty will help her situation. It's the only vehicle she has on the road.

My sincerest
Apologies
Greg Stilson

At the hearing, under oath the Applicant simply stated that she believes she has been "*dealt with unfairly*".

During cross-examination, the Applicant testified that as the horses are not able to go to the hay, she now uses a wheelbarrow to take the hay to feed the horses. The Applicant attested that the horses would become sick unless fed, but that no horses have become sick due to the impoundment.

The Applicant admitted to having another vehicle but it needs to be towed to have a hose replaced. It would cost \$10.00 to replace the hose.

The Applicant confirmed that she has incurred no financial loss, and that if she were to require assistance, her neighbors would help.

In her closing remarks the Applicant commented that she "*wants her truck back as soon as possible*".

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Gregory B. Stilson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 18, 2002.

The Respondent offered no evidence other than the documentation presented prior to the hearing.

In closing, the Respondent stated that the Applicant appealed on the “...*grounds of inconvenience and not financial loss*”. Respondent contended that the Applicant has an alternative vehicle and her health and safety are not in danger due to the impoundment. Further, the Applicant is aware that she can sue Mr. Stilson.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. “Owner” is defined as:

“Owner” means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) “owner” means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

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

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that she has an alternate vehicle and that she is able to feed her horses by using a wheelbarrow.

Thus, as the Applicant has alternate methods of transportation and as she manages to continue to carry on her responsibilities without the impounded vehicle, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant denied having incurred any financial burden.

The Applicant has not satisfied the Tribunal that financial loss has been incurred or that extra expenses which could be considered hardship have occurred.

Is the loss upon a person ordinarily transported in the motor vehicle?

This clause is not applicable as there was no evidence that any person other than the Applicant was being transported by the vehicle. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

- i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...
- ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of Subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon a person other than the suspended driver. As the clause is cumulative, the Applicant is also required to meet the requirements of 22(3)(d)(i)(ii). There are no such losses, the Applicant, therefore, does not meet the criteria set out in 22(3)(d)(i)(ii).

After assessing the evidence presented, the Tribunal finds that the Applicant suffered no hardship.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 24, 2001

EBENEZER M. ASARE

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

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

TRIBUNAL: JOE HEWITT,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

EBENEZER M. ASARE, Applicant
unrepresented

DATE OF HEARING: April 19, 2001

DECISION RELEASED: April 25, 2001 Toronto

REASONS FOR DECISION

A hearing was held on April 19, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner: Ebenezer M. Asare (the "Applicant")
Motor Vehicle: 1995 GMC Safari, plate no. AAJV370 (the "vehicle")
Date of Appeal: March 30, 2001

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

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

This matter came before this Tribunal on April 19, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

A friend of mine by name Paul Tekpenor had requested to use my van to transport his family and some belongings to their new apartment. Knowing that, Paul was a new immigrant and did not have an Ontario drivers Licence, I refused him access to driving my Van. At the time of the request, another friend who happened to be present opted to help in driving the van since I will be going to work at the time. I personally knew this friend and have seen his drivers License before.

I even requested him to show me his drivers License, which he did before I gave the keys to him. I had no clue to call the MTO to verify his license. At the time of the police pull over, Mr. Paul and his family were in the vehicle.

I have three young children and the impoundment is causing great hardship for my family and my work.

Applicant expressed to the Tribunal that he was appealing the impoundment of his motor vehicle on the grounds of exceptional hardship and due diligence.

DUE DILIGENCE

In the Applicant's oral evidence he stated that he was helping out his friend Paul, in moving to a new apartment. The Applicant knew that Paul only had a Cuban driver's licence and told him that he could not lend him his van because he did not have an Ontario driver's licence. Another friend of his, by the name of Bala Fatty was present and offered to drive Paul and his family to their new home. The Applicant had previously seen Bala drive and had also seen his licence in his wallet. The Applicant felt that it would be better that an experienced Ontario driver drives his vehicle than one with a Cuban driver's licence. The Applicant asked Bala Fatty if he did have a driver's licence, Bala Fatty in answer to which he said he did. The Applicant did not ask to see the driver's licence or inspect the driver's licence of Bala Fatty on the day of the vehicle's impoundment. The Applicant also testified that Bala Fatty does not own a vehicle and that Mr. Fatty did not know that his licence was under suspension.

EXCEPTIONAL HARDSHIP

The Applicant testified that the impoundment has caused great inconvenience to him and his family in that he works afternoon shifts in Rexdale and lives in Maple. He starts work at 4:00 p.m. and has to drop off his son at a baby sitter then take a cab to work at a cost of \$35.00. There are no buses to Maple at the end of his midnight shift, so he must rely on his wife to pick him up in her car. She has to wake up the children ages nine, seven and three, and bring them with her which is causing them to lose sleep. The loss of sleep is taking a toll on his wife and children.

The impoundment will result in him not keeping up with some current expenses and he may have to rely on credit cards to take him through this period. He has investigated other means of transportation and a rental car would be too expensive at about \$60.00 per day. On occasion he has made other arrangements to start work later so he can use his wife's car. The impounded van is not used in any commercial venture and is solely a family vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that Mr. Bala Fatty was driving the vehicle at the time it was detained;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Criminal Negligence Causing Bodily Harm under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 28, 2002.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must establish that he exercised due diligence to determine that Bala Fatty's driver's licence was not under suspension at the time of the vehicle's impoundment.

The Tribunal finds that Bala Fatty's driver's licence was under suspension and further finds that he was driving the Applicant's motor vehicle at the time of the impoundment.

Section 50.2(3)(c) of the Act requires that the Applicant exercise due diligence in attempting to determine that Bala Fatty's driver's licence was not suspended at the time of the impoundment of the applicant's motor vehicle.

The evidence establishes that the Applicant made no inquiries with respect to the status of Bala Fatty's driver's licence, prior to the impoundment. His failure to do so indicates he did not exercise due diligence as required by section 50.2(3)(c) of the Act.

The Tribunal therefore finds that the Applicant, having made no inquiries as to the status of Bala Fatty's driver's licence, has failed to establish that he exercised due diligence as required by subsection 50.2(3)(c) of the Act.

The Applicant has also appealed on the grounds of exceptional hardship. Section 22 of Regulation 574, R.R.O. 1990, as amended by Regulation 632/98 sets out what the Tribunal shall consider in dealing with exceptional hardship.

Based on the evidence, the Applicant has not satisfied the Tribunal that he will suffer exceptional hardship pursuant to the impoundment. He may suffer inconvenience but not exceptional hardship. He has also not satisfied the Tribunal that there is no alternative available to him to the impounded vehicle and has not proven that there is a threat to the health and safety of persons, such as his family, as a result of the impoundment. Furthermore, the Applicant has not proven that the impoundment will result in a loss which will be immediate, lasting and significant. Finally, nothing has been placed before the Tribunal to satisfy it that every reasonable option has been considered and required into so as to investigate the loss.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

RELEASED: April 25, 2001

GUIDO VANDEKERCKHOVE

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

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

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

OSWALD W. STAHL, Counsel for Applicant

DATE OF HEARING: April 20, 2001

DECISION RELEASED: April 25, 2001 Toronto

REASONS FOR DECISION

A written hearing was held on April 20, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Guido Vandekerckhove (the "Applicant")
Motor Vehicle:	1994 International 40S, plate no. 3202H0 (the "vehicle")
Date of Appeal:	March 29, 2001

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

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

This matter came before this Tribunal on April 20, 2001 and proceeded as a written hearing.

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

The hearing proceeded.

ISSUE:

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

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

FACTS:

The Tribunal considered the evidence presented in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

IN THE MATTER OF A
NOTICE OF APPEAL
FOR A MOTOR VEHICLE IMPOUNDMENT

I GUIDO, VANDEKERCKHOVE, of Norfolk County, MAKE OATH AND SAY AS FOLLOWS:

1. I am the owner of a vehicle bearing Plate No. 3202H0, being an International 405.
2. The said vehicle was leased to Norfolk Fruit Growers' Association by myself.
3. Pursuant to the said Lease Agreement, Norfolk Fruit Growers' Association was to provide a driver for the vehicle.
4. The said Norfolk Fruit Growers' Association hired Don Marinuk of the Town of Simcoe to be the driver of the vehicle.
5. Pursuant to an Agreement between the Norfolk Fruit Growers' Association and Don Marinuk, Don Marinuk covenanted and agreed to carry out his duties in a conscientious manner and said that he had a valid D Drivers Licence.
6. Attached hereto and marked as Exhibit "A" is a copy of a Contract of Services between Don Marinuk and Norfolk Fruit Growers' Association. Clause 2(a) refers to his having a valid D Drivers Licence.
7. I relied on this Contract of Services, in particular Clause 2(a) in allowing Don Marinuk to drive the vehicle.
8. I am informed, and do verily believe, that the vehicle was impounded on March 12, 2001 with Impounding Order No. 1510511.
9. I am informed, and do verily believe that Donald P. Marinuk, the driver, did not possess a valid D Drivers Licence.
10. This came as a complete surprise to me, and it appears to be in contravention of the Contract of Services, as attached hereto.
11. I make this Appeal stating that I honestly relied on the Contract of Services as proof that Donald Marinuk had a valid D Driver Licence.
12. I make this Affidavit in support of a request for a written Hearing and the consent of the Registrar and the Ministry of Transport to do so.
13. This Affidavit is made in an Appeal of an Impounding Order, and for no improper purpose.

Swore before me at Norfolk County,
This 27th day of March, 2001.

A Commissioner, etc.

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This is Exhibit "A" referred to in the Affidavit of Guido Vandekerckhove, sworn before me at Norfolk County, this 27th day of March, 2001.

A Commissioner, etc.

CONTRACT OF SERVICES

THIS AGREEMENT made in duplicate the 25th day of September, 2000

BETWEEN: THE NORFOLK FRUIT GROWERS' ASSOCIATION
hereinafter referred to as "NORFOLK"

OF THE FIRST PART;

-and- DON MARINUK
of Simcoe, in the Regional Municipality of Haldimand Norfolk
hereinafter referred to as "Don Marinuk"

OF THE SECOND PART;

WHEREAS Norfolk sell apples, (hereinafter called "PRODUCT") both retail and wholesale;

AND WHEREAS Norfolk has acquired a delivery truck;

AND WHEREAS Don Marinuk has agreed to deliver product for Norfolk:

NOW THEREFORE THIS AGREEMENT WITNESSETH that in consideration of the mutual covenants herein contained, the parties hereto covenant and agree as follows:

1. NORFOLK COVENANTS AND AGREES:
 - (a) to pay Don Marinuk \$11.00 per hour for his services rendered under the within agreement.
2. Don Marinuk COVENANTS AND AGREES:
 - (a) that he has a valid D driver's license;
 - (b) that he will be available for delivered to any location, at any time, for all hours required, at the standard hourly rate.
 - (c) that, as an official Norfolk contact, Don Marinuk will conduct himself in the best interests of Norfolk at all times and encourage additional business where possible;
 - (d) acknowledges that he is not an agent of Norfolk;
 - (e) not to assign the within agreement without the consent, in writing, of Norfolk.
3. THE PARTIES HERETO COVENANT AND AGREE:
 - (a) that this agreement may be terminated and cancelled on fifteen (15) days notice, in writing, delivered to the other party, it being understood

that such notice must be in writing and sent by registered mail, in the case of Norfolk, to:

The Norfolk Fruit Growers' Association
P.O. Box 279
Simcoe, Ontario
N3Y 4L1
and in the case of Don Marinuk, to:

86 Pond St.
Simcoe, ON N3Y 2T6
Phone No. (519)42805691

- (b) that there are no representations or collateral arrangements between the parties hereto, save as stated in writing and;
- (c) that every covenant, proviso and agreement herein contained shall ensure to the benefit of and be binding upon the parties hereto, and their heirs, executors, administrators, successors, and assigns and that all covenants herein contained shall be construed as being joint and several, and that when the context so required or permits, the singular number shall be read as if the feminine or neuter, as the case may be, were expresses; and
- (d) as an independent contractor, Don Marinuk will be covered under the Workers' Compensation Board through Norfolk.

WITNESS the corporate seal of the Party of the First Part, duly attested thereto by the hands of its proper signing officers and IN WITNESS WHEREOF the party of the second part has hereunto set his hand and seal:

SIGNED, SEALED AND DELIVERED

in the presence of

)THE NORFOLK FRUIT
) GROWERS' ASSOCIATION
)
) _____ Print Name
)
) _____ Signature

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Donald P. Marinuk;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 10, 2004.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

There is only one issue to be considered in this appeal and is dealt with hereunder.

The Tribunal finds that Donald P. Marinuk's driver's licence was under suspension at the time of the impoundment and that he was driving the Applicant's vehicle at that time. The grounds of appeal under Section 50.2(3)(c) of the Act require that the Applicant show the Tribunal that he exercised due diligence in attempting to determine that Mr. Marinuk's driver's licence was not suspended at the time of the impoundment of the Applicant's vehicle.

The evidence submitted by the Applicant has indicated that he relied on Norkfolk Fruit Grower's Association to verify that Mr. Marinuk's driver's licence was not at the time the order was made, under suspension. This is insufficient in demonstrating due diligence on the part of the owner of the vehicle, Mr. Vandekerckhove.

Mr. Vandekerckhove makes no reference in his submissions that he, as owner made any attempt or inquiries to verify that Mr. Marinuk's driver's licence was not then under suspension as required by the Act.

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: April 25, 2001

ABDUL-HUSSEIN, ALI o/a B & A AUTO SALE

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

IN THE MATTER OF
ALI ABDUL-HUSSEIN O/A B & A AUTO SALE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: August 22, 2000

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

ALI ABDUL-HUSSEIN O/A B & A AUTO SALE

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a motion in the above matter on May 16, 2001, at Ottawa, Ontario;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the motion *peremptory against the Applicant* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 1:30 p.m., on Monday, May 14, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 30, 2001

MARTINAKIS

PREHEARING

ANGELO MARTINAKIS

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE ONTARIO MOTOR VEHICLE
DEALERS COMPENSATION

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

CONSTANTINE ALEXIOU, Counsel, representing Angelo
Martinakis

LARRY A. BANACK, Counsel, representing the Board of Trustees
of the Ontario Motor Vehicle Dealers Compensation Fund

DATE OF

PREHEARING: April 25, 2001

Toronto

ORDER

Following the attendance on April 25, 2001 at a prehearing before the Licence Appeal Tribunal of Constantine Alexious, Counsel for Angelo Martinakis, Mr. Martinakis (the ?Applicant?) and Larry A. Banack, Counsel for the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund (the ?Respondent?):

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was no resolution of the issues in this matter at this time.
- 2) The hearing in this matter is scheduled for 9:30 a.m. on Monday, June 11, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario for one-half day.

- 3) Counsel for the Applicant shall complete full disclosure of all documents to Counsel for the Respondent on or before May 9, 2001.
- 4) The Applicant shall arrange for and be responsible for the cost of a qualified interpreter to be in attendance on the date set for the hearing of this matter.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: April 30, 2001

ADLS - 0538

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

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

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

Applicant,
unrepresented

DATE OF HEARING: April 17, 2001 Windsor

DECISION AND ORDER

A hearing was held on April 17, 2001, at Windsor, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated February 21, 2001 imposed by the Registrar pursuant to Section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to Section 50.1(5).

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 18, 2001

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

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

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

Applicant,
unrepresented

DATE OF
HEARING: April 17, 2001 Windsor

DECISION
RELEASED: April 18, 2001

REASONS FOR DECISION

A hearing was held on April 17, 2001, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on April 18, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway*

Traffic Act was dated March 22, 2001, and was received by the Tribunal on March 30, 2001 together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Prior to the commencement of the hearing, the Representative of the Ministry requested a thirty minute adjournment, in order to contact the Ministry's witness, Police Officer # 1.

Adjournment granted.

The Representative of the Ministry provided the Tribunal with certified copies of Ministry of Transportation documents on file, as well as a "*Will Say Statement*" taken "04MAR01" from Police Officer # 1.

The Applicant admitted to having knowledge of the contents of the "*Will Say Statement*", and had no objection to said document being entered as an exhibit.

All documents were entered on consent.

The Applicant stated for the record that she would be appearing without counsel, as she was advised that she had complied with all the requirements.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated February 21, 2001.
- b) Exhibit # 2 Notice of Appeal Form received at the Tribunal March 30, 2001.
- c) Exhibit # 5 ECG test results from Four Counties Health Services – received April 17, 2001.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received April 11, 2001.
- b) Exhibit # 4 Will say/statement from Police Officer # 1, taken March 4, 2001 - received April 17, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "*February 21, 2001*" as per Notice of Appeal. (Exhibit #2)

Page 2 of Notice of Appeal, is dated March 14, 2001, and is signed by Physician # 1, who has been the Applicant's physician for "*6 years and 6 months*".

A typewritten note sets out the handwritten information on the Notice of Appeal and describes the Applicant's diagnosis as "*...acute chest wall injury; chronic pain; history of fibromyalgia...*".

Physician # 1 construes that "*It is indeed possible that the combination of chronic fibromyalgia and the acute chest discomfort contributed to impaired chest wall motion and inadequate deep inspiration/expiration.*"

A physical examination of the Applicant revealed "*chest wall strain*". The Applicant's visits to the physician occurred on "*November 10, 2000; February 2, 2001, March 9, 2001*".

The Respondent provided the following Documents:

- * Certified Copy of Notice to the Registrar, sealed April 4, 2001.
- * Certified Copy of Driving Record of the Applicant, sealed April 4, 2001.
- * Copy of Vehicle Search from Occurrence date, sealed April 5, 2001.
- * Medical report of Physician # 2, Neurologist, dated January 15, 1998.
- * Medical report of Physician # 3, dated April 10. 2001.

The Applicant's driving record since 1982 indicates that the Applicant's licence was previously suspended on 98 /04/16 for medical reasons and reinstated on 98/04/29.

In a report dated January 15, 1998, Physician # 2 describes the symptoms of fibromyalgia as "*...generalized and localized pain ...may involve trunk, hip ...low back pain ...legs ...arms ...neck...*" and comments "*Patients with a diagnosis of fibromyalgia ...seldom if ever, have respiratory problems or shortness of breath...*"

In a report dated April 10, 2001, Physician # 3, FRCP (C) a consultant in respiratory medicine with the Rosedale Medical Centre, and in practice since 1982, asserts that she has "*...lengthy experience with performance and interpretation of pulmonary function tests ...Assistant Professor at the University of Toronto ...know the background*"

evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest ...aware of breath sampling criteria required to provide acceptable information using the above instrumentation."

After reviewing the information provided in this case, Physician # 3 concludes that *"...inability ...to provide a breath sample is secondary to voluntary lack of effort rather than physical limitation."*

At the hearing, the Applicant testified both in examination in chief and in cross-examination, that she tried to provide a breath sample but was unable to do so, due to her medical condition at the time. The Applicant has been diagnosed with *"acute chest wall injury"* which she was told occurred on the night in question. She is still under investigation to determine what is wrong.

The Applicant attested to the fact that she was *"a nervous wreck and very scared"*. She fainted while in custody and was given baby aspirin by the paramedics. At this time the Applicant felt she just wanted to go home.

The Applicant further testified that her chest pain intensified and that she fainted a second time, after arriving home. This time she was taken to hospital by ambulance. The Applicant confirmed that she has the bills for the ambulance and her physician has the hospital's report, but neither was aware that this information would be required at the hearing.

At this time, a short recess was granted, to afford the Applicant the opportunity to obtain proof of her hospital visit, from her doctor. The Applicant was able to produce an ECG from the Four Counties Health Centre, indicating that she was examined at 04:45:16 on February 21, 2001.

The Respondent had no witnesses. In closing, the Respondent argued that there was no medical reason as to why the Applicant failed to provide a breath sample. The Respondent contends that the Applicant simply was not motivated.

The Respondent further asserts that Physician # 1's report is flawed in that it fails to state the fact that the Applicant was taken to hospital, and more importantly fails to provide insight as to how the Applicant's medical condition could have contributed to her failure to provide a breath a sample.

The Respondent alluded to Physician # 1's use of the word *"possible"* to dismiss Dr. Mawji's statement in the Notice of Appeal as a *"guess"*.

APPLICATION OF THE LAW TO FACTS:

The issues are, how does the medical condition of the Applicant relate to Section 50.1 (2) (b), and did this medical condition cause the Applicant to fail or not comply with the breath demand? Pursuant to Section 13 of Regulation 574 (Amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why a breath sample could not be provided.

The Respondent proffered no first hand evidence from the officer involved, as to the Applicant's demeanor on the night in question. The Tribunal notes that Police Officer # 1's "Will Say Statement" is neither signed nor sworn. Thus, the entirety of the Respondent's evidence is based on the medical information available.

The Respondent suggested that the Tribunal consider Physician # 2's report over Physician # 1's "guess".

With all due respect to Physician # 3's credentials as an expert in the field, the Tribunal notes that not only, did Physician # 3 not observe the Applicant directly, but was also provided with limited information with which to form an opinion. Yet, while the Tribunal agrees with the Respondent that Physician # 1's report is not detailed as to all the events that occurred that evening, the Tribunal disagrees as to the weight of Physician # 1's statement in the Notice of Appeal: *"It is indeed possible that the combination of chronic fibromyalgia and the acute chest discomfort contributed to impaired chest wall motion and inadequate deep inspiration/expiration."* (Exhibit 2)

The Tribunal acknowledges Physician # 2's report of January 15, 1998, which notes that *"Patients with a diagnosis of fibromyalgia ...seldom if ever, have respiratory problems or shortness of breath..."*. However, according to Physician # 1 *"the acute chest discomfort"* was a contributing factor to the Applicant's inability to provide a breath sample. Further, the Tribunal recognizes the possibility of momentary disorientation during episodes of anxiety or chest discomfort. It is evident that the Applicant suffered such pain, as she was eventually taken to hospital and medicated.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1(2)(b), in that she was able to demonstrate that she suffers from a medical condition which would prevent her from providing a breath sample.

The Tribunal finds that there is sufficient medical reasons as to why the Applicant was unable to comply with the request to provide breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 21, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 24, 2001

KEMBER, ANDREW and ANDREWLENE FARMS LTD.

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

IN THE MATTER OF
ANDREWLENE FARMS LTD. AND ANDREW KEMBER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: October 17, 2000

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

ANDREWLENE FARMS LTD. AND ANDREW KEMBER

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on February 15 and 16, 2001;

AND WHEREAS the matter was adjourned upon consent of the parties to May 9 and 10, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicants* to commence at the Middlesex County Building, North Room, 399 Ridout Street, London, Ontario at 9:30 a.m., on Wednesday, July 25, 2001 and to continue July 26, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 30, 2001

JOHNSON

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

IN THE MATTER of
DALTON G. JOHNSON

AND IN THE MATTER of a decision of the
Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund

TO DISALLOW A CLAIM
- Decision dated: December 18, 2000

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

DALTON G. JOHNSON

Applicant

- and -

BOARD OF TRUSTEES
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 27, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Friday, July 6, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 30, 2001

MICHELLE LICKERS

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

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

TRIBUNAL: ALAN HOLBROOK,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
KIM GROSSKURTH,
Representatives for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF HEARING: April 26, 2001

DECISION RELEASED: April 27, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on April 26, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner:	Michelle Lickers (the "Applicant")
Motor Vehicle:	1999 Chevrolet Astro Van, plate no. AEXM 133 (the "vehicle")
Date of Appeal:	April 9, 2001

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

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

This matter came before this Tribunal on April 26, 2001 and proceeded as an oral hearing.

The Applicant was not in attendance at 10:00 a.m. at the commencement of this hearing. The matter stood down until 11:00 a.m. by which time the Applicant was still not in attendance. No communication had been received from the Applicant as to the reason for her non attendance.

The Tribunal asked the Respondent's Agent if she wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters and the hearing proceeded.

ISSUE:

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

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

FACTS:

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Loss of vehicle will result in exceptional hardship.

- I will possibly have to take time off work as I work until 1am and it is extremely difficult to find a ride at that time, as the mother of 4 young children (4 weeks-4yrs) this will result in extreme financial hardship.
- will have to withdraw my 4yr old son from school as this is his main source of transportation getting there.
- none of these losses affect the suspended driver

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record of the proceedings were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Gary W. Silversmith;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 23, 2006.

The Respondent relied solely on written documentation.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The issue to be considered is whether the impoundment of the vehicle will result in exceptional hardship.

The Tribunal finds that the Applicant is the owner of the impounded motor vehicle and that that vehicle at the time of its impoundment was driven by Gary W. Silversmith whose driver's licence was then under suspension.

The onus of proof is upon the Applicant to prove that she will suffer exceptional hardship as a result of the impoundment of the Applicant's motor vehicle.

Section 22(1) of Regulation 574 R.R.O. 1990 as amended by Regulation 632/98 states that the Tribunal shall consider in determining if there has been exceptional hardship, whether no alternative to the impounded vehicle is available. In Applicant's "owner's position on appeal" no mention whatsoever is made by her of what options or alternatives have been considered by her and enquired into. In fact no where in her supporting documents does she refer to or deal with alternate reasonable options having been inquired into or considered.

She has not shown the Tribunal that she is faced with exceptional hardship nor has she demonstrated any efforts having been made by her to consider alternatives to the impounded motor vehicle as is required of her by section 22(4) of Regulation 574 as amended.

The Applicant may be inconvenienced by the impoundment of her motor vehicle but the Tribunal may not consider inconvenience in determining exceptional hardship by virtue of section 22(2) of the aforesaid Regulation.

The Tribunal accordingly finds the Applicant has not established exceptional hardship.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: April 27, 2001

MED - 534

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant,
by written submissions only

DATE OF
HEARING: April 27, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

FACTS:

The Applicant, age 41 received his drivers licence in January 1977 at age 17. His first infraction for impaired driving was November 6, 1977 and again on August 2, 1978, May 6, 1989, September 7, 1989, May 27, 1993 and June 14, 1997.

In 1996 his licence was suspended. He was requested to submit a medical report detailing his use of alcohol pending reinstatement. A report by Physician # 1 was submitted on January 29, 1997 indicating "no signs of alcohol abuse". On February 7, 1997 the Ministry of Transportation advised the Applicant that a notice of reinstatement will be mailed provided he comply with the requirements of the Defaulted Fines Control Centre and that a further medical report would be required in January 1998.

Despite the favourable report from Physician # 1 and reinstatement of his licence, he lapsed into drinking while driving and incurred a court conviction on April 1, 1998 which sentenced him to 21 days in jail and a suspension of his drivers licence for two years.

On June 18, 1998, he was charged again with failure to stop at an intersection. This occurred apparently while his drivers licence was already suspended.

His suspension was registered again on November 3, 1998 for unpaid fines. Apparently he paid these fines in June 2000 and was under the mistaken impression that his licence would automatically be reinstated. Nowhere does the Ministry of Transportation state this in writing. The letter of June 23, 2000 notifies the Applicant that he is required to file an assessment from his physician or a physician specializing in addiction medicine regarding his consumption of alcohol. Thereafter he saw Physician # 2 and addiction specialist on August 29, 2000 who filled out the Alcohol Assessment Form and ordered lab tests. He recommended Abstinence and or relapse prevention program to monitor his progress and document his period of abstinence. This he failed or refused to do, resulting in the Ministry of Transportation notice of October 10, 2000 - maintaining his suspension.

The positive laboratory findings of August 24, 2000 indicating consumption of babiluates benzodiazepines and opiates require clarification. These may be due to prescribed drugs for the treatment of his ongoing shoulder and back disability but dosage and side effects should be monitored as to the effect on his ability to drive safely.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

on the grounds of,

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

Section 50 of the Act states:

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

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

APPLICATION OF THE LAW TO FACTS:

Under section 47 of the Act, the Registrar may suspend the Applicant's driver's licence for sufficient reasons. Section 14(b) of Regulation 340/94 indicates that driver must not be addicted to alcohol to an extent to drive a motor vehicle safely.

The Applicant has a twelve-year history of convictions for impaired driving.

Physician # 2, an addiction specialist recommended a course of therapy which was not followed. We have only the Applicant's statement that he has not been drinking since January 1999.

The Physicians Guide to determine medical fitness to drive. (6th edition - Canadian Medical Association 2000) Section 3.3 recommends that patients with alcohol dependence must complete a recognized rehabilitation program for substance abuse and remain alcohol free for 12 months before recommencing driving. This period may be reduced under specific controlled programs.

The Tribunal finds on the evidence that the Applicant is addicted to alcohol to an extent to significantly affect his ability to drive a motor vehicle.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 10, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: April 30, 2001

Appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROBERT M. EHRLICH, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF HEARING: April 24, 2001 Toronto

DECISION AND REASONS

A hearing was held on April 24, 2001 at Toronto, Ontario by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H. 8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the decision of the Minister pursuant to Section 50.(2) of the HTA.

LICENCE APPEAL TRIBUNAL

Robert M. Ehrlich, M.D.,
Presiding Member

RELEASED: April 25, 2001

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROBERT EHRLICH, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF HEARING: April 24, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS

By Applicant:

- # 1 Notice of Appeal dated March 8, 2001.
- # 2 Letter from Physician # 1 dated March 14, 2001.

By Respondent:

- # 3 Ministry of Transportation SubmissionsTabs1-6 dated April 11, 2001.

PRELIMINARY MATTERS:

The Respondent submitted a file summary containing the itemized list, as well as a copy of the *Highway Traffic Act* and National Safety Code for Motor Carriers items 3.2 to 3.9.

FACTS:

The Applicant is appealing the downgrading of his licence from a Class B to Class G. because of medical letters from Physician # 2 (November 8, 2000) and Physician #1 (December 12, 2000). Physician # 2 indicated that the Applicant has Atrial Fibrillation which is controlled on medication.(Tab 1, Exhibit 3) Physician # 1 stated that the Applicant has had Atrial Fibrillation for 8 years which is currently asymptomatic. An echocardiogram detected Grade 3 left ventricular dysfunction and moderate mitral regurgitation. (Tab 3A, Exhibit 3) Based on this the Applicant's licence was downgraded from a B to a G on November 22, 2000. The medical Review Committee of the MTO upheld this downgrade on February 6, 2001. (Tab 5, Exhibit 3) Dr. Fenech wrote on March 14, 2001 that it was too early to reassess the Applicant. (Exhibit 2) The Applicant has worked for Mississauga Transit as a relief bus driver for 25 years. He has never had an accident. (Tab 6, Exhibit 3) He claims to be able ride a bicycle for 26 kms without any distress. He denies chest pain on exertion or shortness of breath at rest or on exertion. He is on 4 medications: Lanoxin, Atenol, Altase and Coumidin. In closing, the respondent indicated that the Ministry of Transportation's last medical letter was December 12, 2000 but would reconsider his status if they received further medical information.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;

- (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,

- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
- (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS:

Section 17.(1)(d) of Regulation 340/94 states a history of arrhythmia disqualifies a person from holding a Class A to F licence. Section 17.(2) indicates that if a person may hold such a licence " if he or she demonstrates the ability to drive a motor vehicle in the applicable class as safely as any person who meets these qualifications". The Applicant has had Atrial Fibrillation since 1992 and has operated a bus safely without any accidents. (Tab 6, Exhibit 3) Section 3.4 of the National Safety Code for Motor Carriers gives the levels of left ventricular function acceptable to hold a Class A-F licence. The Applicant has Class 3 ventricular dysfunction as stated by Physician # 1 (Tab3A, Exhibit #3). This clearly is below the acceptable standard. Physician # 1 has not re-evaluated the Applicant's ventricular function as stated in the letter of March 14, 2000 (Exhibit #2).

DECISION:

Upon the application by the Applicant to appeal the decision dated November 22, 2000 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50.(2) of the Act that the decision of the Registrar be confirmed pending further medical evidence that his ventricular function has improved.

LICENCE APPEAL TRIBUNAL

Robert M. Ehrlich, M.D.,
Presiding Member

RELEASED: May 2, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
47(1) of the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a written hearing in the above matter was scheduled to be held on Tuesday,
April 17, 2001, by the Tribunal;

AND WHEREAS the Applicant requested an adjournment of the hearing to obtain
additional medical information;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the Applicant's submissions are due April 30, 2001;
- (3) the Respondent's response is due May 10, 2001;
- (4) the Applicant's reply is due May 17, 2001;
- (5) the written appeal shall be heard on Friday, May 18, 2001 by this Tribunal.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: April 3, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
32(12)(b)(i) of the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Monday, April 23, 2001, at London, Ontario;

AND WHEREAS the Applicant requested an adjournment of the hearing due to his scheduled surgery for April 25, 2001;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 10:00 a.m. on Thursday, August 30, 2001 at the Churchill "A" Room, Ramada Inn London, 817 Exeter Road, London, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: April 20, 2001

RONALD A. DESROCHES

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

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

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: BRIGITTE HAMMOND
Representative for the Registrar of Motor Vehicles

RONALD A. DESROCHES, Applicant
unrepresented

DATE OF HEARING: April 24, 2001

DECISION RELEASED: May 1, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on April 24, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Ronald A. Desroches (the "Applicant")
Motor Vehicle: 1988 Plymouth VOF, plate no. AJWB944 (the "vehicle")
Date of Appeal: April 5, 2001

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

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

This matter came before this Tribunal on April 24, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals which were entered into evidence as Exhibit # 3. These documents were submitted with consent of all parties.

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

OWNER IS HANDICAPPED (BAD LEGS) HAS DIABETES, IS UNABLE TO WALK FAR.
RELIES ON VAN TO GET TO DOCTORS AND HOSPITAL FOR APPOINTMENTS,

LIVES IN COUNTRY. THE VAN IS THE ONLY MEANS OF GETTING AROUND WHEN NEEDED.

The Applicant testified that while he was asleep the landlord's son took his van in order to get urgently needed medication for his friend. He stated that the police stopped his van as it was similar to a wanted vehicle sought by police. A standard check on the driver's licence revealed the driver was under suspension for "failing to remain", and as a result the Applicant's vehicle was immediately impounded.

He stated permission was neither asked nor given for the use of his vehicle, and he knew Richard Dean's licence was in trouble.

The Applicant's health requires him to make frequent medical visits into town. He testified that because of his rural address he needs his car to attend to his Doctor's office and other essential needs such as groceries. He spoke of the high costs of taxis and of his inability to find other means of travel. He is very concerned in the event he needs emergency health care for his suspected heart condition.

The seventy year old Applicant has a very limited income and cannot afford to replace his vehicle or rent a car.

Joan Dean, his landlord, and the mother of Richard Dean, the suspended driver, testified in support of the Applicant, but added no other evidence.

Neither witness testified why the impoundment took place at 0130 hours or where the driver expected to get medication so late at night for the friend.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

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

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

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

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail To Remain At Accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 4, 2001.

It was determined by the Registrar during the examination of the Applicant that although several community agencies provide transportation for those in need at a very nominal

cost, none of these options had been investigated by the Applicant. It was also learned that a second party in the impounded vehicle who was qualified to drive, road as a passenger. No explanation was offered except that he was asleep.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from consideration of any other factors not arising from or directly related to the impoundment itself.

Section 22(3)(d) of Regulation 632/98 precludes the Tribunal considering the impact of any loss as a result of the impoundment that may be on the person who was driving the vehicle at the time impoundment while their driver's licence was under suspension. In this case it was the landlord's son whose licence was already under suspension and not the Applicant.

In order for the Applicant's claim to be considered under Section 22(2)(b), (c), and (d), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been explored for an alternative vehicle. Also, the evidence does not establish that the impoundment results in a threat to the health or safety of any person normally transported in the motor vehicle, as referred to in section 22(1)(a) of Regulation 574, amended.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been explored and inquired into under section 22(4) of the Regulation. In fact the evidence indicates a number of options remain to be considered as the Registrar suggested and that section 22(3) has not been met.

Therefore, the Tribunal finds that the Applicant has failed to meet the onus of proof under Section 22(2) of the Regulation and is therefore precluded from consideration of the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford
Presiding Member

RELEASED: May 1, 2001

C.C. CONTRACTING INC. O/A 1400598 ONTARIO LTD.

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

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

TRIBUNAL: NORMAN MEALING,
Presiding member

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

C.C. CONTRACTING INC. O/A 1400598 ONTARIO LTD., Applicant

CHRIS COLUCCI, Agent for Applicant

DATE OF HEARING: April 30, 2001

DECISION RELEASED: May 2, 2001 Toronto

REASONS FOR DECISION

A hearing was held on April 30, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: C.C. Contracting Inc. o/a 1400598 Ontario Ltd. (the "Applicant")
Motor Vehicle: 1997 Ford COF, plate no. 194 1JB (the "vehicle")
Date of Appeal: April 10, 2001

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

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

This matter came before this Tribunal on April 30, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Driver Licence was Suspendent

The Applicant stated that Mr. Borley had worked for C.C. Contracting, Inc. for "about two and a half years", and, at the time of Mr. Borley's employment, a Driver's Abstract had been obtained that indicated Mr. Borley was in possession of a valid driver's licence. The Applicant did not provide written evidence in support of this statement.

The Applicant further stated that, on the day the impoundment took place, Mr. Borley was driving the vehicle in place of another employee. He also stated that this was an exceptional situation in that Mr. Borley was not required to drive on a regular basis in the course of performing his job. The Applicant indicated that, on the day in question, he did not confirm that Mr. Borley possessed a valid driver's licence.

The Applicant also indicated, during the course of his statement, that the truck impounded was equipped with special fuel tanks, a tool chest, and specialised electrical equipment, and that it served a particular purpose in servicing C.C. Contracting, Inc. job sites at the airport, and in Woodbridge and Whitby. He also indicated that the cost of replacing the impounded truck would affect the profitability of the company, and that the company could not afford to rent a replacement truck. The Applicant provided no documentation to this effect.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. John D. Borley;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Breath or Blood Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 1, 2002.

At the hearing, the Agent for the Registrar, with the consent of the Applicant, introduced documentation which showed that C.C. Contracting, Inc. had at its disposal three leased trucks, including the truck which was impounded.

The Agent for the Registrar questioned the Applicant concerning the driver abstract obtained for Mr. Borley at the time of his employment with C.C. Contracting Inc., and, in particular, his statement that “nothing appeared” on Mr. Borley’s record. The Agent pointed out that, given Mr. Borley’s driving record, the Applicant should have noticed previous convictions and suspensions dating from 1997. The Agent also confirmed that the Applicant had not checked the status of Mr. Borley’s driver’s licence on the day of the impoundment.

The Agent for the Registrar also questioned the Applicant on the impacts on C.C. Contracting Inc. as a result of the impoundment. His questioning established that C.C. Contracting Inc. continues to work at jobs at the airport, and in Woodbridge and Whitby, that no contracts had been lost, and no layoffs had occurred. He also questioned the Applicant concerning alternatives to replace the impounded truck, and, in response, the Applicant indicated that the specialized equipment referred to in his testimony had been removed from the impounded truck and placed in one of the other trucks. The Applicant also indicated that he had explored renting a replacement truck, but that it was too costly. He did not, however, recall the exact cost, nor did he have any documentation to support this statement.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

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

APPLICATION OF LAW TO FACTS:

The Applicant appealed the impound order on the grounds of due diligence and exceptional hardship. The onus, therefore, is on the Applicant to demonstrate that either condition exists.

With respect to due diligence, the law requires that the owner exercised all reasonable efforts to determine that Mr. Borley's driver's licence was not suspended. The evidence indicates that the Applicant stated that he had obtained a driver's abstract for Mr. Borley at the time of his employment "about two and a half years ago", and that, at that time, Mr. Borley held a valid driver's licence. However, Mr. Borley's driving record indicates that his licence was suspended from July 18, 1997 to July 18, 1998 or roughly at the time of his employment with C.C. Contracting Inc. The Applicant's failure to provide an exact date for Mr. Borley's employment, and his statement that the abstract showed a clean record raises doubts as to the veracity of this claim. Moreover, the Applicant stated that Mr. Borley did not regularly drive as part of his employment, but, rather, worked closely with the applicant. It is not unreasonable to conclude that, depending upon the nature of the working relationship, that the Applicant might have been aware of Mr. Borley's most recent suspension which occurred on December 21, 1999. The Applicant also testified that, at the time Mr. Borley was asked to drive the impounded truck, he did not request that Mr. Borley show him his driver's licence.

In light of the evidence, therefore, the Tribunal finds that the Applicant has failed to demonstrate that he exercised due diligence, i.e. all reasonable efforts, to determine that Mr. Borley's driver's licence was not suspended.

With respect to exceptional hardship, Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

The evidence indicates that the Applicant has been inconvenienced due to the impoundment. However, other alternatives to the impounded truck are available to the Applicant including the use of two other trucks leased to C.C. Contracting Inc. There is no evidence of there being a health or safety issue as a result of the impoundment.

There is also no evidence of immediate or significant economic impact given that the company continues to work, no contracts have been lost, and no layoffs have occurred.

Therefore, the Tribunal finds that the Applicant has failed to demonstrate that C.C. Contracting Inc. has suffered exceptional hardship as a result of the vehicle impoundment.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: May 2, 2001

POLSINELLI

VINCENZO POLSINELLI

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE TRAVEL INDUSTRY COUNCIL
OF ONTARIO

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES: STEVE POLSINELLI, Agent, representing the Applicant
TREVOR BRANION, Counsel, representing the Travel Industry
Council of Ontario

DATES OF
HEARING: April 5, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision dated November 7, 2000 of the Board of Directors of the Travel Industry Council of Ontario (the "TICO") to deny the Applicant's claim for reimbursement in the amount of \$379.00 from the Compensation Fund established under section 45(1) of the Ontario Regulation 806/93 (the "Fund").

Vincenzo Polsinelli (the "Applicant") bases his claim on the provisions of Section 50(1) of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

THE EVIDENCE:

Evidence was both oral and documentary. Oral testimony was given by the Applicant, Vincenzo Polsinelli, and his wife Rose Polsinelli. The Applicant stated that when he tried to purchase a one-way airline ticket home from Mexico, the agent in Mexico told him that he had to buy a regular ticket and could not buy a *charter* ticket as he had come to the country by car. The Applicant stated that he did not know it was illegal to leave the country on a *charter* flight if he had not arrived by a *charter* flight.

The Applicant testified that prior to his leaving Canada, Anna the travel agent at Richmond Hill Travel had told him that if he needed a ticket to call her. Accordingly, when he could not get a ticket in Mexico, he called his wife and instructed her to buy a ticket from Anna at Richmond Hill Travel. He did not tell his wife about the problem with a *charter* ticket, and his wife purchased a *charter* ticket at Richmond Hill Travel.

When the Applicant tried to pick up the ticket in Mexico, he was advised that he could not use it, and he never received the ticket. In order to fly back to Canada, he had to buy a package of tickets which cost him \$600.00 in U.S. funds. There was a delay in his departure from Mexico as he had to apply to the Immigration department to extend his visitor's permit. Once he returned to Canada, he tried to get his money back from Richmond Hill Travel, but was told that he needed the ticket which he was never given. Finally, he received a voucher from Premier Travel, but when he tried to use it, he found that it would have been more expensive than buying a ticket from Air Canada.

Under cross-examination, the Applicant stated that he had driven to Mexico and flown home before, but did not remember if he had returned on a *charter* flight. He denied that Anna at Richmond Hill Travel had advised him that there could be the problem if he tried to return with a *charter* ticket.

Mrs. Rose Polsinelli testified that she is the wife of the Applicant, and made arrangements with Richmond Hill Travel to obtain a ticket for him to come home. She did not request any particular type of ticket, and did not advise the travel agent that the Applicant had tried to purchase a *charter* ticket but had been told that he could not fly out of Mexico with it. The witness did not think that the travel agent had advised her that the ticket she purchased was non-refundable, but she was not sure.

Cindy Mirochnick and Lori Furlan gave evidence on behalf of TICO.

Cindy Mirochnick testified that she had been employed as a Complaints Officer with TICO for one year. Prior to that, she was the Systems and Operations Manager for Premier Holidays. Although she had no dealings with this case, she confirmed that Premier Holidays was registered as a wholesaler and that the ticket purchase by the Applicant's wife was a non-refundable *risk* seat. Ms. Mirochnick stated that the travel agent, Richmond Hill Travel would be aware that the seat was non-refundable, and was obliged by section 21(2) of Regulation 806/93 to the Act to advise the customer. When she was asked about the voucher given by Premier Holidays, she explained that although the wholesaler was not responsible to provide a refund to the customer, the voucher was given as a *goodwill gesture*. She explained that when the customer tried to use the voucher to purchase *charter* travel for a trip with a stay of more than one or two weeks, it may have been more expensive than a regular ticket, as the customer would have to purchase two return trip tickets and forfeit the travel one-way on each ticket. Ms. Mirochnick explained that the travel agent would take the credit card payment in the name of the wholesaler, as the travel agent did not have status as a merchant to accept payments. She testified that Premier Holidays would not have advised the Applicant or his wife that the ticket sold through Richmond Hill Travel was non-refundable. In cross-examination, she agreed that Premier Holidays would know that a person could not fly out of Mexico on a *charter* if they had driven into the country.

Ms. Lori Furlan testified that she is the claims coordinator for TICO and dealt with this matter. She stated that the amount eligible for the claim was \$350.00 as the amount paid for tax was not eligible. Her evaluation of the case was that the claim would be denied as the \$350.00 voucher was given as a "good will gesture" and was excluded by the Act. She also stated that the travel agent advised her that the claimant told them that he was driving to Mexico and wanted the one-way ticket Toronto and that they

claimed to have advised him he would have problems using a ticket for a *charter* flight to come back, but that he advised them that he had done it before.

FACTS FOUND PROVEN:

The Tribunal finds that the travel agent at Richmond Hill Travel knew that she had not sold a *charter* ticket for the Applicant to travel to Mexico.

The Applicant testified that he was not warned that if he drove to Mexico he would not be able to fly home on a *charter* ticket. There was evidence that the travel agent told the investigator for the Fund that she had warned the Applicant that he could have trouble leaving Mexico with a *charter* ticket and that she was told by the Applicant that he had done it before. However, the travel agent did not testify before the Tribunal, and the best evidence before the Tribunal was that of the Applicant. The Tribunal finds that the travel agent did not, as required, warn the Applicant and did not warn the Applicant's wife of the potential problems with the ticket that was sold. The travel agent at Richmond Hill Travel sold a *charter* ticket which the Applicant would not be able to use, and it was also non-refundable. The travel agent purchased the ticket through Premier Holidays and offered the Applicant a refund on a condition that the Applicant could not fulfill. Premier Holidays attempted to resolve the matter by giving a voucher in the amount of \$350.00. However, when the Applicant tried to use the voucher, it did not make economic sense to do so.

In this case, the ticket sold for the use of the Applicant did not provide travel services as it could not be used by him for reasons within the knowledge of the travel agent. The Applicant intended to use the ticket, but could not do so. He did not choose not to use it. There was a refusal to provide him with a refund without the ticket, and he was later given a voucher by Premier Holidays. This voucher could have been used for the purchase of travel services from Premier Holidays, however it was not cost-effective to do so and was of no value to him.

ISSUE:

Does the claim for \$379.00 by the Applicant for the cost of the ticket purchased from Premier Holidays through Richmond Hill Travel fall within the terms of Regulation 806/93 to the Act?

THE LAW:

The relevant portions of regulation 806/93 of the *Travel Industry Act* that are applicable to these proceedings are:

Section 21(2) which states:

.....

(2) Before reserving travel services for a customer, the travel agent shall bring to the attention of the customer any conditions related to the

purchase of travel services that the travel agent has reason to believe may affect the customer's decision to purchase and shall,

- (a) disclose the price and the terms and conditions of reservation,

.....

Section 50(1), which reads as follows:

Section 50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer made payment for the travel services directly to or through a registered travel agent;
- (b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- (c) the customer has not been reimbursed by,
 - (i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

.....

Section 50(3), which reads as follows:

Section 50(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

.....

- 4. For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.

.....

- 7. For any taxes, fees or levies imposed by a government or a government body.

APPLICATION OF LAW TO FACTS:

As required by section 50(1)(a) of Regulation 806/93, the Applicant made payment for travel service directly to or through a registered travel agent. Here the Applicant made payment to the registered Wholesaler Premier Holidays through the registered travel agent Richmond Hill Travel.

The Applicant made demand for payment as required by section 50(1)(b) of Regulation 806/93. Premier Holidays attempted to settle the matter by giving the Applicant a voucher for travel services. He attempted to use it, but in the circumstances it would have cost him more to use it than to purchase service elsewhere. The voucher, therefore, is not a factor relevant to this claim.

As required by section 50(1)(a) of Regulation 806/93 the customer has not been reimbursed by the registrant, because Premier Holidays became bankrupt or by any other person who has received the Applicant's money, that is Richmond Hill Travel; or by any other person or legally obliged to reimburse or compensate the Applicant.

Also, the services were not available and it was not due to the Applicant's action or failure to act. Here the Applicant tried to obtain the *charter* ticket to fly back to Canada. It was not released to him because a condition, known to the travel agent but not to the Applicant, was not met.

The allowable amount of the Applicant's claim only includes the cost of the travel services which are \$350.00. Any amount paid for taxes, fees, or levies imposed by a government or government agency are excluded under section 50(3) paragraph 7 of Regulation 806/93.

DECISION:

Accordingly, pursuant to the authority vested in it by section 62(6)(a) of Regulation 806/93 under the *Travel Industry Act*, this Tribunal allows the Applicant's claim in the sum of \$350.00 against the Travel Industry Council of Ontario and directs the Council to pay such amount out of the Compensation Fund to the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: May 2, 2001

DURETTE-EXHP

SUSAN DURETTE

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

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

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

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

SUSAN DURETTE, Applicant
unrepresented

DATE OF HEARING: May 1, 2001

DECISION RELEASED: May 4, 2001 Belleville

REASONS FOR DECISION

A hearing was held on May 1, 2001, at Belleville, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Susan Durette (the "Applicant")
Motor Vehicle: 1986 Pontiac Firebird, plate # AJWF 825 (the "vehicle")
Date of Appeal: April 11, 2001

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

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

This matter came before this Tribunal on May 1, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

pg1

To whom it may concern:

Brian Paterson and I, (Susan Durette) had just bought a /86 firebird so we could travel back and forth to work also for everything else as we live out in the country with our 13 yr old son. Right after I got the car saftied and on the road, Brian did a tune up on the car and crossed the wires. We called out to Bill Leeman's garage and talked to Timmy Brix,

he told us to bring the car into Rossman and he would look at it. It took Timmy about two hours to fix the problem and we all went to test drive the car to make sure it was running properly. That was when we came across a ride program and got stopped. The officer asked Timmy for his licence and he told them he didn't have one.

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Right away I offered my licence, ownership and insurance to him. He then arrested Timmy and talked to my boyfriend Brian. They then impounded my car for 45 days. The next day I phoned the police to find out where the car was and find out what I could do to get the car back. They told me the car was at Academy Towing, and because I didn't know Timmy didn't have a licence that I could appeal this. I then phoned Academy Towing to find out what the cost would be after the 45 days and they said it would be about \$850.00 approx. I had recently just moved back into the Picton/Belleville area. We found a home to live in, I had just gotten an insurance back as it lapsed due to funds. I also just got a car, due to the fact that my other one was no longer working. Brian and I are on

pg3

Ontario Works trying to get off of it by trying to get any work we can. To say that having no car is a hardship is an understatement for the following reasons. As I live out in the country I have no transportation of any kind, and there are no buses. I also have a daughter with a new born baby; which dose not have any transportation and rely on me to take her and the baby to the doctors, grocery's ect. I am now also behind in my rent as a result of losing the car, we are unable to get back and forth to work. My mother and father let us use their car when they don't need it, but that doesn't help us for work hours, as my mother needs the car for herself. They also have my little brother at home with lots of medical problems and needs their car there in case

pg4

of any emergencies. We put money into a van in which the rad went on it and froze up, we tried to put a Mustang on the road and the trans-mission went on it the same day we put a trip permit on it. So we picked up a transmission and found out that the front pump on it was broken. Brought it back to R & B's, Randy the owner didn't have another transmission and he wouldn't give us our money back, but he said he would give us credit for in store parts. In which we didn't need or use. We told Randy we would wait on a transmission. This is now two months later. So then we came across the firebird and desperately needed a car for ourselves. We took our income tax money bought the car. Had Timmy do all the work and got it on the road. And that is how I came to this situation. I would never of let Timmy Brix drive my car if I had known he didn't have a licence.

Susan Durette

As someone wipted out my mail box through the winter, I've had to have all my mail sent to my mothers.

Address is
Susan Durette
R R 2 Picton Ont
K0K-2T0
Thank you.

To whom it may concern:

I James D. Brix was working on Susan Durette's car in Rosemore on Thursday, March 29th, 2001 at Leeman's Auto Restoration. When we finished the car I test drove it and was pulled over and charged. Susan Durette was not informed that I didn't have a licence.

James Daniel Brix
April 4, 2001

To whom it may concern.

Susan Durette had her 1986 Firebird here at my shop on March 29/01 then (Jim) worked on it until approx. 10:30-10:45 they took it for a test drive.

William B. Leeman

The Applicant was on Ontario Works Programmed and was registered with three "Temp" Agencies. The Applicant was basically *"on call"* and had to get to work when called. The Applicant testified that she lost *"lots of work"* because of lack of transportation.

The Applicant stated in her sworn testimony that she cannot afford to pay the impoundment charges.

Under cross-examination, the Applicant re-iterated her viva voce evidence and confirmed that she lost her home and is now living in her mother's trailer. The Applicant admitted that Ontario works had promised her assistance in repairing her mother's car, the Mustang, but that vehicle broke down shortly it was put on the road. At this time, her parents need the Mustang as their other car is in need of repair.

The Applicant is able to borrow her mother's car, but not during work hours, as her parents need the car to get to work. As for after hours, the Applicant affirmed that her brother needs special medical attention and her mother is reluctant to lend her the car as the brother, who is in a wheel chair, may need medical intervention.

The Applicant was not aware that she still had a car registered in her name as that car was taken to the scrap yard.

According to the Applicant, neither the driver of the vehicle nor the owner of the garage have offered to pay the Applicant's costs in recovering her car.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. James D. Brix;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 6, 2001.

The Respondent offered no evidence other than the documents on file presented for the hearing.

In closing, the Respondent quoted section 22 of the Act. The Respondent argues that the impoundment may be inconvenient to the Applicant, but that there is no hardship, as Ontario Works would have provided for transportation costs for a recipient to get to and from work.

The Respondent contends that the Applicant made no efforts to mitigate her losses, by making herself aware of the venues available to her through Social Services.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Before proceeding to set out the reasons for the decision, the Tribunal will address the Respondent's comment regarding the dates of the notes submitted by the Applicant, from Jimmy Daniel Brix, the driver of the vehicle and William B. Leeman, the owner of the garage where Mr. Brix works.

The Tribunal acknowledges that both notes refer to the date the car was in the garage as March 29, 2001. The Respondent argued quite correctly that the impoundment took place on March 28, 2001.

The Tribunal refers to the Notice of Appeal filed by the Applicant, wherein the date of impoundment is shown as "*March 29/01*". The Tribunal has no alternative but to assume that the Applicant has confused the dates and accepts the handwritten notes from Mr. Leeman and Mr. Brix, as evidence.

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2 of the Act.

Subsection 22(2) of Regulation 574 as amended by O. Reg. 632/98 provides that for the purposes of considering hardship, inconvenience, financial loss, loss of employment or opportunity for employment cannot be considered, unless there is no alternative vehicle and the economic loss is immediate, significant and long lasting, and the impact of the loss is on a person other than suspended driver.

The Tribunal will address each point separately.

Is there no alternative to the impounded vehicle?

The Respondent confirmed that there is no public transportation in the area, but contends that Ontario Works would have paid for taxis on the daily basis, if needed. The Applicant testified that she was in touch with her Worker who in fact suggested that assistance would be provided to fix the Applicant's mother's car, but at no time did the worker inform the Applicant that transportation could in fact be provided.

The Tribunal is aware of the current policy guidelines in place with respect to special transportation and that *transportation costs may also be covered*. The pertinent word being "*may*". The Applicant did not receive such a benefit, and the Applicant's Social Worker failed to inform the Applicant that such payments were available to her. The Tribunal cannot find that the Applicant would have been entitled to benefit, but finds that the Applicant did not receive such a benefit.

With respect to the Applicant's possible use of other vehicles, the Tribunal accepts the testimony of the Applicant that doing so, would not only probably require not only extra costs in repairs, but also could put her brother at risk.

Subsection 22(3)(a) of Regulation 574 as amended by O. Reg. 632/98 provides that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available. The Tribunal finds that there is no alternative vehicle to replace the impounded vehicle.

Is the loss immediate, significant and lasting?

This Tribunal further finds that the Applicant meets the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that economic loss may be regarded if the loss is immediate, significant and lasting.

The Applicant testified that she has lost work due to her lack of transportation. The Tribunal finds this loss of income to be immediate and in the circumstances of the Applicant working for "temp" agencies, it will have possibly long lasting cumulative effects.

The Applicant satisfied the Tribunal that she has in fact incurred a loss of income and extra expenses which could be considered hardship which must be immediate, significant and lasting.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne by the owner of the vehicle who ordinarily uses the vehicle, not the driver. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574, provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of Subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon a person other than the suspended driver. The Applicant meets the cumulative requirements of the requirements 22(3). There is no doubt that the economic losses incurred by the Applicant are not a result of a loss by the suspended driver. At this point in time the Applicant is the sole provider, for her family, the loss of the motor vehicle significantly affects her earning capacity.

After assessing the evidence presented, the Tribunal finds the Applicant has met all the criteria of Subsection 22(3) and that the Appellant has suffered exceptional hardship as a result of the impoundment.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: May 4, 2001

1428791 ONTARIO LTD.

HIGHWAY TRAFFIC ACT
Revised Statutes of Ontario, 1990, Chap. H8, as amended

1428791 ONTARIO LTD.

IN THE MATTER of an APPEAL from a PROPOSAL ISSUED BY
THE DIRECTOR OF VEHICLE INSPECTION STANDARDS

AND IN THE MATTER OF a Proposal of the Director of Vehicle
Inspection Standards made pursuant to section 95(2) of the
Highway Traffic Act from a Decision dated January 12, 2001 to
refuse the issuance of a motor vehicle inspection station licence.

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

1428791 ONTARIO LTD.

Applicant

-and-

DIRECTOR OF VEHICLE INSPECTION
STANDARDS

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8, as amended (the "Act"), 1428791 Ontario Ltd. (the "Applicant") initiated an appeal under section 95 from a Proposal of the Director of Vehicle Inspection Standards pursuant to section 91(3)(a), and (e) of that Act, dated January 12, 2001 to refuse the Applicant issuance of a motor vehicle inspection station licence;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period prescribed by section 95(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8, as amended;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 95(4) of the *Highway Traffic Act*, this Tribunal directs the Director of Vehicle Inspection Standards to carry out his proposal to refuse the issuance of a motor vehicle inspection station licence to 1428791 Ontario Ltd.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: May 7, 2001

HAKIM

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

IN THE MATTER OF
JAWAD HAKIM

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 12, 2001

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

JAWAD HAKIM

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

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

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 7, 2001

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

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Jawad Hakim
71 – 1020 Central Park Drive
Brampton, ON L6S 3J5

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Jawad Hakim (hereinafter referred to as “the Applicant”) and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as “the Registrar”), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to an order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
3. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
4. The Applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
6. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under the

Criminal Code or convicted under any law of an industry-specific offence, the Registrar is directed to and shall carry out the proposal.

10. The Applicant will provide a copy of this order to his employer forthwith.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of April 2001.

Jawad Hakim (signature)

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

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

KLEIN and WEINSTEIN

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

IN THE MATTER OF a CLAIM by
ELISA KLEIN AND ELLIOT WEINSTEIN

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

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

ELISA KLEIN AND ELLIOT WEINSTEIN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TRAILWOOD HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter
on February 20-21, 2001;

AND WHEREAS the matter was adjourned upon consent of the parties to May 9 and
10, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing
peremptory against the Applicants to commence at the Tribunal's Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, September 10,
2001, and to continue September 11 and 12, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 8, 2001

NGUYEN

CUONG KIEN NGUYEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

CUONG KIEN NGUYEN, representing himself
A. MICHAEL ROTHE, counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF

HEARING: April 30, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal dated December 7, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Cuong Kien Nguyen ("Nguyen") as a motor vehicle salesperson under the provisions of the Act. Nguyen appeals the Notice of Proposal to the Tribunal.

The Registrar's Notice of Proposal to refuse registration states as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that the Applicant be financially responsible in the conduct of business and that the Applicant carry on business in accordance with the law and with integrity and honesty. The Applicant's conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The Registrar's Notice of Proposal also states that the following are the particulars upon which the Registrar relies:

1. The Applicant applied for registration on or about November 20, 2000. The Applicant proposes to work for Markham Mazda.
2. Question 9 of the application for registration asks "Have you ever been found guilty or convicted of an offence under any law or any charges pending". The Applicant answered, "Yes" indicating "theft under fell (sic) to report".
3. A criminal background check revealed the following convictions:

May 5, 1988 (Youth Court)

(1) Theft Under \$1,000.00

(2) Fail to Appear

May 10, 1988	Poss of Property obtained by Crime over \$1,000
May 5, 1989	Theft by Conversion over \$1,000
Nov 23, 1989	Fail to Comply with Recognizance
July 3, 1990	Att Fraud under \$1,000.00
Mar 4, 1991	(1) Fraud under \$1,000 (2) Attempt to Obstruct Justice (3 Chgs.) (3) Theft Over \$1,000
Mar 11, 1991	(1) Fraud over \$1,000 (2) Fraud under \$1,000 (3) Att Fraud under \$1,000
April 17, 1991	(1) Attempt to Obstruct Justice (2) Theft under \$1,000 (3) Fail to Comply with Probation Order Sec 740CC
Sep 7, 1994	Theft over \$1,000.00
July 30, 1997	(1) Conspiracy to Traffic in a Narcotic (2) Trafficking in a Narcotic (3 Chgs)
December 16, 1997	Fail to Comply with Probation Order
4. The Applicant was granted parole on November 7, 2000.
 5. The Applicant is wanted in the Province of Quebec in relation to a Fraud offence that occurred January 30, 1986.

THE EVIDENCE:

The sole witness for the Registrar was Laura Gordon ("Gordon").

She testified that she is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC, which was created in 1997, is charged with enforcing and ensuring compliance with the Act and its Regulations. Her duties include overseeing compliance with the Act and Regulations which includes reviewing applications for registration as salespersons.

In the course of her duties she became aware of Nguyen's application for registration, and she is familiar with the details surrounding his application and the investigations instituted by OMVIC relative to his application.

On November 13, 2000 OMVIC received Nguyen's application for registration (Exhibit 3, Tab 3). Together with the application were two attachments. The first attachment was a letter of October 11, 2000 addressed "To whom it may concern" from Muriel Lett, Nguyen's Parole Officer, which read as follows:

This is to advise that Kien Cuong (Jason) Nguyen, D.O.B. 1969-12-30, has been on Full Parole since 1999-09-29. Throughout this time, there have been no apparent violations of his parole.

The second attachment is a letter from the Sales Manager of Markham Mazda also addressed "To whom it may concern" and dated November 10, 2000, which reads as follows:

This letter is to recommend Mr Jason Kien Nguyen. We believe that Mr Nguyen will be a great asset to our company. Since Mr Nguyen employed by us, he has been a good role model and the team leader by consistently exceeding his target of the month and being employee of the month for 5 consecutive months. We are not hesitated to recommending Mr Nguyen to OMVIC to get his sales license. We known about his past criminal record and we strongly feel that Mr Nguyen has changed and dedicated himself to an automotive industry. If there are any questions or information needed please feel free to contact me at the number above.

Gordon stated that when she reviewed Nguyen's application she had concerns with his answer to question 9 which question reads as follows:

Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).

To this question Nguyen had answered "Yes" and also stated:

Theft under and fell (sic) to report"

Subsequent to receipt of Nguyen's application for registration OMVIC, on November 15, 2000, received a letter from Nguyen reading as follows:

My name is Jason Kien Nguyen, I'm would like to register with OMVIC for my sales license to work at car dealership. I do have a criminal record and I'm currently under parole for the charger of conspiracy and trafficking, as you can see the attached with the application is the 2 recommendations from my parole officer and my boss at Markham Mazda.

I have convictions for theft under and fail to comply with the bail condition. Most current one is back in 1994 I have difficulty with my wife and her family so I started to associated with the wrong crown of friend, I got in troubles, I plead guilty for conspiracy and trafficking in 1997. I admitted what I did is wrong and I had served my sentence and now I'm on parole. Due to this unthoughtful thing that I had done, I got sentence for 7 years and lost my wife and my two children. While I'm serving my time I had been attending a few educational courses, I got all the recommend from the teacher as well as the volunteer works. Presently I employed with Markham Mazda and my boss is well aware with my record, he has given me a chance and I found my future in automotive industry. This is my chance and my only chance that I have to make thing right and to contribute myself to the society. I like to ask for your approval with my license so I can continue with my job at Markham Mazda, and if there is any other needed information please feel free to contact me at 416 977-6608.

In order to verify the accuracy of Nguyen's statements in answer to question 9 a C.P.I.C. report was obtained on November 23, 2000.

The C.P.I.C. report contained a list of criminal charges against Nguyen as well as convictions. These convictions are referred to in the particulars in the Notice of Proposal to refuse registration. (Exhibit 3, Tabs 1and 5)

Upon receipt of the C.P.I.C. report Gordon noted that Nguyen had not made full disclosure of his criminal record despite the following warning appearing at the foot of question 9 on the application:

Note: Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offence under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.

Gordon's initial concern was that Nguyen had not made complete disclosure.

She also stated that she had a further concern in that Nguyen's criminal activity spanned the period of 1988 to 1997 which is indicative of a pattern of dishonesty as well as a course of ongoing misconduct. Her concern was heightened by the fact that Nguyen had not fully disclosed his criminal past which indicated that he was not telling the truth.

Gordon also stated that the Act's primary purpose is to ensure consumer protection and sets out the criteria for registration of persons to ensure that the public is protected when dealing with motor vehicle salespersons.

Nguyen gave evidence himself, and he confirmed the convictions as listed in the C.P.I.C. report which are convictions also referred to in the Notice of Proposal.

However, he did wish to bring to the Tribunal's attention that the date of each conviction related to an offence that had occurred some two or more years before the conviction. Therefore the last date when he committed a criminal offence was not on December 16, 1997 but in approximately 1994. Accordingly, he contended he has been conviction free since 1994.

He denied that he did not intend to disclose his convictions as alleged by Gordon and pointed to the fact that on November 15, 2000, some two days after his application was reviewed by OMVIC, he wrote to the latter giving additional disclosure.

He also stated that he has paid for his criminal past. He is reformed and is now working for a car dealership as a motor vehicle salesperson. His position with the dealership has given him the opportunity to change his life. He has voluntarily attended 5 courses of counselling and has not breached his parole in any manner. He has also done volunteer work.

Under cross-examination, he admitted that he is working as an unregistered motor vehicle salesperson and that the dealership is aware of his past convictions. He contended that he is not aware that being unregistered as a salesperson disentitled him to act as a motor vehicle salesperson.

FACTS FOUND PROVEN:

The following are the facts found proven by the Tribunal, based upon the evidence presented in this matter.

1. On November 7, 2000 Nguyen signed and executed an application for registration as a motor vehicle salesperson and attached to that application were two letters; one from Nguyen's Parole Officer and the other from a motor vehicle dealership, namely Markham Mazda. (Exhibit 3, Tab 3)
2. The aforesaid application and attachments were received by OMVIC on November 13, 2000.
3. On November 15, 2000 Nguyen wrote a letter to OMVIC in amplification of his application and which letter was received by OMVIC on November 15, 2000. (Exhibit 3, Tab 4)
4. Nguyen was convicted of the various criminal offences between May 5, 1988 and December 16, 1997 as are set out in the C.P.I.C. report of November 23, 2000. (Exhibit 3, Tab 5)

THE LAW:

The *Motor Vehicle Dealers Act*, Section 5.(1)(b) and (d) state as follows:

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

Section 6.(1) of the Act states:

Section 6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

.....

Section 7.(1) and (4) of the Act state as follows:

Section 7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

.....

Section 7.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove that the past conduct of Nguyen affords reasonable grounds for the belief that Nguyen will not carry on business in accordance with law and with integrity and honesty.

The proper test to be applied in a matter of this nature has been set out in *RE BRENNER*, 19 CRAT 58 in which Southey J. stated:

The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

The Tribunal finds that Nguyen did initially, in answer to question 9 in the application, fail to fully answer that question. However, on November 15, 2000 some two days after OMVIC received Nguyen's application it was in possession of his subsequent letter expanding on his convictions. This letter was not a complete disclosure of his convictions, but nevertheless the Tribunal is not able to find a deliberate attempt to cover up his criminal past. Nguyen's answer to question 9 and his follow up letter leaves the Tribunal with the belief that there was no deliberate non-disclosure but rather a partial disclosure due to carelessness and the lack of attention to detail. Nevertheless, there was a warning at the foot of question 9 that full and complete disclosure was required and this was clearly not adhered to by Nguyen.

However, of greater moment is Nguyen's past conduct as reflected by his admitted criminal convictions. Those convictions are many and span a period of nearly ten years. They show an ongoing inability to abide by the law. Many of the convictions relate to fraud and theft which in themselves indicate a lack of integrity and honesty. Taken in their totality these convictions show an ongoing course of conduct unacceptable in an ordered and law-abiding society.

The Tribunal believes, that having regard to the recent past misconduct of Nguyen, sufficient grounds exist to support the Registrar's opinion that Nguyen will likely not act within the law and with integrity and honesty. This is borne out by Nguyen continuing to act as an unregistered motor vehicle salesperson. This in and of itself indicates flouting

of the law and a non-acceptance of an ordered society - one which accepts and embraces the rule of law. Not only in the past has Nugyen seriously transgressed the law and acted without integrity and honesty but also his present day activity of acting as an unregistered salesperson is indicative that he will in the future not act lawfully and with honesty and integrity.

The Tribunal notes that Nugyen has been conviction free since December 16, 1997. However, the period of some three and one half years since his last conviction is not sufficient to imbue this Tribunal with confidence that Nguyen is now fully reformed. In the matter of *RIPANI*, 18 CRAT 356, the Commercial Registration Appeal Tribunal in discussing the recent nature of convictions stated:

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then, certain terms and conditions will be imposed.

The Tribunal believes that at this stage, at any event, Nguyen's many convictions are too recent and that some further time must be allowed to pass within which Nguyen does not re-offend. Only with the passage of time, coupled with exemplary behaviour, will it be possible to consider him for registration as a salesperson. At the present, the Tribunal finds that there is no error in the Registrar's proposal to refuse Nguyen registration.

DECISION:

By virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out his proposal dated December 7, 2000 to refuse the registration of Cuong Kien Nguyen as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 9, 2001

HAINSWORTH

ROSS HAINSWORTH

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ROSS HAINSWORTH, representing himself
LARRY A. BANACK, counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF

HEARING: April 23, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal dated November 15, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Ross Hainsworth ("Hainsworth") as a motor vehicle salesperson under the provisions of the Act.

The Registrar issued the Notice of Proposal in terms of Section 7(1) of the Act. The reasons for the Registrar having issued the Notice of Proposal are stated in that proposal to be as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register Ross Hainsworth as a motor vehicle salesperson.

The Registrar, under the heading "Particulars," gives the following reasons for his proposal:

1. Ross Hainsworth submitted an application for registration as a motor vehicle salesperson to the Registrar on or about July 13, 2000.
2. On his application for registration the applicant disclosed that he was disbarred by the Law Society of Upper Canada in 1995. The applicant further disclosed that there were charges pending against him relating to criminal harassment of a member of provincial parliament.

3. Subsequent to submitting the applicant, Hainsworth was convicted of criminal harassment.
4. Mr. Hainsworth's disbarment together with his conviction are inconsistent with the intention and objective of the Motor Vehicle Dealers Act and therefore the applicant is not entitled to registration as a salesperson pursuant to the Act.

Hainsworth, in terms of Section 7(2) of the Act, has appealed the Registrar's proposal to this Tribunal.

THE EVIDENCE:

The sole witness for the Registrar was Mary Jane South, a summary of whose testimony follows.

Ms. South stated that since 1997 she has acted as the Deputy Registrar under the Act and is employed by the Ontario Motor Vehicle Industry Council (OMVIC) which is a non-profit corporation with delegated powers to administer the Act and its Regulations. She explained that the Act is a consumer protection statute.

In the course of her duties, she oversees applications for registration as a motor vehicle salespersons and became familiar with Hainsworth's written application for registration as a motor vehicle salesperson which was marked as Exhibit 3. When the application was reviewed, it was noted that Hainsworth had disclosed a pending criminal harassment charge against him and that he had been disbarred as a lawyer in Ontario and a criminal record check was run on Hainsworth.

Ms. South stated that a copy was obtained of the February 22, 2000 criminal indictment of Hainsworth before the Superior Court of Justice which indicated that he had been charged on five counts and plead guilty to two of those counts upon which two counts he was found guilty on October 13, 2000.

The two charges being counts two and five in the indictment read as follows:

2. ROSS HAINSWORTH stands further charged that he, on or about the 7th day of May in the year 1999, at the City of Toronto, in the Toronto Region, did without lawful authority, and knowing that the staff of Tony Ianno, M.P. or being reckless as to whether the said staff of Tony Ianno, M.P. was harassed, engaged in conduct that caused them reasonably, in all the circumstance, to fear for their safety, contrary to the Criminal Code.

5. ROSS HAINSWORTH stands further charged that he, on or about the 17th day of September in the year 1999, at the City of Toronto, in the Toronto Region, being at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance directed by the said justice, did fail without lawful excuse to comply with that condition, to wit: abstain from communicating directly or indirectly with the staff of Tony Ianno, M.P. except as reviewed in advance and

forwarded through Constable Mike Stone of 14 Division or his designate on the Toronto Police Service, contrary to the Criminal Code.

On counts 1, 3 and 4, Hainsworth was found not guilty.

Ms. South further stated that Hainsworth had been disbarred as a Barrister and his name struck off the Roll of Solicitors after having been found guilty on March 23, 1995 of professional misconduct by the Law Society of Upper Canada in that he had suborned or counselled perjury.

Under cross-examination, Ms. South stated that she accepted the findings of the Discipline Committee of the Law Society of Upper Canada and Hainsworth's disbarment by Convocation. She confirmed that she made the recommendation to the Registrar, after reviewing the Hainsworth file, that the Registrar proceed with the Notice of Proposal to refuse registration as a motor vehicle salesperson. She further stated that at the time Hainsworth applied for registration as a salesperson, she knew that he was employed by Dave Nicholls Toyota and that it was a contravention of the Act to act as a motor vehicle salesperson when not registered as such under the Act.

Hainsworth testified on his own behalf. He did not call any other witness to testify on his behalf.

Hainsworth testified that his disbarment was unlawful and that the Law Society of Upper Canada had erred in making the findings it made. He appealed his disbarment by the Society, but his appeal was dismissed for delay.

As to his criminal convictions of October 13, 2000, he stated that he plead guilty to counts two and five "in view of the hopelessly biased appeal judge". He stated that he did write "mildly threatening" letters to his Member of Provincial Parliament and pursuant to such letters, was charged with criminal harassment. He stated that he has filed a notice of appeal to his conviction but has not perfected the appeal. He confirmed that in relation to count 5 of the indictment, to which he had plead guilty, such count referred to letters he had sent to his Member of Provincial Parliament.

On cross-examination, he stated he confirmed working for Dave Nicholls Toyota in or about May, 2000. He had been hired as a motor vehicle salesperson and performed the services of such at Dave Nicholls Toyota.

Until the receipt of the Registrar's Notice of Proposal to refuse registration, he was enrolled and studying in the certification course more fully referred to in "Option (b)" on page 2 of his application for registration. (Exhibit 3) He stated that he was not aware that the course materials dealt with it being illegal or improper to act as a motor vehicle salesperson while he was enrolled in this course. He confirmed that he signed the application for registration as a motor vehicle salesperson and did not disclose under Section D thereof that he had been employed by Dave Nicholls Toyota in the three years prior to his signing the application. He conceded that immediately above his signature on the application the following paragraph appeared in that application:

I understand that I may not buy or sell vehicles for a motor vehicle dealer unless I am registered under the Act as a salesperson to that dealer. I acknowledge that 'buying or selling' refers to any form of negotiation concerning the purchase, sale or lease of a

vehicle, and is not limited to the signing of contracts. I know that this also includes attendance at wholesale auctions or the positions commonly referred to as Sales Manager, Finance and Insurance Manager and Business Manager. I confirm that I will not buy, sell or lease for any dealer until I receive confirmation from OMVIC that I am registered as a salesperson.

Hainsworth acknowledged the transcript of the criminal proceedings before Mr. Justice Hamilton on October 13, 2000, which transcript incorporated the Judge's reasons as well as Hainsworth's submission made before sentence was passed. (Exhibit 5)

The Registrar's counsel handed Hainsworth six photocopies of letters which Hainsworth acknowledged having authored and signed and which were accepted into evidence as exhibits 6 through 11.

Hainsworth confirmed that he believed the contents of all six letters to be true when he wrote such letters and stated that his allegations in his letters dealt with hereunder are accurate.

Exhibit 6 dated December 5, 2000

This letter is addressed to the Law Society of Upper Canada for the attention of Robert Armstrong, Q.C., Treasurer. It states that Hainsworth has received two anonymous threatening telephone calls, and he suspects the Toronto Police or R.C.M.P. may be responsible for such calls. In addition, he states other likely candidates for these telephone calls are most likely Michael Royce "who headed up the Law Society cover-up" and Frank Marrocco "who played a key role in my wrongful disbarment and absconded with \$22,000.00 of mine".

Exhibit 7 dated December 15, 2000

This letter is addressed to "The Honourable Michael D. Harris, M.P.P., The Premier of Ontario" in which he states "would you please not lie to me. Do you think you can lie to me to cover-up your Attorney General's dereliction of duty in my case?" The letter continues...

I have repeatedly complained about your Attorney Generals' failure to do anything about the Law Society's cover-up of my wrongful disbarment, and now I am complaining that Mr. Flaherty will do nothing to get Chief Justice McMurtry to answer my request for an appointment of counsel in my appeal. Clearly, both Attorney General Flaherty and Chief Justice McMurtry support the Law Society in its cover-up of my wrongful disbarment. This is why I wrote to you - I have to go outside the legal establishment to get proper action in my case.

Exhibit 8 dated December 20, 2000

This letter is addressed to "The Honourable David Tsubouchi, Solicitor General of Ontario". In this letter, Hainsworth writes that he has received three threatening telephone calls and the police refuse to respond to his complaints.

Hainsworth states that the threatening telephone calls emanate from either someone connected with the Law Society of Upper Canada or the Attorney General. Hainsworth also accuses the Chief of Police of a cover-up and states he suspects "either Attorney General Flaherty instructed the Premier's staff to lie to me....., or the Premier's staff

independently lied to me". He goes on to state "It is clear that Attorney General Flaherty is involved in the Law Society's cover-up of my wrongful disbarment".

Exhibit 9 dated December 29, 2000

This letter is addressed to Lenczner Slaght Royce Smith Griffin for the attention of Michael E. Royce. In this letter Hainsworth states as follows:

RE: Hainsworth v. Law Society of Upper Canada
Court File Nos. 95-CU-901703, 261/95

Do you expect me to believe your pronouncement that you're not the source of the threatening calls I've been receiving?

You've lied from the beginning. Your statement of defence is a pack of lies. There's clear evidence I was wrongfully disbarred, and from a procedural standpoint any idiot lawyer can see that your client should not have charged me until after the court martial proceedings were concluded, (if at all). You've just covered up for your client, who never reviewed the evidence at the Gravline trial and then stupidly accepted the provably false testimony against me. You never even read my account of what I did in the Gravline case.

Your client has made mistake after mistake and you've covered up by lying and willful ignorance. You even secretly instructed the registrar of the Divisional Court to dismiss my appeal for delay when you knew Tinsley had caused the delay by refusing to produce the full record.

You will pay for your lies and cover-up. I'm going to sue you, and I won't be deterred by any threatening phone calls. Will one of your partners represent you, or will you retain outside counsel? I will phone you in the new year for your answer.

Exhibit 10 dated April 4, 2001

This letter is addressed to Smith Lyons, Barristers and Solicitors for the attention of Frank N. Marrocco, Q.C., and reads as follows:

Dear Sir:

I enclose a copy of my letter today to W. Keith Gauntlett, Deputy Registrar of the Court of Appeal.

I now add to my letters: you are lazy, stupid, incompetent and corrupt; and I invite you to sue me for libel.

Furthermore, I enclose a copy of my pamphlet headed TO ALL LAWYERS, BENCHERS, AND ONTARIO SUPERIOR COURT JUDGES.

I am sending a copy of this letter and my pamphlet to Larry Banack, and I ask him to confirm that he has distributed them to all benchers. If Mr. Banack refuses to do this - I suspect he will refuse, because he appears to be corrupt as well, along with the corrupt and idiotic Tinsley - I will rely on these two letters and my pamphlet at the Licence Appeal Tribunal scheduled to start April 23.

Also, I need to know who is going to act on behalf of the Crown Law Office-Civil Division in my action against Barry and the provincial Crown. And who is going to act for Royce and his firm in my action against them for their role in the Law Society cover-up?

The enclosure to the above letter reads as follows:

TO ALL LAWYERS, BENCHERS, AND ONTARIO SUPERIOR COURT JUDGES

Many of you will already know that I was wrongfully disbarred in 1995 and the Law Society of Upper Canada, through its diverse agents in the legal establishment, has covered up. There is clear evidence in existence that proves I was wrongfully disbarred, and the evidence of cover-up is widespread.

What you should also know, to avoid a repetition of such a wrongful disbarment and cover-up in the future, is who was primarily responsible for it. I know the following individuals played significant roles, as outlined:

1. Gavin MacKenzie, who was the lead Law Society prosecutor, laid charges before any investigation of the allegations against me had been conducted. An investigation would have shown the allegations against me are false.

2. Clayton Ruby, who was a bencher and chair of a panel of the Discipline Committee prior to the hearing, wrongly decided that a hearing must proceed in the absence of an investigation and while there were unconcluded parallel criminal proceedings.

3. Paul Copeland, who was a bencher and chair of the hearing panel of the Law Society's Discipline Committee, wrongly decided to proceed with a hearing in my absence. He knew I had not been personally served with a notice of the time and place of the hearing but he went ahead with the hearing anyway. He ignored evidence that showed my accusers had lied in their allegations.

4. Paul Lamek, Q.C., then the treasurer of the Law Society, led the benchers to wrongly decide to adopt the report of Mr. Copeland's panel. Mr. Lamek was more interested in paying deference to his bencher colleagues than applying the law.

5. Frank Marrocco, Q.C., then my counsel and now a bencher, maintained a pretense of representing me while he was secretly representing the Law Society. He charged me over \$22,000 for achieving nothing on my behalf, and had the nerve to try to bill me an additional \$8,000 after I fired him.

6. Michael Royce, Law Society counsel after my wrongful disbarment, failed to properly advise the Law Society. He has done everything in his power to manipulate court officials to the advantage of his client.

7. Successive Attorney Generals of Ontario, Charles Harnick and James Flaherty, refused to look into my charge of a Law Society cover-up. Also, the Chief Justice of Ontario, R. Roy McMurtry, a bencher by virtue of his former position as the Attorney General of Ontario, refused to look into my charge of a Law Society cover-up.

Exhibit 11 dated April 4, 2001

This letter is addressed to Court of Appeal for Ontario, Osgoode Hall and is marked for the attention of W. Keith Gauntlett, Deputy Registrar. This letter is sent in reply to Gauntlett's letter to Hainsworth admonishing the former for what Gauntlett called an obnoxious and disgraceful letter Hainsworth had addressed to him. Hainsworth's letter to Gauntlett reads as follows:

1. A Deputy Registrar of the Court of Appeal (you) who cannot think of one good reason why an appellant (me) should not embark on a campaign of vandalism in and about Osgoode Hall, and then lies by stating he can think of a "number" of reasons;

2. A Deputy Registrar of the Court of Appeal (you again) who refuses to report to the Chief Justice of Ontario that two of his colleagues, (Kromkamp and Poole), have executed their duties in a biased and incompetent manner, or have committed a serious misconduct, (Poole), by accepting a bribe from the Law Society;
3. An Attorney General of Ontario, (Flaherty), who ignores evidence that the Law Society is covering up a wrongful disbarment (mine) and then instructs his staff not to answer his correspondence;
4. An Attorney General of Ontario, (Flaherty again), who refuses to investigate an allegation (mine again) that an accused (me) was subjected to a perverse six-month pre-trial incarceration, and the Ontario criminal process was employed to buttress the Crown's ongoing contempt of a court order and an abuse of power;
5. A bencher, (Frank Marrocco, Q.C.), who charges his client (me again) over \$22,000 to represent him in Law Society discipline proceedings, achieved absolutely nothing, and then demands another \$8,000 in fees and disbursements;
6. An Assistant Crown Attorney, (Calvin Barry), who wrongly charges an accused (me again) with multiple counts of criminal harassment, and advocates he be incarcerated solely to punish him for pleading not guilty to multiple counts;
7. Law Society counsel, (Michael Royce), who refuses to investigate a well-founded allegation that his opposing party, acting in person (me again), was wrongfully disbarred and there exists evidence to prove it, and he is withholding evidence tending to show there was a wrongful disbarment;
8. A Registrar of the Divisional Court (Poole) who causes an order to issue dismissing an appeal of disbarment (mine) on grounds of delay, when the delay was caused by the Law Society secretary withholding evidence tending to show the appellant was wrongfully disbarred;
9. A pack of corrupt, know-nothing, lazy benchers, (the Law Society of Upper Canada), who would prefer not to hear that they charged, prosecuted and disbarred the wrong lawyer; and
10. A Member of Parliament (Tony Ianno) who would rather throw a constituent of his in jail (me again), than lobby a Minister of Justice (McLellan), to appoint an independent counsel to investigate his allegation that he was illegally prosecuted as a civilian under the military justice system, and subjected to an abuse of governmental power by the RCMP and the military acting as agents of the government.

I could go on and on, but ten is a nice round number. Which of the above do you not find obnoxious and disgraceful?

You think I am obnoxious and disgraceful. You are arrogant, incompetent, lazy, stupid, and a liar. You should not be employed in the position you currently hold. You should be fired. Furthermore, Kromkamp is lazy, stupid and incompetent. And Poole, also, is lazy, stupid and incompetent. Crown Attorney Barry is lazy, stupid and incompetent. Michael Royce is lazy, stupid, incompetent and corrupt. Please convey my opinion of these "people" to each of them individually.

I will send a copy of this letter to bencher Larry Banack, and ask that he distribute copies to all of the benchers of the Law Society. Finally, I invite you, or any of Kromkamp, Poole, Barry, or Royce, to sue me for libel.

FACTS FOUND PROVEN:

The following facts, based on both oral and documentary evidence adduced at the hearing, are found to have been proven.

1. By a decision of Convocation of the Law Society of Upper Canada Hainsworth was, on March 23, 1995 disbarred as a Barrister and his name was struck off the Roll of Solicitors.
2. The decision of Convocation followed upon the Report and Decision of the Discipline Committee of the Law Society of Upper Canada of August 5, 1993 wherein Hainsworth was found guilty of professional misconduct.
3. The professional misconduct of which Hainsworth was found guilty by the Law Society of Upper Canada was for suborning or counselling perjury and offering an indirect financial benefit to a witness for his false evidence.
4. On October 13, 2000 Hainsworth plead guilty before Mr. Justice Hamilton of the Superior Court of Justice and was convicted of reckless harassment of the staff of Tony Ianno, a member of the Ontario Provincial Parliament, which conduct caused Ianno or his staff to reasonably fear for their safety contrary to the Criminal Code.
5. On October 13, 2000, Hainsworth also plead guilty to and was convicted before Mr. Justice Hamilton of the Superior Court of Justice on the charge that, while at large on his recognizance entered into before a justice and being bound to comply with a condition of that recognizance directed by the said justice, did fail without lawful excuse to comply with that condition namely: abstaining from communicating directly or indirectly with the staff of Tony Ianno, M.P., except as reviewed in advance and forwarded through Constable Mike Stone of 14 Division or his designate on the Toronto Police Service, contrary to the Criminal Code.
6. In or about July 2000, Hainsworth was employed by Dave Nicholls Toyota and during such employment he acted as a motor vehicle salesperson without registration under the Act.
7. Hainsworth completed and signed an application for registration as a motor vehicle salesperson on July 12, 2000 and failed to disclose therein that he was at that time employed as a motor vehicle salesperson by Dave Nicholls Toyota and was acting as such for Dave Nicholls Toyota.
8. Hainsworth authored and signed letters, copies whereof are marked exhibits 6 through 11 inclusive.

THE LAW:

The Act's relevant portions are:

Section 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

Section 7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

.....

Section 3.(1)(b) of the Act reads as follows:

.....

(b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

.....

DECISION AND REASONS:

The onus of proof falls upon the Registrar to show that the past conduct of Hainsworth affords the Registrar reasonable grounds for belief that Hainsworth will not carry on business in accordance with law and with integrity and honesty.

The Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of Hainsworth afforded reasonable grounds for belief that Hainsworth will not carry on business in accordance with law and with integrity and honesty. This was clearly indicated in the case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No. 1017, April 7, 1983. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of Hainsworth does not afford reasonable grounds for belief that Hainsworth will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusion based upon the evidence, are set out hereunder.

DISBARRMENT

The Discipline Committee of the Law Society of Upper Canada recommended to Convocation that Hainsworth be disbarred after it found that professional misconduct had been established in that:

1. Between February 3 and 5, 1991, inclusive, the Solicitor attempted to induce David Clost, a witness at the General Court Marshall of Corporal Gravline, to give false evidence in that proceeding.
2. Between February 3 and 5, 1991, inclusive, the Solicitor offered to accept a financial reward from David Clost for providing Mr. Clost with assistance in connection with a claim which Mr. Clost might be able to assert against the Government of Canada.

(Exhibit 12, Tab 2, page 2)

Convocation, in the presence of Hainsworth's counsel, read the Discipline Committee's report of August 5, 1993 and, having heard counsel, Convocation ordered Hainsworth disbarred.

The Tribunal quotes from the Discipline Committee's reasons for its recommendation to Convocation:

The actions of Mr. Hainsworth in this case are totally contrary to the behavior one would expect and require of a solicitor. Suborning and counseling perjury and offering an indirect financial benefit to a witness for his false evidence are most serious offences.

Our courts require that the evidence presented before them be truthful. Very serious penalties are imposed for perjury even in minor matters. Perjury is bad enough for lay people. Lawyers with their skill and knowledge know what evidence will be important. They better than anyone else will know what false evidence will assist in a case. If lawyers think that it is permissible to fabricate evidence or to have witnesses lie, our system of justice will break down.

An attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an "officer of the court" in most compelling sense. Frankfurter J in *Re Sawyer*, 360 U.S. 622, 668 (1959)

In our view the behaviour of Mr. Hainsworth is more serious than misappropriation of funds by a lawyer.

The public must be assured by our decision that we totally disapprove of and reject this type of behaviour. General deterrence is an important aspect of the penalty in this case. Generally speaking disbarment is required in these types of cases. In the absence of any mitigating factors concerning the actions of Mr. Hainsworth, i.e. stress, psychiatric problems, substance addictions, coupled with character evidence, or a proven background of professional excellence and contribution, Mr. Hainsworth should be disbarred.

The disbarment of Hainsworth remains undisturbed and the reasons for his disbarment are compelling. Hainsworth's suggestion that this Tribunal should permit evidence to be introduced before this Tribunal as to why he considers his disbarment improper or wrongfully is without merit. The fact that Hainsworth's disbarment in 1995 has not been set aside or disturbed is sufficient to satisfy this Tribunal as to the final disposition of the matter of his disbarment. This Tribunal is not the forum either to reconsider or to overrule the decision of Convocation and cannot look behind that decision. It is not open to Hainsworth to relitigate before the Tribunal a matter in which the Tribunal has no jurisdiction and in which the Tribunal certainly has no appellate jurisdiction. See *Maria Didaskalow* and the Motor Vehicle Dealers Compensation Fund released by the Divisional Court on November 29, 1994.

CONVICTION

Hainsworth presently stands convicted of one count of criminal harassment and another count of breach of recognizance. To both of these criminal charges he plead guilty on October 13, 2000 before being sentenced. Although Hainsworth contends that he has filed an appeal, he concedes he has not perfected that appeal. The appeal therefore presently stands undisturbed.

A conviction on a criminal harassment charge is a serious matter and from a reading of the Judge's decision on sentence, the harassment may well have had a traumatizing effect on one particular party, who felt compelled to leave her employment due to the fear that the harassment caused.

UNREGISTERED SALESPERSON

Apart from Hainsworth's disbarment and criminal conviction, it is clear by Hainsworth's own admission, that he acted as a motor vehicle salesperson when not registered. The Act requires that no person shall act as a motor vehicle salesperson unless registered as such under the Act (Section 3.(1)(b)).

Hainsworth is neither an uneducated nor an illiterate person. He is quite articulate and has had training and experience as a lawyer. Despite this, when he executed the application form for registration as a salesperson on July 12, 2000 he ignored the warning in the application form, which appears immediately above his signature, that he was not permitted to buy or sell vehicles unless registered under the Act. By his own admission he was selling motor vehicles without registration and was thereby violating the Act. Additionally, Hainsworth did not disclose in his application that he was employed by Dave Nicholls Toyota in the three years proceeding the execution of his application. As a lawyer, he ought to have known how important it was to comply with all the terms and conditions on the application form. The irresistible inference to be drawn from Hainsworth's material non-disclosure is that he did not wish OMVIC to know of his employment as a motor vehicle salesperson while he was unregistered with Dave Nicholls Toyota.

The Tribunal believes that his violating the Act was done when he knew or should have known that what he was doing was wrong.

The numerous letters (Exhibits 6 through 11), to which reference has been made in this decision, were all written by Hainsworth subsequent to his conviction for criminal harassment. Following upon his conviction - to which charge he plead guilty - and having expressed remorse to the Court in regard to his actions, the Tribunal imagines Hainsworth would be more circumspect in the allegations contained in his letters. All these letters speak to the fact that Hainsworth has learned little, if anything, from his past conduct and conviction and that it is reasonable for the Registrar to have concluded that Hainsworth's future conduct will be reflective of his past conduct. In Hainsworth's submissions to Court prior to his sentencing he stated as follows:

For over eight years, I started lawsuits. I hired, I fired lawyers. I wrote enumerable letters to lawyers, judges and politicians. I wrote to any public official I thought may be in a position, I thought, to correct the injustice that had been done to me. I complained excessively to anyone who might listen. The whole thing consumed me. Both mentally, financially and emotionally it entirely consumed me. It was a 24-hour a day preoccupation.

Having regard to the letters written recently by Hainsworth, it is evident that he is, even at this stage, still consumed by his grievances. The Tribunal believes that if he were to be registered as a motor vehicle salesperson, members of the public with whom he would have occasion to deal would be the recipients of the same vitriol as he has directed to the addressees of his letters.

Both the disbarment of Hainsworth and his convictions reflect directly on his lack of integrity and honesty as well as his inability to conduct himself in accordance with law. The subsequent letters written by Hainsworth lead the Tribunal to the conclusion that the past conduct of Hainsworth will continue in the future and that the Registrar was not wrong in concluding that Hainsworth is not suitable for registration as a motor vehicle salesperson.

Counsel for the Registrar made application, at the conclusion of the hearing, for costs citing Section 8 of the Licence Appeal Tribunal Act, 1999 which states as follows:

If, on the application of a party to a hearing before the Tribunal with notice to the other parties, the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing or may terminate the hearing at any time and make an order of costs as it considers appropriate in the circumstances.

The Registrar's Notice of Proposal contains a clause that Section 8 of the above Act would be invoked at the hearing by the Registrar. Hainsworth in his final submissions did not respond to or deal with the Registrar's application for costs.

For the Registrar to be successful in his application for costs he must show that the appeal of Hainsworth was frivolous and vexatious. Black's Law Dictionary, Sixth Edition defines a "frivolous appeal" as

One in which no justiciable question has been presented and appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.

"Vexations" is defined in Black's Dictionary as

without reasonable or probable cause or excuse.

The Tribunal believes that there is a "justiciable question" that was presented to the Tribunal and, although the appeal fails, it cannot be said to be devoid of or entirely without merit. There was a serious question to be tried.

Accordingly, the Registrar's application for costs is denied.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out the Registrar's proposal dated November 15, 2000 to refuse the registration of Ross Hainsworth as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 9, 2001

CANADIAN WILDERNESS PROGRAM

CANADIAN WILDERNESS PROGRAM

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REFUSE TO RENEW LICENCE

TRIBUNAL:

HUGH HANSON, Presiding Member
JOE HEWITT, Member
JOAN GENTLE, Member

APPEARANCES:

GREGORY DuCHARME, Counsel for the Applicant
KATHARINE RENISON, Counsel for the Director

DATES OF
HEARING:

December 18, 19, 20, 2000 &
February 12, 13, 14, 2001

North Bay

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Director's Notice of Intention dated September 22, 2000 to refuse to renew a licence under the *Child and Family Services Act* ("CFSA") held by Canadian Wildlife Program (the "Applicant" or "CWP") to operate a group home. An appeal dated September 29, 2000 was lodged with Licence Appeal Tribunal. The hearing of this appeal began December 18, 2000. After the sixth day on February 14, 2001, the hearing was adjourned pending receipt of written submissions.

The Director's Notice contains some 17 allegations of non-compliance with the CFSA and Regulation, many of which contain sub-points.

Two preliminary issues were raised. The first was an objection by counsel for the Director to the Applicant's request to have a witness testify by teleconference from Germany. Counsel for the Applicant argued that the witness was essential to the defence. The Tribunal reserved judgement and learned before giving a decision the next day that the witness would travel to Canada to testify in person.

The second preliminary matter was a request by counsel for the Applicant that only evidence bearing on the allegations in the Notice of Intention be admitted. He argued that he was prepared to answer those allegations but had not prepared for any other matters that may have arisen in the past. Counsel for the Director argued that the Tribunal should be aware of all previous non-compliances, which the Director takes into account in deciding about the decision he must make. The Tribunal ruled that it would hear evidence only on the issues raised in the Notice, but would allow evidence of previous problems relating to those particular issues.

The following witnesses were called by the Director:

- 1) Shirley Price
- 2) Donna Murray
- 3) John Goch
- 4) Germain Lacoursiere

The following witnesses were called by the Applicant:

- 1) Mr. Robert Fairbridge
- 2) Herr Christian Seidl

The documentary evidence was voluminous.

THE ISSUE:

The *Child and Family Services Act* states:

Section 197.(4) Where an applicant or licensee requires a hearing under subsection (2), the Tribunal shall appoint a time for and hold a hearing and may, on hearing the matter,

- (a) order the Director to carry out the proposal; or
- (b) order the Director to take such other action as the Tribunal considers appropriate, in accordance with this Part and the regulations,

and the Tribunal may substitute its opinion for that of the Director.

The issue before the Tribunal is to determine which of these courses of action to take.

THE LAW:

The *Child and Family Services Act* states:

Section 196. A Director may refuse to renew or may revoke a licence where, in the Director's opinion,

- (a) the licensee or an employee of the licensee, or where the licensee is a corporation, an officer or director of the corporation has contravened or has knowingly permitted a person under his or her control or direction or associated with him or her to contravene,
 - (i) this Act or the regulations,
 - (ii) another Act, or the regulations made under another Act, that applies to the activity for which the licence is required, or
 - (iii) a term or condition of the licence;
- (b) the premises where the children's residence is located or the residential care is provided do not comply with the requirements of this Part and the regulations;
- (c) the activity for which the licence is required is carried on in a manner that is prejudicial to the children's health, safety or welfare;

- (d) a person has made a false statement in the application for the licence or for its renewal, or in any report or document required to be furnished by this Act or the regulations, or by another Act or regulations made under another Act that applies to the activity for which the licence is required; or
- (e) a change has occurred in the employees, officers or directors of the applicant that would, if the applicant were applying for the licence in the first instance, afford grounds under clause 195 (b) for refusing to issue the licence. R.S.O. 1990, c. C11, s 196.

Section 197 of the CFSA states:

- (1) Where a Director proposes to refuse to issue a licence under section 195 or to refuse to renew or to revoke a licence under section 196, the Director shall cause notice of the proposal, together with written reasons, to be served on the applicant or licensee, who may require a hearing.
- (2) A notice under subsection (1) shall inform the applicant or licensee that the applicant or licensee is entitled to a hearing by the Tribunal if he, she or it mails or delivers to the Director and to the Tribunal, within ten days after notice under subsection (1) is served, a written request for a hearing.
- (3) Where an applicant or licensee does not require a hearing under subsection (2), the Director may carry out the proposal.
- (4) Where an applicant or licensee requires a hearing under subsection (2), the Tribunal shall appoint a time for and hold a hearing and may, on hearing the matter,
 - (a) order the Director to carry out the proposal; or
 - (b) order the Director to take such other action as the Tribunal considers appropriate, in accordance with this Part and the regulations,and the Tribunal may substitute its opinion for that of the Director.

HISTORY OF THE PROGRAM

The Canadian Wilderness Program (CWP) was begun in 1993 by Robert Fairbridge (the “operator”) to provide a year-long experience for troubled German youth. Taking “truth, trust and respect” as its motto, the program aims to build self-confidence in its clients. Located in Northern Ontario, CWP places heavy emphasis on outdoor activities. There are two properties, one at Restoule, the other in Mattawa.

Children are referred to the program by Fachsentrum fuer Kinder–Jugend-und Familienhilfe der Diakonie Freistadt, a German agency that serves German youth. The youth referred to CWP have been in conflict with family or society. Guardianship of each child in the program is transferred to Robert Fairbridge with the consent of the agency, child and parent. The program is funded by German Social Services.

After a visit by a Licensing Officer and Program Advisor of the Ministry of Community and Social Services in June 1997, the decision was taken to require the program to be licensed as a group home (staff based with more than three unrelated children in the home) under the *Child and Family Services Act*. The first full licensing inspection of the Restoule property occurred on 3 and 4 November 1997, and the first provisional license

for the Restoule program was issued in April 1998. The Mattawa property has never been licensed.

Since that time, there have been five provisional licenses issued, each with a number of conditions attached:

- April, 1998 to June, 1998
- June, 1998 to December, 1998
- April, 1999 to August, 1999
- October, 1999 to January, 2000
- July, 2000 to September, 2000.

The operator, Mr. Fairbridge, has a long history of service in residential programs, both in British Columbia and Ontario. He was on the staff of the Ontario Ministry of Community and Social Services for nine years, during which time, among other things, he conducted licensing inspections of facilities for young offenders. He has been Senior Manager of Project DARE, operating out of a wilderness campus.

THE ALLEGATIONS AND EVIDENCE:

This section identifies the specific allegations in the Notice of Intention and the relevant evidence brought forward at the hearing.

1. It is alleged that contrary to section 196(a)(i) of the Child and Family Services Act, the licensee or an employee of the licensee has contravened or has knowingly permitted a person under its control or direction or associated with it to contravene the Act or the regulations and more particularly:

- (a) there was a failure to ensure that each and every person employed in the residence received such immunizations as required by the local medical officer of health (only one of seven staff persons – NL – submitted a record of immunizations prior to hire) and a health assessment (only two of seven staff persons – NL and KS – submitted medical certificates prior to hire) prior to commencing employment as required by section 75 of Regulation 70 under the Child and Family Services Act as identified during licence inspections August 23, 24 and September 23, 2000.*

There is the credible testimony of Ms. Price and Mr. Goch, supported by the documentary evidence relating to the August 2000 inspection, to lead the Tribunal to conclude that certain staff immunization records were missing. Records of previous inspections, such as can be found in exhibits R-2-69, 88, 98, and 101, indicate that this has been an enduring problem. The operator admitted that he was not in full compliance. Not having medical qualifications, the Tribunal refrains from commenting on the assertion in the Applicant's submissions that staff immunization does not affect the health of children. The Tribunal finds that this is a clear, if partial, non-compliance.

(b) there was a failure to ensure that each person employed in the residence received an orientation with respect to the policies and procedures of the residence within thirty days of commencement of employment, as required by section 76 of Regulation 70 under the Child and Family Services Act as identified during licensing inspections on September 13, 2000 (none noted in the personnel records of the following staffpersons: AK, PG, KS and TB).

The operator provided documentary evidence of orientations for AK and TB (exhibits A-3-20 & 23), but could not produce evidence regarding PG and KS. He testified that all staff are given appropriate orientation when hired. Given his extensive experience with residential programs for young people, we find that, on the balance of probabilities, this is true. Nevertheless, he had a responsibility to document this so as to demonstrate compliance. Evidence that he has not done so despite repeated urging is found in exhibits R-2-86 and 88. The Tribunal finds this to be a non-compliance.

(c) there was a failure to ensure that the plans of care were complete in that case records revealed that none of the residents' files included a statement of the educational program that is to be developed for a resident, as required by section 86(2)(d) of Regulation 70 under the Child and Family Services Act as identified during licensing inspections on August 23, 24, and September 13, 2000.

The testimony of Ms. Price, which we find credible, is that there was no educational program in the plans of care that she examined in the August 2000 inspection. A review of the provisional licences issued to the applicant (for example, exhibits R-2-10, 12 13, & 128) indicate that an educational component was missing from the plans of care, since conditions are put on a licence when those items are not in compliance at the time of the issuance of the licence.

There was credible testimony that the German authorities have waived the need for any formal education for the children while they are at CWP. These are typically children for whom formal schooling has proved to be unsuitable. There was credible testimony that attempts have been made to find some compromise with the education authorities, but that these have been unsuccessful.

It is not for the Tribunal to set out an appropriate educational program for these children, to determine how much, if any, academic content there should be, or to disregard the requirement for children in Ontario to be involved in the education system at least until the age of sixteen. Since CWP admits children under the age of sixteen, it has a responsibility to incorporate some specific educational programming in its plans of care. The Tribunal finds that the applicant is in non-compliance in this regard.

(d) there was a failure to ensure that plans of care were reviewed as required by section 86(6) of Regulation 70 of the Child and Family Services Act in that there was no monthly review of the development of the residents in relation to the plan of care

developed for the residents as identified during licensing inspections on August 23, 24, and September 13, 2000.

There is credible evidence that the inspections of August and September 2000 failed to find monthly reviews of the development of children in relation to their plans of care. There is also credible testimony that the operator submits monthly reports on each child's progress to Germany. Herr Seidl testified that he regularly received these reports. There is no evidence that any of these expected reports were not received in Germany. These reports (exhibit A-4) give an assessment of the child's progress for the month and often identify specific goals towards which the child will be working. The Tribunal cannot determine whether the inspectors in August and September 2000 would have been satisfied in regard to this Regulation had copies of these reports been shown to them. No doubt the operator was remiss in not having these reports available, but seems to have kept some files on site, and some off-site. The Tribunal finds that these reports substantially meet the requirement of the Regulation and that, although two reports could not be found, on the balance of probabilities, the operator was in compliance in this respect.

(e) there was a failure to ensure that plans of care were reviewed, as required by section 86(8) of Regulation 70 under the Child and Family Services Act in that the records revealed that there was no review of the plan of care for LP (open file) which was due on July 5, 2000 and the review of the plan of care for DT (closed file) was done on April 27, 2000, three months past the due date.

Section 86(8) of the Regulation reads:

(8) Every licensee shall ensure that each plan of care with respect to each resident in a residence operated by the licensee is reviewed three months and six months after the resident is admitted to the residence and if requested by any person involved with the development of the plan of care every six months after the initial six-month review.

The inspectors were unable to find evidence of reviews of plans of care for two children. In submissions, the Applicant suggests that the monthly reports prepared for Germany should be considered as evidence of the required reviews. The Regulation is quite specific, requiring a review of the plan for each resident at specific times. The Applicant failed to provide the Tribunal with evidence that persuades it that such specific reviews are in fact undertaken. Indeed, he testified that he does not do so specifically and that there is no difference between monthly and three-monthly reviews. The Tribunal finds that this is a non-compliance.

(f) there was a failure to maintain a written record for each resident of any personal, family, and social history and assessment that has been prepared by the licensee or provided to the licensee as required by section 99(1)(c) of Regulation 70 under the Child and Family Services Act. Specifically, case records reviewed (closed files – DT, SG, SP; open files – KW, OE, RF, LP) revealed no social/family history for DT and only brief overviews for the other residents and no assessments were prepared by the licensee or

provided to the licensee regarding the residents' personal, family and social histories as identified during licensing inspections on August 23, 24 and September 13, 2000.

The Tribunal was presented with credible evidence that the Applicant, despite requests, has not in the past been provided with many details of the residents' personal, family and social history and assessments by the authorities in Germany. Those authorities have been reluctant to disclose confidential information about the children in their charge. There was a commitment by Herr Seidl that more such information would be forthcoming in the future. The requirement of this regulation is to maintain records, not to obtain information with which to create a record. There is no evidence that the Applicant failed to maintain any such records with which he had been provided, and he testified that he kept whatever was provided. There is no evidence that he has not maintained any such records that he had prepared. The inspections of August and September 2000 uncovered certain of these records, as is evidenced by the Notice of Intention itself. The Director has failed to persuade the Tribunal that this is a non-compliance.

(g) there was a failure to designate a person in charge of the shift in situations where more than one program staff person was on duty per shift, contrary to section 104(3) of Regulation 70 under the Child and Family Services Act as identified during licensing inspections on August 23, 24, and September 13, 2000.

The testimony of Ms. Price is that, in interviews with staff, there lacked clarity about who would be in charge when more than one staff person is on the premises. The operator testified that decisions are to be made by consensus, whenever possible. Reference can be made to him if necessary. If he were not available, the most senior staff would take charge. He provided a policy statement dated November 16, 2000 outlining this policy (exhibit A-3-39). There is also a letter signed by Ryan Small dated November 14, 2000 intended to clear up a misinterpretation of an answer given to a social worker visiting CWP (exhibit A-3-40). The writer of the letter maintains that the policy set out in exhibit A-3-39 is and has been in place. The Tribunal finds it difficult to place much weight on the letter and written policy; they were written nearly three months after the inspection of August 23 and 24 when the deficiency was identified. In testimony the operator said that there was no formal policy in this regard and that the designated person in charge was not recorded on the shift schedule. The Tribunal finds this to be a non-compliance.

(h) there was a failure to ensure that the water temperature in a washroom or bathroom in a residence does not exceed 49 degrees Celsius as required by section 106(9) of Regulation 70 under the Child and Family Services Act as identified during licensing inspections on August 23, 24, and September 13, 2000.

The inspections on February 29 and March 1, 2000 found the water temperature to exceed 49 degrees Celsius, as did the inspections mentioned in the allegation. Exhibit A-5 is a fax sent to the operator on November 17, 2000 indicating that the author had

turned down the water heater as per the operator's request that past spring. The Tribunal cannot know from the evidence placed before it, just when this adjustment was made. There is, however, uncontradicted evidence that the water temperature was too high both in the spring and late summer. The Tribunal finds this to be a non-compliance.

- (i) there was a failure to ensure that records were kept of each monthly fire alarm drill contrary to section 109(1)(b)(ii) of Regulation 70 under the Child and Family Services Act as identified during licensing inspection on August 23, 23, and September 13, 2000.*

Ms. Price testified that she found an appropriate policy in regard to fire drills but not evidence that there was compliance with that policy. The log book, she testified, noted fire drills on only February 21 and June 13, in 2000. The provisional licence of October 25, 1999 indicates that there was a record of a fire drill on only in May of that year (exhibit R-2-88). The resident children interviewed in the August-September 2000 inspections indicated that fire drills were held irregularly. One child had experienced only two fire drills since arriving in April (exhibit R-2-155). Applicant's exhibit A-3-42, a record of fire drills, indicates that drills were held in February, April, June (twice) and September. This is not what the Regulation calls for. The Tribunal finds this to be a non-compliance.

- (j) there was no evidence to indicate that staff were trained in the proper use of fire extinguishing equipment and there was a failure to ensure that records were kept of each training session involving proper use of fire extinguishing equipment by all staffpersons contrary to section 109(1)(f) of Regulation 70 under the Child and Family Services Act as identified during licensing inspections on August 23 and 24 and September 13, 2000.*

Ms. Price testified that during the inspections noted in the allegation, there was no policy relating to staff training on the proper use of fire extinguishing equipment, nor was there a policy requiring recording of such training. There was no record of training in the personnel files, she testified. Exhibit R-2-99, the terms, conditions and directives to be attached to the proposed final provisional licence to expire September 5, 2000, identifies this section of the Regulation. We conclude that this is a result of an identified non-compliance. Exhibit A-3-44 shows photos of a fire equipment training session. The operator testified that he did not record the training in the files. Exhibit A-3-51 appears to be a contract, signed by the operator, for annual inspection of fire extinguishing equipment and a "Hands-On" fire extinguisher demonstration. This one-time training session gives no assurance that all staff will be given appropriate training in this area, and there is no policy to ensure it. The Tribunal finds that to be a non-compliance.

- (k) there was a failure to ensure that nightly inspections of the premises were recorded, contrary to sections 109(1)(g) and (h) of Regulation 70 under the Child and Family Services Act as identified during licensing inspections on August 23, 24, and September 13, 2000.*

Ms. Price testified that in the inspection noted in the allegation there was not, to the best of her belief, a policy regarding nightly inspections of the property, and that the daily log showed no recordings of such safety inspections having been done. Exhibit R-2-70, the summary of terms and conditions of a CWP provisional licence effective April 26, 1999, identifies this issue. The operator testified that such nightly checks are carried out without exception. He said that there was no separate log, but note is made in the daily log. Exhibit A-3-52 shows daily logs with the security check mentioned. These logs, however, begin on September 13, 2000, the day of the last inspection. The Tribunal finds that, at the time of the inspections, this was a continuing non-compliance.

2. It is alleged that contrary to section 196(a)(iii) of the said Act, a term or condition of the licence has been contravened and more particularly,

(a) there was a failure to create a policy setting out an on-call procedure at such times as only one staff is available in the residence which would include:

(i) a description of who is on call during each shift and where they can be reached;

(ii) the ability of such person to respond within a reasonable timeframe (i.e. within twenty minutes).

The operator testified that the on-call policy has been in the policy manual throughout 2000. The policy in that manual appears to be satisfactory to the Tribunal. A list of instructors is kept in the office, as is a list of neighbours who might assist in an emergency. The operator is available on his cell-phone when he cannot be contacted by land-line. While in practice the program does not specifically identify an individual who is on-call at any particular time, the Tribunal is satisfied that the spirit of the requirement is met and that the safety and welfare of the residents is in no way jeopardized as a result. The Tribunal finds that this is not a non-compliance.

(b) there was a failure to amend current policies and procedures to provide:

(i) attempts to be made by the licensee to obtain immunization records of the residents from the referring agency;

(ii) where the attempts set out in (i) were not successful, this was to be noted/dated/signed off in the resident's file;

(iii) consultation with the local Medical Officer of Health regarding the need for immunization on a case by case basis where the children's immunization records were not available from Germany;

(iv) where recommendations for immunizations by the Medical Officer of Health were carried out in accordance with (iii), that appropriate records of such immunizations should be kept in each child's file;

- (v) inclusion of this new practice as part of the screening/orientation of program/residence.*

With respect to (b)(i), exhibit A-3-61 shows a fax dated April 10, 2000 from the operator to Herr Seidl emphasizing the importance of getting immunization records of the residents from the German authorities. The Tribunal finds that this condition was met.

The operator admitted that the recording specified in (b)(ii) was not done. The Tribunal finds that this is a non-compliance.

There is evidence (exhibit A-3-17 and the operator's testimony) that the operator wrote to the local medical officer of health on June 25, 2000 asking for advice on developing a policy for instances where he has no immunization record for residents. When no reply was received, he hand-delivered a copy to the doctor's office. At the time of the hearing there still had been no reply. The Tribunal finds that the operator has made sincere attempts to comply with item (b)(iii). That the attempts have failed is not the fault of the operator. Since items (b)(iv) and (v) depend on accomplishing item (b)(iii), it would be unreasonable to find the operator in non-compliance in these regards.

3. *It is alleged that contrary to section 196(c) of the said Act, the activity for which the licence is required is carried on in a manner that is prejudicial to the children's health, welfare and safety in that:*

(a) The Language Barrier:

- (i) There was a failure to ensure that the residents clearly understood their rights and responsibilities during their placement.*

The residents are isolated by virtue of the language barrier. Most of the residents arrive in Canada from Germany and do not understand or speak English. None of the current staff speak German satisfactorily and there are no persons who are readily available to the residents with whom they can communicate in their native language.

The licensee has submitted a protocol that would enable staff (not residents) to contact German-speaking individuals on an as-needed basis.

Information with respect to residents' rights, fire evacuation plan, complaint procedure, and information with respect to appropriate individuals to contact for the purpose of lodging a complaint have been translated into German and posted at the residence.

However, the written procedures governing the expression of concerns or complaints by residents are insufficient in terms of questions and concerns that residents may have regarding the posted written procedures. There is a need for the residents to

have someone available who can effectively address their immediate questions and concerns (i.e. ideally a German-speaking staffperson who would be available at all times).

The language barrier between the residents and staff means that the rights of the child are effectively compromised.

For example, one resident, SG, was illiterate and, thus, the posted translation in and of itself, without verbal translation, would have been of no assistance in ensuring he understood his rights.

During the licensing inspections of August 23, 24 and September 13, 2000, it was revealed that staffpersons rely on other residents to translate for them when they feel it is necessary. To rely on the children for translation is inappropriate and does not guarantee that the residents truly comprehend their rights.

Both the operator and Herr Seidl testified that the children are explained their rights and responsibilities before they come to Canada. Those rights, however, may not comply exactly with those contained in the CFSA. Both an English copy of their rights and a German translation are available on-site. As the Applicant's submissions point out, the children come to the program voluntarily, with the consent of parents and the social service agency. There is a clear understanding on the part of these parties that the environment is one of English immersion. The Tribunal finds no problem in having to rely on a resident to translate for an illiterate colleague, especially as this would be a near repetition of what the child had already heard in Germany. The list of German-speaking contacts in CWP's Policy Manual (exhibit A-2) is clearly there for the benefit of the children, regardless of who makes the initial call. Herr Seidl testified that he is in contact with residents on an as-needed basis. The Tribunal finds no fault with the operator in this aspect of the "language barrier."

(b) The Potential Impact of the Language Barrier During High Risk Situations and Wilderness Events:

- (i) the personal safety of a resident and/or others at the residence would be at risk if a resident does not fully understand the procedure to follow during emergencies (e.g. fires).*
- (ii) the personal safety of a resident or others would be at risk if a resident does not understand instructions or directions when participating in the wilderness activities.*

If regular fire drills were conducted, a matter in which the Tribunal has found the operator to be in non-compliance, language would be no issue in case of fire. The operator testified that children are not involved in any potentially dangerous activity until the instructors are satisfied that the child will be successful. Nonetheless, unexpected events can occur. It has been the individual experience of the members of the panel that in such cases instructions are conveyed as much in gestures as orally, and, if

orally, in very simple terms. There is no evidence that this potential risk to safety has ever materialized at CWP. While it would be ideal to have someone bilingual in English and German with the children at all times, the lack thereof has not been demonstrated to the Tribunal's satisfaction to constitute a serious risk to the residents.

(c) Process Concerning Serious Incidents

There are serious concerns related to the process followed with regard to a resident's (OE) potentially suicidal gesture on August 15, 2000 as noted in the daily log. The incident involved the resident running out of the residence into the barn and being found in an extremely agitated state holding a rope. The child needed to be restrained. Although the child was brought to hospital, he was taken back to the residence before being seen by a doctor.

Of particular concern is that there is nothing to indicate that the child has received any follow-up treatment.

The operator phoned Ms. Murray on the day of this incident, mentioning his concern about OE. He took the child to the hospital. He took the child to the doctor who serves the program. At the time, the local Community Counselling Service was on strike and could not provide treatment, but OE has subsequently received counselling. The incident was written up in the daily log. At the time the operator did not consider this incident to constitute a "serious occurrence." Some days later Ms. Murray told the operator that she thought this should be reported as a serious occurrence, and the operator subsequently submitted a serious occurrence report. Three days after the incident the child turned eighteen and passed out of the jurisdiction of the Director. There is no evidence of other serious occurrences before the Tribunal. The Tribunal does not find the Director's concern, as noted in the allegation, to be substantiated.

(d) Complaint Procedure

According to the complaint procedure, there is a four-step approach to the follow. As it reads, each step of the process must be exhausted before moving to the next one (in short, the process involves first discussing a problem with an instructor and if the problem remains unresolved, it goes to the Director, then to the child's parents or the child's social worker or the Ontario Ombudman's Office and finally, a contact list is included which sets out the telephone numbers of the referral source and various agencies).

Of serious concern is that the procedure suggests that only at Steps 3 or 4 should a resident speak to an independent third party regarding his complaint. This not only compromises the complaint procedure but it also appears to conflict with the rights of the child as set out in section 103 of Part V (Rights of Children in Care) of the Child and Family Services Act.

The Tribunal considers it entirely appropriate that an attempt should be made to resolve complaints internally before calling in an outside mediator. None of the rights outlined in

section 103 of the CFSA is denied to a child by the CWP complaints procedure, although no mention is made of the Office of Child and Family Service Advocacy, an omission that should be rectified. The Tribunal finds that the Director's concerns in this regard are without foundation.

ANALYSIS:

The operator has a long history of service in residential care. He has been an official in the Ministry of Community and Social Services, during which time he conducted licensing inspections of residences for young people. He should be fully aware of the need to comply with the Act and Regulation governing the running of group homes. Nevertheless, he has been in continuous non-compliance in a number of areas since the first provisional licence was issued.

Some of the areas in which the Tribunal finds the operator to be in non-compliance are in fact only partial non-compliances. Record keeping has obviously been a substantial problem. Nevertheless, there are ample areas of non-compliance to justify the Director in his decision not to renew the CWP licence. The operator had been warned that the last provisional licence was to be the final one, but various non-compliances were still found in the September 2000 inspection.

There is evidence that the operator has taken a number of steps to bring CWP into compliance in certain areas since the Notice of Intention was issued. In addition, it appears that more information about the residents will be forthcoming from the authorities in Germany. These improvements should stand the operator in good stead if he decides to reapply for a licence in the future.

The Tribunal recognizes that closing the program will entail significant problems for the facility, its staff, the young people involved, and the German authorities. We propose, therefore, to instruct the Director to wait six weeks from the time of the issuance of the order to implement his proposal.

DECISION:

Pursuant to the authority vested in it by section 197(4) of the *Child and Family Services Act*, the Tribunal orders the Director to carry out his proposal not to renew the licence of Canadian Wilderness Program, this order to be effective six weeks from the date of issuance.

LICENCE APPEAL TRIBUNAL

Hugh R. Hanson,
Presiding Member

Joan Gentle,
Member

Joe Hewitt,
Member

RELEASED: May 10, 2001

HEADGATE HOMES (NORTH) INC.

HEADGATE HOMES (NORTH) INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel, representing the Applicant
MICHAEL W. BADER, Counsel, representing Registrar, Ontario
New Home Warranty Program

DATES OF HEARING: November 14, 15, 16 and 17, 2000 and
November 28, 29, 20, 2000 and May 7, 8, and 9, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31, as amended, Headgate Homes (North) Inc. (the "Applicant") appealed a Notice of Proposal dated June 8, 2000 of the Registrar of the Ontario New Home Warranty Program (the "Registrar") to refuse to renew registration of the Applicant;

WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal requesting a hearing;

AND WHEREAS the hearing was held on November 14-17, 2000 and continued November 28-30, 2000 and further continued on May 7-9, 2001 at Toronto;

AND WHEREAS the hearing commenced on May 9, 2001 and Counsel for the Registrar advised the Tribunal that they have withdrawn their Proposal;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter before the Tribunal is therefore concluded.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

RELEASED: May 10, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1502360 OWNED BY: Ann-Marie Mate of: P.O. Box 92, Gooderhem, Ontario K0M 1R0 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: April 18, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

ANN-MARIE MATE

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ann-Marie Mate, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 8, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

ANN-MARIE MATE

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #V1502360** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on December 4, 1999.
2. The applicant, **ANN-MARIE MATE**, whose name is shown on the plate and vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the Highway Traffic Act, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that the said motor vehicle is needed to transport the applicant on a regular basis for health and safety reasons and that continued impoundment of the said motor vehicle will, therefore, cause a serious threat to the health and safety of the person for whom the transportation is required.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

ANN-MARIE MATE

REGISTRAR OF MOTOR VEHICLES

(signature of Applicant)
(date)

(signature of Registrar)
(date)

HENLEY MOTORS LTD. and FREDERICK HURST and DONALD HURST

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

IN THE MATTER OF
HENLEY MOTORS LTD. AND FREDERICK HURST
AND DONALD HURST

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: March 7, 2001

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

HENLEY MOTORS LTD. AND FREDERICK HURST
AND DONALD HURST

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Henley Motors Ltd. and Frederick Hurst and Donald Hurst, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

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

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 11, 2001

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

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: Henley Motors Ltd
212 Lakeport Road
St. Catharines, ON L2N 4R5

Henley Motors Ltd
135 Dieppe Rd.
St. Catharines, ON L2M 6R7

Henley Motors Ltd
O/a Henley Auto Xcess
545 Ontario Street
St. Catharines, ON L2N 4N4

Frederick Hurst
122 Lakeshore Rd. Unit 47
St. Catharines, ON L2N 6N6

Donald Hurst
48 First Street
St. Catharines, ON L2S 3J4

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Henley Motors Ltd, (hereafter the "Dealer"), Donald Hurst and Frederick Hurst, (hereafter the 'Salespersons') and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle dealer and salesperson:

1. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchasers or lessees or any form of negotiation concerning the purchase, sale or lease of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.

3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store its books and records at the location approved by the Registrar.
4. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify its registered name and the address of the location approved by the Registrar.
5. The Dealer agrees not to invite the public to deal at a place other than its approved location.
6. The Dealer agrees to operate exclusively from the registered premises approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in registered premises address in the form required by the Registrar.
7. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
8. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
9. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Dealer agrees that it is under a positive obligation to disclose, in writing, all material facts about the vehicles it sells or leases to its purchasers or lessees. Material facts include, but are limited to disclosure of salvage, previous salvage, accidented and repaired, frame damage and unibody damage. The Dealer agrees to make reasonable efforts to research the history of all vehicles prior to sale or lease to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold or leased, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser or lessee.
12. The Dealer agrees to conduct a thorough audit of all sales of used motor vehicles sold or leased within the last 2 years, and contact all purchasers or lessees who purchased or leased vehicles without full disclosure of material fact. The Dealer further agrees to provide reasonable compensation to all purchasers or lessees of vehicles who purchased or leased same without full disclosure of material fact. The Dealer shall provide written proof that it has complied with this term of the Term and Conditions to the Registrar within 60 days of the date of this order. Said proof shall include a list of all vehicles sold or leased without full disclosure of material fact, copies of the purchase

and sale contracts or lease contracts, and the nature of reasonable compensation made or offered to the purchasers or lessees.

13. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
14. The Dealer and salespersons acknowledge that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
15. The Dealer and salespersons acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.
16. The Dealer agrees to comply with the OMVIC Code of Ethics and Standards of Business Practice.
17. The Dealer and Salespersons hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Dealer and Salespersons agree and acknowledge that should either the Dealer or Salespersons intentionally breach any of the terms and conditions set out herein, in a material or significant way, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Dealer's and Salespersons' registrations shall automatically be revoked.
19. The Dealer and Salespersons hereby withdraw their appeals to the Licence Appeal Tribunal.
20. The Dealer and Salespersons hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 2001.

(Signature) Henley Motors Ltd
I have authority to bind the dealership.

Frederick Hurst

Donald Hurst

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

Carl Compton, Registrar.

Date:

ASH-FAB ROOFING SYSTEMS LTD.

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

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

TRIBUNAL: MALCOLM FEALING,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

STEVE WHITLOCK, Agent for Applicant

DATE OF HEARING: May 7, 2001

DECISION RELEASED: May 14, 2001 Toronto

REASONS FOR DECISION

A hearing was held on May 7, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Ash-Fab Roofing Systems Ltd. (the "Applicant")
Motor Vehicle: 1989 GMC Sierra, plate no. XV6 847 (the "vehicle")
Date of Appeal: April 12, 2001

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

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

This matter came before this Tribunal on May 7, 2001 and proceeded as an oral hearing.

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

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

The hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Please see attached documents proving due diligence

- signed letters by co workers
- personal guarantee to myself several times
- letter signed by employee in question
- 3 year drivers search
- copy of employment records stating length of employment
- copy of impound # 1600209
- copy of ownership reg.

Steve Whitlock

"Steve Whitlock"

**ASH-FAB
ROOFING SYSTEMS LTD.**

Licence Appeal Tribunal
1 St. Clair Avenue, West, Suite 1200
Toronto, ON M4V 1K6

Re: Impoundment of Vehicle –Impound Order Number#1600209

To whom it may concern,

Our Ash-Fab Roofing Systems business truck was impounded March 31, 01 for a period of 45 days. We understand the reason for this impoundment was due to an unlicensed driver operating vehicle. We're in complete surprise the driver operating this vehicle, Rodney Alexander was operating this vehicle without a valid drivers license.

We understood Rodney Alexander's driver was valid upon his employment mid 2000 (please see attached drivers search).

It is our company policy to check license validity periodically, and recently Rodney Alexander claimed and made known his license to be valid. At the time of impoundment we had other valid licensed drivers available to drive this vehicle as follows:

Darryl Flynn	License# F 5688-15606-10106
Bob Wilson	License# W 4395-65806-11003
Stephen A. Whitlock	License# W 3525-72216-10930
Mark C. Whitlock	License# W 3525-52155-20419

All of the above mentioned licensed drivers were lead to believe Rodney Alexander's driver license was valid at the time of this incident. Other employees of Ash-Fab Roofing Systems were frequently car-pooled in Rodney Alexander's personal vehicle, therefore we understood his drivers license to be valid. As a go forward Ash-Fab Roofing Systems has contacted our insurance agent to ensure more frequent searches on our all employees driving records.

Please feel free to contact myself directly at (905) 564-0043, should any additional information be required.

Regards,
"Stephen A. Whitlock"
Stephen A. Whitlock
Ash-Fab Roofing Systems Inc.

**ASH-FAB
ROOFING SYSTEMS LTD.**

Licence Appeal Tribunal
1 St. Clair Avenue, West, Suite 1200
Toronto, ON M4V 1K6

Re: Impoundment of Vehicle –Impound Order Number#1600209

To whom it may concern,
I had no reason to believe at the time the Ash-Fab Roofing Systems Inc. vehicle was impounded that Rodney Alexander's license was invalid. Please find my signature below that attests to this fact as follows:

Darryl Flynn "Darryl Flynn"
Bob Wilson "Bob Wilson"
Stephen A. Whitlock "Stephen A. Whitlock"
Mark C. Whitlock "Marc C. Whitlock"

Please feel free to contact myself directly at (905) 564-0043, should any additional information be required.

**ASH-FAB
ROOFING SYSTEMS LTD.**

Licence Appeal Tribunal
1 St. Clair Avenue, West, Suite 1200
Toronto, ON M4V 1K6

Re: Impoundment of Vehicle –Impound Order Number#1600209

To whom it may concern,

I Rodney Alexander believed at the time (March 31, 2001) of the Ash-Fab Roofing Systems Inc. vehicle impoundment that my drivers license was valid.

Regards,

Rodney Alexander "Rodney Alexander"

Ash- Fab Roofing Systems Inc. did not produce any witnesses.

The agent, Mr. Whitlock had little to add to his appeal. He testified that Rodney Alexander joined the Company on May 5, 2000, and at that time his company was informed by it's Insurance Company that Mr. Alexander's driving licence was valid. He stated that he always admonished his employees to be careful, and that they should not drink and drive, but he never had any reason to check the validity of Rodney's licence.

As indicated above, Mr. Alexander himself stated in writing that he had not been aware that his licence had been suspended. He knew that he had been charged with impaired

driving, but he had not attended at his court hearing in February, and was therefore not aware of the suspension.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Rodney Alexander;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 26, 2002.

The Respondent's only direct questions to Mr. Whitlock were whether he ever checked his employees drivers' licences himself, and whether the licences were checked more than once a year.

Mr. Whitlock testified that his company depended on the Insurance Company to do the checking, and that it was normal practice to do the checks once a year. He claimed that he had learned his lesson and that he would check personally and intermittently in the future.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

As to issue filed, the Tribunal finds that Rodney Alexander's driver's licence was under suspension at the time of the impoundment, and that he was driving the Applicants vehicle at the time. The grounds of appeal under section 50.2(3)(c) of the Act require that the Applicant show the Tribunal that he exercised due diligence in attempting to determine that Mr. Alexander's driver's licence was not suspended at the time of the impoundment of the Applicant's vehicle.

While the Applicant's Insurance Company policy did demonstrate an effort in this regard, the Tribunal finds that simply asking Mr. Alexander if he had licence and relying on the insurance company was insufficient in demonstrating due diligence on the Applicant's part. The Tribunal finds that it is not the responsibility of a third party, such as the Applicant's insurance company, to perform the tasks required of the Applicant to show its own due diligence.

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

DECISION:

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

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: May 14, 2001

SINGH, GURNEK o/a SARWAN AUTO SALES

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

IN THE MATTER OF
GURNEK SINGH O/A SARWAN AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: January 23, 2001

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

GURNEK SINGH O/A SARWAN AUTO SALES

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 14, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Friday, July 6, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 15, 2001

MED - 0549

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF HEARING: May 3, 2001 Peterborough

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant suffers from cardiac disease and made a good recovery from an M.I. in August 1997, as reported by his family doctor Physician # 1 on April 24, 2000. The Ministry of Transportation advised him that he no longer meets the medical standards for a classified licence with instructions on how to apply for a medical waiver.

He was referred to a cardiologist Physician # 2 who reported his condition on October 10, 2000 and suggested that consideration of a medical waiver be deferred awaiting cardiac investigation. Physician # 2's report of December 22, 2000 indicates that the Thallium Scan raises the possibility of two vessel C.A.D. An Echodoppler test showed grade 2 1/2 L.V. A repeat coronary angiogram was ordered.

On January 23, 2001 the Ministry of Transportation notified the Applicant that his licence was downgraded to "G" and that he may appeal this decision to the Licence Appeal Tribunal. The Applicant submitted an appeal received on April 4, 2001.

On February 27, 2001 there was a reassessment report from Physician # 2 indicating that his angiogram shows evidence of new disease and despite his relative freedom from symptoms, should have an angioplasty.

The Medical Advisory Committee's report of April 17, 2001 upheld the downgrading of his licence to "G" and notified the Applicant that he would require an up-to-date medical assessment from an interventional cardiologist to decide if he can safely operate a class "A" motor vehicle.

All of the above evidence was presented by the Respondent as received by the Ministry for the purpose of this appeal.

The Applicant began his testimony by providing new medical reports of his progress since the last report on file. It indicated that he had an angioplasty on March 1, 2001 by Physician # 3 at the T.G.H. and a follow-up assessment by his cardiologist dated April 27, 2001 indicating the beneficial effects of his surgery and improved cardiac status.

It was explained to the Applicant that this new evidence was inadmissible for this hearing because of their late disclosure contrary to the Tribunal's Rules of Procedure. These reports were given directly to the Ministry's representative who will submit them as soon as possible to the Medical Advisory Committee for reconsideration.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

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

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

Regulation 340/94, Section 17 and 18 states:

17.
 - (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
 - (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
 - (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.

- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS:

From the medical evidence presented for the purpose of this appeal. This Tribunal finds that the Applicant did have significant coronary insufficiency to contravene Regulation 340/94, Section 17(1)(c).

The CMA Physicians guide to determine Medical Fitness to Drive, Section 8.1.4 states that angiographic demonstration of 50% or greater reduction in patency of the left main coronary artery should disqualify that person for commercial driving.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 29, 2001 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D.,
Presiding Member

RELEASED: May 10, 2001

CHAD J.H. McNAMARA

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

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

TRIBUNAL: JEAN-MARC LEFEBVRE, Q.C.,
Vice-Chair

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

CHAD J.H. McNAMARA, Applicant

DEBBY JO HILL, Agent for the Applicant

DATE OF HEARING: May 10, 2001

DECISION RELEASED: May 16, 2001 Ottawa

REASONS FOR DECISION

A hearing was held on May 10, 2001, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner:	Chad J.H. McNamara (the “Applicant”)
Motor Vehicle:	1989 Honda Civic, plate no. AEJT 104 (the “vehicle”)
Date of Appeal:	April 17, 2001

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

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

This matter came before this Tribunal on May 10, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Owner's Position to Appeal

On Friday March 31, 2001 Tim Stallwood, Steve Wakely and myself Chad McNamara went into Ottawa to go out for the evening. We had plans to go to a nightclub so we went to my sisters house to park the car. She lives in the west end of Ottawa. Our intention was to take the bus downtown. Steve mentioned the buses would not be running when the clubs closed and not wanting to walk back offered to be the DD or designated driver for the evening. In support of grounds to appeal #3- I had not seen Mr. Wakely for several weeks. I was not aware that he had been to court and had his licence suspended. Neither he nor any of my other friends mentioned this to me. At the time I had no reason not to accept his offer to be our DD for the evening. On reflection I realize I made the innocent mistake of assuming that everything was correct. I now realize, hopefully not too late, that one should ask even those you think are friends relevant questions.

I feel that the lose of my car does fall under section 55.1 of the Act. I attend college in downtown Ottawa and live in a small rural community 32 km from the nearest public transit. To get to school I drive to the Park & Ride where I take the bus. I have attached the enrolment papers for my course. Since losing my car I have been unable to find a ride to the bus stop. This has interrupted my studies. As I was not the driver nor the person under suspension I feel Section 22 (3) (d) (i) of regulation 574, R.R.O. 1990 applies to my case.

In closing I would appreciate the tribunal setting aside the impound order so I can continue my education. While I realize ignorance is not a defense, I do hope that I will not be punished for my "friends" dishonesty or omit ion.

The following documents are attached as

- Money order for \$100.00 payable to the Minister of Finance
- Notice of Appeal form
- Owner's Position in Appeal
- Copy of Ministry's order to impounding the vehicle
- Copy of the owner's ownership permit
- Two copies of all written material

Applicant also sought permission to introduce a photocopy of an original letter, dated August 30, 2000, addressed to him by Willis College of Business and Technology, for the purpose of establishing that he was enrolled as a full time student in a Network Architect Diploma Program, at a tuition cost of \$16,000.00, for a full year term extending from the end of November 2000 to the end of November 2001. The representative of the Registrar indicated that a copy of the letter in question had been forwarded to the Registrar and consented to its introduction as an exhibit. A copy of the document, which had been previously filed by Applicant with the Tribunal, was compared with the original and all parties agreed to its filing as exhibit #7.

Applicant was the only witness to present evidence in this matter. His evidence was forthright. It followed very closely the written memorandum which he had submitted to the Tribunal and was entirely consistent with the content of the memorandum throughout.

Applicant stated unequivocally that he permitted his friend, Steven B. Wakely, to drive his motor vehicle on the April 31, 2001 without even thinking of asking him whether he was currently in possession of a valid driver's licence.

Applicant testified that he only became aware that Steven Wakely's licence had been suspended when Steven admitted, to the Ottawa Police Constable who had intercepted

the vehicle for a minor traffic infraction, that his licence was under suspension since a few days earlier. In fact, the suspension was for the Criminal Code of Canada offence of driving with more than 80 milligrams of alcohol in his blood, for which he was convicted on April 21, 2001.

Applicant testified that that he did not take any steps, nor did he undertake any enquiries whatsoever, to ascertain the licence status of the proposed driver and that he merely presumed that Steven Wakely was the holder of a license. When he was cross-examined, he readily admitted that he had not undertaken any active steps whatsoever in fulfilment of the onus upon him as set out in Subsection 50.2(c) of the *Highway Traffic Act*, R. S. O. 1990, Chap H.8, as amended.

Applicant presented the following evidence in support of his appeal on the grounds of exceptional hardship: he lives at the outer reaches of the newly revised boundaries of the amalgamated city of Ottawa, namely at Constance Bay, where there is no public transportation. The closest public transportation is 32 kilometers away from his home. To get around, he has to find random rides with friends. He has a sister in Ottawa. However, he states that there are already too many people living with her, in her home, and that to contemplate asking her to take him in for the duration of the vehicle impoundment period would have been unreasonable, as he would have to be getting up by 4:00 a.m. to be able to get ready for school, having regard to the large number of persons in the premises who also have to get going in the morning. He stated that it was really too inconvenient, and he did not consider this a reasonable option. He readily admits that he did not seek her help in that regard.

On cross-examination, he testified that he had an arrangement in place with his mother to get him to school or to the bus to get to school for the next 5 days i.e. when his vehicle impoundment period would run out. He stated that he had missed 7 or 8 days of school since the impoundment began. He stated that he had otherwise managed to get to school, albeit sometimes arriving late and being taken to task for this by his teachers. He did state that his studies had not faltered and that he did not, at that time, have an educational loss although his reputation for timeliness had suffered and he had been warned on the matters of missing school and lateness.

It is at this juncture that he outlined the future difficulties which he would face by reason of his impecunious state: he is facing the prospect of being unable to pay the impoundment charges. On cross-examination he readily admitted that what was of great concern to him was the continuing difficulty he would encounter by the prospect of forfeiture of his vehicle for non-payment of impound charges and the vehicle's probable sale for impound charge recovery; he was also concerned about the likelihood that he may also have to become responsible for a shortfall in impoundment recovery charges, if the vehicle is sold for less than the amount owed for the impound.

In cross-examination, Applicant was apprised of the fact that he may be entitled to recourse against the driver who brought about the difficulties, to which the Applicant expressed surprise.

Evidence for the Registrar

The Registrar did not present any oral evidence but rather made submissions based upon the law and upon the responses elicited in cross-examination of the Applicant.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Steven B. Wakely;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 21, 2002.

The Registrar referred to two decisions of the Tribunal and produced copies thereof for the Applicant and for the Tribunal. The decisions with reasons are Re: Sheri Spinks – 0190/MVIA/00/041, a decision released on September 20, 2000, and Re: Debra Theakston – MVIA/99/33, a decision released on May 18, 1999.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

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

APPLICATION OF LAW TO FACTS:

Applicant's evidence and his submissions were not sufficient to meet the onus upon him set out by the legislation, and this Tribunal is not persuaded that it would be appropriate to set aside the impoundment order.

As to the both grounds of appeal, the evidence of the Applicant was not persuasive.

In summation, the Registrar rightly pointed out that: the evidence of the Applicant did not sustain the reasons or grounds upon which the Applicant had filed his appeal.

With respect to the due diligence grounds of appeal: there was no evidence whatsoever to sustain it.

With respect to the Applicant's appeal on the ground of "exceptional hardship", the Registrar's representative analyzed the Applicant's evidence, piece by piece, to show that the hardship which the Applicant really was alluding to was a hardship which, might or might not, come about after the impoundment period would expire, that is to say, that the difficulties which he has been facing would not be resolved by the fact that the impoundment period was due to expire in five days. His dilemma is that he is concerned by the prospect of the future loss of his educational prospects, if he cannot pay the impound charges, as he claims that he will have no way to get to school. He is also facing the prospect of having to repay the Ontario Government for the large school loan he had obtained (\$16,000.00) and he feels that he would then be unable to get a job, for lack of transportation. This Tribunal cannot indulge in such speculation and, certainly, no hard evidence was brought forward to sustain it. The Applicant has not met the onus of establishing that he has no alternative to the impounded motor vehicle.

Applicant admitted that he had not sought compensation from Mr. Stevens, and this fact was alluded to by the representative of the Registrar of Motor Vehicles as further evidence that every reasonable option had not been considered by the Applicant or inquired into, to attempt to eliminate or adequately mitigate any threat or loss.

The evidence establishes clearly that the Applicant has managed, albeit with great inconvenience, and his efforts have been successful in keeping him going, despite the difficulties he encountered. His hardship has not been exceptional nor has the Applicant established that the loss is immediate, significant and lasting.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre, Q.C., Vice-Chair

RELEASED: May 16, 2001

LORI ANNE REID

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair

DATE OF
HEARING: March 26, 2001 Toronto

BACKGROUND:

The Appellant, by a notice in writing to the Registrar and the Tribunal dated July 6, 2000, appealed the Proposal and requested a hearing by the Tribunal pursuant to Section 9(2) of the Act.

The Registrar bases the Proposal upon Section 8(2) of the Act whereby the Registrar may revoke the registration of the Appellant as a salesperson in circumstances which would disentitle the Appellant to such registration if the Appellant were an applicant for such registration. It is the opinion of the Registrar, as stated in the Proposal, that the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not carry on business in accordance with law and with integrity and honesty as required by Section 6(1)(b) of the Act.

The Appellant appeals the resulting decision emanating from this opinion of the Registrar based not only on an incomplete understanding by the Registrar of the particular circumstances of the various facts relied upon by the Registrar in the Proposal, but also upon the remedial efforts made by the Appellant following such circumstances to rectify any errors in judgement on the part of the Appellant which gave rise to such opinion and decision.

EVIDENCE:

Margaret James, a Registration Officer of the Real Estate Council of Ontario, was called as a witness by the Registrar and gave evidence as to the documentary evidence which was relied upon by the Registrar in reaching the opinion of the Registrar as contained in the Proposal. She also gave evidence as to the occasion of an interview between the Appellant and Brian Schlotzhauer, the Assistant Registrar, during which the aforesaid issues were discussed.

Brian Schlotzhauer, the Assistant Registrar, also gave evidence as to the said interview and his assessment of the circumstances of the allegations set forth in the Proposal with particular regard to the facts or events which lead to the opinion and decision of the Registrar.

The Respondent called one other witness to give evidence at the hearing, that being Christine Mitchell, who is and was at all material times subsequent to March 1, 1994, the owner and principal of Garden Green Realty / Better Homes and Gardens, the employer of the Appellant up to the date of termination on December 17, 1998. The evidence given at the hearing by Christine Mitchell dealt mainly with the events of her investigation over the course of two days from December 15, 1998 to December 17, 1998 respecting certain business transactions completed by the Appellant prior to such investigation and the said termination of employment of the Appellant. The said investigation revealed forgeries and manipulation of documents by the Appellant, including the unauthorized use of a stamping device in the exclusive custody of her employer for the purpose of obtaining temporary loans or other fraudulent financial advances on a revolving basis for the sole benefit of the Appellant. It was particularly difficult for this witness to testify as to these matters given the pre-existing friendship and trust between them due to the mentor relationship offered to and accepted by the Appellant. The facts revealed by the investigation lead directly to a report thereon to the local police authorities which thence lead to criminal charges laid against the Appellant.

The documentary evidence identified by Margaret James discloses a conviction and sentence imposed by the Ontario Court of Justice on the Appellant at a trial of these charges on October 18, 1999 at Chatham, Ontario.

The Notice appealing the Proposal signed and filed by the Appellant with the Tribunal makes reference to some facts and certain remedial actions taken by the Appellant, but due to the absence of the Appellant at the hearing before this Tribunal, no evidence was given which would substantiate these references.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Appellant at the date of the Notice of Proposal was and is registered as a salesperson under the Act, and as such is a "registrant" within the meaning of section 9 of the Act;
2. The alleged Registration History of the Appellant as set out in Section C of the Notice of Proposal, Paragraphs 1 to 18, inclusive, are true as set out therein;

3. The alleged Fraud Conviction of the Appellant as set out in Section C of the Notice of Proposal, Paragraphs 19 to 31, inclusive, are true as set out therein;
4. The alleged Bankruptcy and Terms & Conditions of the Appellant as set out in Section C of the Notice of Proposal, Paragraphs 32 to 41, inclusive, are true as set out therein;
5. The Registrar served a notice of the Proposal on the Appellant as a registrant on June 15, 1999, stating that the Registrar proposes to revoke the registration of the Appellant as a salesperson based upon the opinion of the Registrar that such past conduct affords reasonable grounds for belief that the Appellant will not carry on business in accordance with law and with integrity and honesty.

THE LAW:

Pursuant to section 8(2) of the Act, the Registrar may revoke the registration of the Appellant under the Act for any reason that would disentitle the Appellant to registration under section 6 of the Act:

.....

"8(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of registration."

Pursuant to section 6(1)(b) of the Act, the Appellant is entitled to registration or renewal of registration by the Registrar, inter alia as a salesperson, except where the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not carry on business lawfully:

"6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) ...; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;"

.....

Based upon the above noted facts, the Registrar has reached the decision that there is reasonable grounds for belief that the Appellant will not carry on business in a lawful manner, and pursuant to section 9(1) and (2) is required to serve a notice on the Appellant:

"9.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar

shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal."

.....

The appeal comes to this Tribunal by virtue of section 9(4) of the Act, which provides:

.....

"9.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

.....

Applying the statutory provisions of the Act to the facts of this particular case, the only question to be determined by this Tribunal is whether or not the Registrar erred in reaching the decision that the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not in the future carry on business as a salesperson in accordance with the law and with honesty and integrity. Such an opinion requires an examination into the particular circumstances of the past conduct of the registrant and the likelihood that such conduct will be repeated by the registrant in the future or some other equivalent conduct or unlawful act. In the opinion of this Tribunal, the opinion of the Registrar as contained in the Proposal is entirely appropriate in this case.

DECISION AND ORDER:

The onus of proof that the Proposal is correct lies with the Registrar, and this Tribunal finds that this onus has been discharged in the face of all of the evidence given at the hearing and for the reasons hereinbefore stated. Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the Act, directs the Registrar to carry out the Proposal to revoke the registration of the Appellant as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

RELEASED: May 17, 2001

GEORGINA TOULOUSE

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

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

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

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

GEORGINA TOULOUSUE, Applicant
unrepresented

DATE OF HEARING: May 16, 2001

DECISION RELEASED: May 17, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on May 16, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Georgina Toulouse (the "Applicant")
Motor Vehicle: 1996 Chevrolet Monte Carlo, plate no. 823 ZAN (the
"vehicle")
Date of Appeal: May 7, 2001

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

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

This matter came before this Tribunal on May 16, 2001 and proceeded as an electronic hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

The Licence Suspension Appeal Board
1 St. Clair Avenue West, 12th Floor
Toronto, Ontario
M4V 1K6

April 18, 2001

Reference No. 2G1WW12M22T9131710

Impound Order No. 1501981

Dear Sir:

This letter is to appeal "The Order To Impound" on the following grounds:

"The loss of my vehicle will result in exceptional hardship". The vehicle is required for basic necessities which are located at another town and city. It is 10 miles to the nearest school, grocery store, pharmacy and bank. The closest hospital in case of emergency is 25 miles away in Espanola or Elliot Lake.

Your consideration on this appeal will be greatly appreciated. As owner of this vehicle, I was not aware of the above circumstances. This has caused considerable stress. Thank you in advance for giving this matter your consideration.

Georgina Toulouse

At the hearing, both in examination in chief and cross-examination, the Applicant attested to the fact that she walks to work and has alternate modes of transportation when required. The Applicant owns another vehicle which she uses to take refuse to the dump.

The Applicant has admitted to losing no time of work due to the impoundment, and confirmed that she has incurred no financial loss.

The Applicant further testified that her health has not been, nor would it be at risk, due to the loss of the vehicle. If she were to require assistance, her neighbours and family would be there to help.

The driver of the vehicle at the time of impoundment has agreed to pay a portion of the cost of impoundment.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Justin J. E. Lewis;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 6, 2002.

The Respondent offered no evidence other than the documentation offered prior to the hearing.

In closing, the Respondent argued that the Applicant appealed on the grounds of "...financial hardship...". The Applicant has an alternative vehicle and her health and safety are not in danger due to the impoundment. Further the Applicant suffered no immediate and long lasting losses, and is aware that she can recover the costs from the driver of the vehicle.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

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

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that she has an alternate vehicle.

Thus, as the Applicant has alternate methods of transportation and as she manages to continue to carry on her responsibilities without the impounded vehicle, the Tribunal may not consider the grounds set out in 22.(1) of Regulation 574 as amended.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of section 22(3)(b) O. Reg. 574 as amended by which provides that the Tribunal may not regard the grounds of appeal set out in clauses 2(b), (c) or (d) of section 22(2) unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant denied having incurred any financial burden.

The Applicant has not satisfied the Tribunal that financial loss has been incurred or that extra expenses which could be considered hardship have occurred.

Is the loss upon a person ordinarily transported in the motor vehicle?

The Applicant is a person ordinarily transported in the vehicle.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider loss set out in section 22(2)(b), (c) or (d) unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of Subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon a person other than the suspended driver.

The clause in section 22(3) are cumulative, the Applicant must meet all the criteria set out in that section in an appeal. As indicated above, the Applicant does not meet the criteria of clause 22(3)(a) and (b).

After assessing the evidence presented, the Tribunal finds that the Applicant has not established that she has suffered exceptional hardship as required under section 50.2(3) of the Act.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: May 17, 2001

WILLIAMS and MAXAM

SHARON WILLIAMS AND DANIEL MAXAM

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

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

SHARON WILLIAMS AND DANIEL MAXAM, appearing on their
own behalf
KAREN JONES, Counsel, representing the Ontario New
Home Warranty Program
No one appearing on behalf of CHAHAL AND SON CONTRACTOR
INC., the Added Party

DATES OF HEARING: March 13 and 14, 2001 and
May 7, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Sharon Williams and Daniel Maxam (the "Applicants"), appeal the decision of the Ontario New Home Warranty Program (the "Program") set out in its decision letter of April 25, 2000 (Exhibit 1).

The home of the Applicants, which is the subject matter of this hearing, is situated at 34 B Lambton Avenue in the City of York. The Applicants purchased the home pursuant to an Agreement of Purchase and Sale with Chahal and Son Contractor Inc., (the "Added Party"). The transaction closed and Applicants obtained possession of the home on September 31, 1997. After the Applicants obtained possession of the home, the Added Party went out of business.

At the commencement of the hearing on March 13, 2001, counsel for the Program, made a motion to the Tribunal on the basis set out as follows:

1. On November 8, 2000 when this matter came before the Tribunal for hearing, the Applicants had handed the Program a report by an individual who the Applicants intended to call as an expert witness.
2. The Applicants had failed to comply with Rule 6.(4) of the Rules of Practice of the Tribunal in that they had failed to make timely disclosure of the written report of the Applicants' expert.

3. The Program accordingly moved for an adjournment of the hearing in order to consider the Applicants' expert's reports handed to the Program's counsel on November 8, 2000.
4. The Tribunal issued an Order on November 8, 2000, granting the Program an adjournment so as to enable the Program's counsel to consult its expert for the purpose of examining the report of the Applicants' expert.
5. The November 8, 2000 Order of the Tribunal also stated that the Applicants were to provide a Curriculum Vitae "of any expert witness upon whom they intended to rely at the hearing".
6. At the commencement of the hearing on March 13, 2001, Applicants handed to the Program's counsel a report of one Kaleides who had been retained by the Applicants in lieu of the expert whose report they had attempted to hand in on November 8, 2000.
7. The report of the Applicants' new expert, Kaleides, was provided in an untimely fashion without complying with Rule 6(4) of the Tribunal's Rules of Practice and no Curriculum Vitae of Kaleides was provided. This was done in breach of the November 8, 2000 Order of the Tribunal.
8. The Program's counsel accordingly moved that the Kaleides report not be permitted to be entered or received in evidence.

In response to the Program's submissions, the Applicants conceded that they had not provided the Program with a Curriculum Vitae of Kaleides but had merely provided a report of Kaleides to the Program's counsel on the morning of the hearing on March 13, 2001. The Applicants also conceded that this was a report of a new expert retained by them in the last few days, well after November 8, 2000. The Applicants also stated that the late production of the Kaleides report was due to the fact that the Applicants' original expert had not cooperated with them and as a result they had sought the services of someone else to testify on their behalf. Their endeavours to find a replacement for their original expert were not successful until they managed to retain Kaleides when it was then too late to comply with the Tribunal's November 8, 2000 Order.

Having heard the parties submissions and upon considering such submissions, the Tribunal ruled that the Applicants had complied with neither the Tribunal's Rules of Disclosure regarding expert witnesses nor the Tribunal's Order of November 8, 2000. Accordingly, the Tribunal ordered that Kaleides would not be permitted to testify as an expert witness.

The hearing then proceeded and Sharon Williams commenced her testimony.

The Added Party, added as a party to this hearing by the Tribunal's Order of July 18, 2000, was not present or represented at the hearing.

THE EVIDENCE:

The evidence adduced at the hearing, both documentary and oral, was as follows.

On October 29, 1997 the Program received written notice from the Applicants of certain deficiencies in the home. On March 1, 1998 Applicants completed a conciliation request form and forwarded it to the Program. (Exhibit 4, Tab 3)

On April 21, 1998 the Program's warranty representative Mark Roccatagliata attended at the Applicant's home with the Applicants to inspect the home. The Added Party did not attend the meeting. At the meeting, Roccatagliata completed a written "Field Report". (Exhibit 4, Tab 4) This report noted the complaints pointed out to Roccatagliata by the Applicants and his observations regarding those complaints.

On April 29, 1998 following the inspection of April 21, 1998, the Program's conciliation report was sent to the Applicants. The report contained 27 items which the Program considered as covered under warranty (Schedule A(1) items) and four items considered as not covered under warranty (Schedule A(2) items). At the hearing, Applicants took no issue with the four non warranted items.

The Program called upon the Added Party to repair the items covered under warranty. Due to the non cooperation by the Added Party, the Program approached three building contractors on July 7, 1998 and invited them to quote on the repair of the items covered under warranty. Of the three contractors only one responded and submitted a quotation. This contractor had done work for the Program before and the Program had found the work to be satisfactory. Accordingly this contractor, The Paisley Group Inc., was awarded the contract for repairs in regard to the warranted items. The Program had prepared a work schedule in regard to the 27 items covered under warranty. This schedule included the scope of repair work to be done relative to each item and the estimated cost of repair work for each such item. (Exhibit 4, Tab 8) The total estimated cost of repairs to the 27 warranted items was \$12,993.75 plus G.S.T. in the sum of \$901.16.

Subsequently, reinspections were held at the home on September 24, 1998 and October 1, 1998. The Applicants, Roccatagliata and Dwight Lawrence, another warranty representative, attended these reinspections.

Pursuant to these two reinspections a conciliation reinspection report was issued by the Program in which a further 6 items were noted as items covered under warranty. The total estimated cost of repairs to these six additional items was \$7,075.00 plus \$495.25 G.S.T. A work schedule of repairs necessary for each item, together with the cost of repairs to each item, was prepared by the Program and accepted by The Paisley Group Inc. which was awarded this contract on October 21, 1998. (Exhibit 4, Tab 12)

The Applicants took issue with neither the 27 warranted items nor the six additional warranted items. The Applicants had been notified by the Program as to the repairs, the scope of the repairs and the awarding of the contracts for such repairs to The Paisley Group Inc.

On October 27, 1998 The Paisley Group Inc., advised Roccatagliata that although numerous attempts had been made by it to make interior repairs to the home, the Applicants had not allowed access to the home.

In early November of 1998, Sharon Williams informed Roccatagliata that she did not want the repair work to proceed as she had a young baby who she feared would be adversely affected by the repair work, and she wished the repairs to be delayed until the Spring of 1999. Certain work had already been done by The Paisley Group Inc., and by the end of November 1998 they had debited the Program with \$7,657.00 in repair costs. However, the Applicants were not satisfied with the repairs done by The Paisley Group Inc., and refused to allow further repairs to the home. On December 9, 1998 the Program offered the Applicants a cash settlement in lieu of having the balance of repair work done. This cash offer made to the Applicants by the Program was for \$9,308.81. The offer was refused by the Applicants.

On May 3, 1999 a further conciliation reinspection of the home was carried out Dwight Lawrence of the Program in the presence of both Applicants. On May 11, 1999 a conciliation reinspection report was issued by Lawrence (Exhibit 4, Tab 22).

On June 11, 1999 the Program made a revised cash settlement offer to the Applicants. This offer comprised:

- (a) The outstanding items not repaired by The Paisley Group Inc. on the first work schedule (Exhibit 4, Tab 8) and set forth in that work schedule under item numbers 2, 3, 4, 7, 8, 11, 12, 13, 14, 15, 16, 18, 22, 23, 25, 26 and 27. The amount offered in respect of the aforesaid items was \$4,361.25.
- (b) One outstanding item of repair on the work schedule of October 21, 1999 (Exhibit 4, Tab 12). This item number 4 and the estimated value thereof was \$775.00.
- (c) All items, other than item 7, on the May 11, 1999 conciliation reinspection report which were estimated to cost \$10,760.00. Item 7, according to Roccatagliata, been repaired.

The sums contained in (a), (b) and (c) above total \$15,896.25.

Lawrence testified that he is currently employed with the Program as the Regional Manager for the East/Central area of Ontario and is responsible for an office staff of 18 persons. Prior to his holding this position, he was Manager of the Program's West Central office. Before joining the Program, he was the Director of Construction for an international company and had personal involvement in the overseeing of the construction of thousands of homes.

He stated that he attended at inspections of the Applicants' home with Roccatagliata and the Applicants and confirmed with reasons why the Program was warranting various items in the home while not warranting other items.

Roccatagliata also testified at the hearing and gave a background of his experience in the building industry which dated back to 1982 and includes a college diploma in architectural technology. Since 1988 he has worked at the Program and held positions as a conciliator, warranty representative and contract manager. In his employment with

the Program he has inspected approximately 2800 homes. Roccatagliata further testified as to the estimated cost of repairs to the various warranted items and described from his nearly twenty years experience in the building industry how the repair cost of each item was calculated for both labour and materials.

Sharon Williams conceded in her testimony that the Program's June 11, 1999 offer of \$15,896.25 had been received by the Applicants. By September 29, 1999 she had not decided or advised the Program whether or not the Applicants would accept the Program's offer of settlement. She did however write to the Program on September 29, 1999 advising it that she was going to obtain an assessment of the cost of repairs still outstanding from an independent contractor as she believed such outstanding repairs was between \$35,000.00 and \$40,000.00.

On October 14, 1999 the Program wrote to the Applicants in reply to the Sharon Williams letter of September 29, 1999 pointing out that some four months had passed since the June 1999 offer of settlement and that if the Applicants continued to dispute the offer the Program would issue a final decision letter which would allow the Applicants to appeal the Program's decision to the Tribunal. Finally, on January 5, 2000 the Applicants faxed to the Program a quotation from a contractor which, she conceded in her testimony, had neither details as to the scope of repairs nor the cost of repairs to individual outstanding warranted items but only contained a final globular figure of \$45,000.00 (Exhibit 4, Tab 29). The Program rejected this quotation as it was not able to assess the individual items' scope of repairs and cost of repairs. No further quotation was received by the Program from the Applicants.

Sharon Williams further stated that she had not been successful in obtaining any further quotations from contractors as none of the contractors she had approached for a quotation had agreed to furnish her with one.

Sharon Williams also stated that the Applicants had refused to accept the Program's offer of \$15,896.25 because they viewed it as inadequate to cover the cost of repairs to the outstanding warranted items. She further stated the Applicants were dissatisfied with the repairs done by The Paisley Group Inc. and for this reason she had refused them further access to the home and that she will continue to refuse them access. She also stated she will refuse to accept any contractor nominated by the Program due to the Applicants no longer having any faith in the Program or its contractors' abilities to satisfactorily do the necessary repairs to the warranted items.

FACTS FOUND PROVEN:

Based upon the oral and documentary evidence presented to the Tribunal, the following are the facts found proven:

1. On August 25, 1997, the Applicants contracted with the Added Party to have a residential home constructed by such builder at 34 B Lambton Avenue, City of York, Ontario.
2. Pursuant to the contract, title to and possession of the home was given to the Applicants on September 31, 1997.

3. On or about October 29, 1997, the Applicants advised the Program in writing of certain deficiencies in the home which the Added Party had failed or refused to repair.
4. On or about March 1, 1997, the Applicants requested the Program to hold a conciliation inspection of the home regarding the deficiencies noted by the Applicants.
5. On April 21, 1998, a conciliation meeting was held at the Applicants' home. Present at that meeting were the Applicants and the Program's representative Mark Roccatagliata who noted on a "Field Report" the nature and particulars of the deficiencies complained of by the Applicants.
6. On April 29, 1998, the Program issued its written conciliation report relating to the April 21, 1998 meeting and forwarded it to the Applicants.
7. The conciliation report contained a list titled "Schedule A1" of 27 items of deficiencies in the Applicants home which the Program considered to be covered under warranty. The report also contained a list titled "Schedule A 2" of what the Program considered not to be covered under warranty.
8. The four items in Schedule A 2 of the conciliation report of April 29, 1998 were not disputed by the Applicants.
9. The Program awarded The Paisley Group Inc. the contract for repairs to the 27 items covered under warranty in the above conciliation report.
10. Under the contract awarded to it by the Program, the scope of repair work to be done by The Paisley Group Inc. was accepted by the latter on September 16, 1998 at an agreed total price of \$12,993.75 plus G.S.T. of \$901.16.
11. Certain repairs were carried out by The Paisley Group Inc. and it was paid by the Program for such repairs.
12. On October 1, 1998, following a reinspection of the premises by Roccatagliata together with warranty representative Dwight Lawrence and the Applicants, the Program issued a reinspection report listing a further six complaints all of which were covered under warranty by the Program.
13. Pursuant to the October 1, 1998 reinspection report, the contract for repairs in regard to the six warranted items was awarded by the Program to The Paisley Group Inc. Under that contract, the scope of repair work to be done was set out as well as the cost of repairs, which cost totalled \$7,075.00 plus G.S.T. of \$495.25.
14. By November 26, 1998, the Program had paid \$7,657.00 to The Paisley Group Inc. for repair work done by it at the home and that repair work had been verified by the Program as complete.
15. The Paisley Group Inc. since November 1998 has not been permitted access to the home by the Applicants who since that date have refused The Paisley

Group Inc., as well as any other contractor nominated by the Program, permission to do repairs.

16. The Applicants refused to accept a cash settlement offer of \$9,308.81 made to them by the Program on December 1998.
17. On May 3, 1999, a further conciliation reinspection was held at the home when the Applicants and Dwight Lawrence of the Program were present.
18. On May 11, 1999, a conciliation reinspection report was issued identifying eight outstanding items covered under warranty and three items not covered under warranty. The estimated cost of repair to the eight outstanding warranted items was \$10,760.00.
19. The total cost of estimated repairs to all outstanding warranted items in the Applicants' home is \$15,896.25 which sum was offered on June 11, 1999 by the Program to the Applicants as a cash settlement which was not accepted by the Applicants and will not be accepted by them as they consider the offer to be inadequate.
20. On January 5, 2000, the Applicants submitted a written document to the Program listing 35 items that they assert require repair, for a total cost of \$45,000.00. The document does not attribute the cost to individual items or identify the scope or nature of the work required.
21. The Program rejected the sum of \$45,000.00 as it was not able to assess how that sum was arrived at as it lacked an item by item breakdown.

THE LAW:

The *Ontario New Home Warranties Plan Act* (the "Act") states as follows:

Section 13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

.....

Section 14.(1)(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

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

.....

Section 14.(3) The Corporation may perform or arrange for the performance of any work in lieu of or in the mitigation of damages claimed under subsection (1).

DECISION:

The onus of proof in this matter rests upon the Applicants.

The evidence, both documentary and oral, reveals that there were deficiencies in the construction of the Applicants home. Both witnesses for the Program, Roccatagliata and Lawrence, freely conceded that there were defects in the home's construction and that it was not constructed in a workmanlike manner, free from defects in material and in breach of the Ontario Building Code. The Program accordingly conceded that there had been a violation of Section 13(1)(a)(i) and (iii).

Initially the Program listed 27 items as deficiencies "covered under warranty" and required the Added Party to repair these deficiencies. The Added Party did not repair the deficiencies and the Program, as it was entitled to do, awarded the contract for repairs to The Paisley Group Inc., a construction company which the Program had successfully used before to rectify builders' deficiencies. Subsequently, upon further reinspections of the home by the Program, there were additional deficiencies revealed and the Program added to the initial list of 27 items that it had already "covered under warranty". The repair of the further warranted deficiencies were awarded to The Paisley Group Inc.

When the Applicants complained regarding the repairs that The Paisley Group Inc. was carrying out and refused to allow the latter to continue, the Program's Roccatagliata inspected the repairs effected by The Paisley Group Inc. determined the extent of such repairs and paid the cost of such completed repair. Roccatagliata confirmed and satisfied himself as to the competency of the repairs carried out by The Paisley Group Inc. a cash settlement was offered to the Applicants by the Program in lieu of further repair work being done on the home. All offers of settlement were rejected by the Applicants including the Program's final cash offer of \$15,896.25 made on June 11, 1999. All offers of settlement were rejected as being inadequate, and the Applicants refused to allow any work on the outstanding deficiencies to be carried out by the Program's contractors.

The Applicants took the position that they would not permit repairs to be done by the Program or its contractor, and they would not accept any offers made by the Program including the final cash offer of settlement. This position was confirmed and repeated by Sharon Williams in her testimony during the hearing. She was adamant that the Applicants would not allow the Program's contractors access to the home so as to effect repairs nor would they consider accepting all offers of cash settlement in lieu of repairs.

Despite the Program's repeated requests to the Applicants to furnish a quotation or quotations as to the cost of outstanding repairs, the Applicants failed to do so. Eventually, in January 2000, the Applicants sent Program a list of items that according to the Applicants required "work to be done", with no breakdown as to the individual cost of repair to each item but merely with a total cost of \$45,000.00.

It is clear to the Tribunal that the Applicants were, and continue to be, unreasonable and uncooperative in their attitude in either allowing the Program to complete repairs or in refusing to accept the final offer of the Program. The Applicants have given no rational or reasonable explanation for refusing the Program's offer of \$15,896.25. They merely take the position it is insufficient without producing evidence as to why it is not sufficient.

The evidence of Roccatagliata and Lawrence left the Tribunal in no doubt as to their competence and expertise in the field of residential home construction. Roccatagliata, in particular, has vast practical experience in residential construction including the nature and cost of repairs to the Applicants home. The evidence showed that the Program was quick to respond to the Applicants complaints, was supportive of their concerns and in no way delayed, either in the implementation of repairs or in making cash settlement offers.

In contrast to the Program's position is the Applicants' position which can be termed as one of obstructiveness and unreasonableness. The Applicants persist in their refusal to allow access to their home for the purposes of repairs, whether by the Program or its contractors. The Applicants persist in their refusal to accept the cash settlement offered by the Program while providing no credible basis for their belief that the cash settlement offer is too low.

Under section 14(1)(b) of the Act, the Applicant's may claim the amount of their damages where they have a cause of action for damages for breach of warranty. The evidence is that the Program assessed the Applicant's claims and arranged to repair the defects. The Tribunal finds that the Program's conclusions respecting the repairs and their scope, as testified by Roccatagliata, are reasonable. The Program made every reasonable effort to arrange for the performance of the necessary work.

The Applicants refused access to the Program's agent to perform the work necessary to repair the defects. The Program has been denied the opportunity to complete the repairs. The Program's repairs would have cost the Applicants nothing as the repairs would have been done under warranty, and the Applicants would have no damages. The Applicants, by refusing to permit the Program to effect repairs, have failed to mitigate their damages.

Under section 14(3) of the Act, the Program is entitled to arrange for the performance of any work in lieu of or in mitigation of any damages claimed by the Applicants. The work arranged by the Program would, on the evidence, fully satisfy the Applicant's claims under section 14(1). The Program has arranged for the work, but the Applicant's have refused it. The evidence shows no justification for the Applicant's refusal to permit the Program to effect repairs. The Tribunal finds that the Program's arrangements are those contemplated by section 14(3) of the Act and although implementation of the arrangements is frustrated by the Applicants' conduct, the arrangements are, in themselves, sufficient to be in lieu of the Applicants claims under section 14(1).

ORDER:

Accordingly, by virtue of the authority vested in it under Section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: May 17, 2001

MOGHADDAM, ALIREZA and JKA MOTORS LTD.

JKA MOTORS LTD. AND ALIREZA MOGHADDAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DOUGLAS MACKINTOSH, VICE-CHAIR

APPEARANCES:

G. PETER ABRAHAMS, Counsel, representing the Applicants
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

May 18, 2001

Toronto

ORDER

Following attendances on May 18, 2001 at a hearing before the Licence Appeal Tribunal of G. Peter Abrahams, Counsel for JKA Motors Ltd. and Alireza Moghaddam (the "Applicants") and Aviva R. Harari, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"),

After the hearing of evidence in this matter, rather than adjourning to another date for submissions from counsel, it became preferable to require written submissions.

Accordingly, on consent, both parties are ordered to make submissions as follows:

1. Within fifteen days from May 18, 2001, counsel for the Applicant will serve on the Registrar and file with the Tribunal his written submission.
2. Within thirty days thereafter, counsel for the Registrar will serve on the Applicant and file with the Tribunal her written submission.
3. Within ten days thereafter, counsel for the Applicant will serve on the Registrar and file with the Tribunal any written reply he wishes to make.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: May 22, 2001

ZAYAT, HASSAN and CYRVILLE STAR TOP AUTO SALES INC.

CYRVILLE STAR TOP AUTO SALES INC. AND HASSAN ZAYAT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: F. BRUCE FITZPATRICK, VICE-CHAIR

APPEARANCES:

HASSAN ZAYAT, Agent, representing the Applicants
MARY JANE SOUTH, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: May 15, 2001 Ottawa

ORDER

Following attendances on May 15, 2001 at a hearing before the Licence Appeal Tribunal of Hassan Zayat, Agent for Cyrville Star Top Auto Sales Inc. and Hassan Zayat (the "Applicants") and Mary Jane South, Agent for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"),

WHEREAS, prior to the commencement of the hearing of this matter, I advised the parties that upon reviewing the material it became apparent to me that I had some dealings in the past with the Applicant, Hassan Zayat. Some seven years ago Mr. Zayat was a party in a proceeding where I was counsel for an opposing party. I suggested in the circumstance it might be better if I recuse myself. Both counsel for the Applicant, Mr. Samek and the representative of OMVIC, Mary Jane South, agreed.

The parties further agreed that the matter is to proceed before another Chairperson on July 18 and 19, 2001, at Ottawa. The parties agreed that I could bind over to the next hearing date two independent witnesses which had been summonsed by OMVIC, namely Nadine Cosentino of 1717 Burton Road, Vars, Ontario and Rachelle Denis also of 1717 Burton Road, Vars, Ontario. I advised the witnesses they were bound over, and I so order.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick
Vice-Chair

Released: May 22, 2001

CASTLETON CUSTOM HOMES DESIGN & BUILD LTD.

CASTLETON CUSTOM HOMES DESIGN & BUILD LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel, representing the Applicant
ANDREW LEWIS, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATES OF HEARING: April 9, 2001 and
May 10 and May 23, 2001 Toronto

ORDER

Following attendances on April 9, 2001, May 10 and May 23, 2001 at a hearing before the Licence Appeal Tribunal of Brian M. Campbell, counsel on behalf of Castleton Custom Homes Design & Build Ltd. (the "Applicant") and Andrew Lewis, counsel on behalf of the Registrar, Ontario New Home Warranty Program (the "Registrar");

WHEREAS both counsels agreed to adjourn the hearing to a further date;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the hearing is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Wednesday, August 1, 2001 and to continue on August 2 and 3, 2001 and to further continue on Thursday, August 16 and 17, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

RELEASED: May 23, 2001

CARMELO DE CICCIO CONSTRUCTION CO. LIMITED

CARMELO DE CICCIO CONSTRUCTION CO. LIMITED

APPLICATION TO CONSIDER WHETHER CONDITIONS
IMPOSED UPON APPLICANT HAVE BEEN MET

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

EDWIN G. HOOKER, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING: May 14, 2001 Toronto

REASONS FOR RULING AND ORDER

BACKGROUND:

The Ontario New Home Warranty Program (the "Program") issued a Notice of Proposal dated June 15, 2000 to refuse to renew the registration of Carmelo De Cicco Construction Co. Limited (the "Applicant") under the *Ontario New Home Warranties Plan Act* (the "Act"). The Applicant did not file its appeal to the Registrar's proposal within the time fixed by the Act and brought an application to the Tribunal for an extension of time. The hearing of the Application for extension originally came before the Tribunal on November 10, 2000 on which date it was adjourned to November 20, 2000 and eventually came to hearing before the Tribunal on January 19, 2001.

On January 19, 2001 Vice-Chair Hiley presided, heard testimony and at the conclusion of the hearing granted the Applicant an extension of time for the filing of its appeal to the Registrar's proposal on the following conditions:

1. On or before January 29, 2001, the Applicant pays to the Program a security deposit on those homes that were enrolled after June 15, 2000 and for which no security deposit has yet been paid, provided that any existing security deposits held by the Program but now repayable to the Applicant can be used by the Applicant for the payment of security deposits on these particular homes, and
2. The Applicant will not enroll any new homes prior to the hearing and decision of the Tribunal unless he immediately pays a security deposit of \$5000.00 per home to the Program.

This hearing is therefore to consider whether the Applicant is in compliance with the conditions set out in paragraph 1 of the Tribunal's January 19, 2001 Order.

THE EVIDENCE:

The evidence placed before the Tribunal on May 14, 2001, was both documentary and oral.

The only persons who testified before the Tribunal were Pat Varcoe for the Program and Vincenzo Emmanuel De Cicco for the Applicant.

Pat Varcoe stated he is a chartered accountant by profession and the Vice President, Licensing and Underwriting, with the Program. He testified that between the date of the Tribunal's Order of January 19, 2001 and January 29, 2001 the Applicant provided no security deposit to the Program nor has security been provided to date.

On January 26, 2001 Varcoe addressed a letter to the Applicant setting out how the Program calculated that \$30,000.00 was owing to the Program for which a security deposit was required in terms of paragraph 1 of the Tribunal's Order. (Exhibit 1, Tab 3)

On January 29, 2001 Julia Cook, the agent for the Applicant, wrote to the Program acknowledging receipt by the Applicant of the Program's letter of January 26, 2001. Cook's letter disputed the correctness of the Program's calculations. (Exhibit 2, Tab 8)

The Program replied to Cook by letter dated January 31, 2001 in which it took issue with the contentions of Cook and reiterated that \$30,000.00 was, according to the Program's calculations, owing by the Applicant and that the Applicant had not complied with the Order of the Tribunal.

Varcoe testified further that neither Cook nor De Cicco contacted the Program to discuss the Program's letter of January 26, 2001. Furthermore, no explanation of any of the Program's calculations was requested by Cook or De Cicco, nor was any request made for time to consider the Program's calculations.

Varcoe explained that in order to calculate what security deposit was to be furnished by the Applicant, it was necessary to calculate how many homes had been "enrolled after June 15, 2000 and for which no security deposit had yet been paid" as stated in paragraph 1 of the Tribunal's January 19, 2001 Order.

According to Varcoe, the homes enrolled after June 15, 2000 required \$5,000.00 per enrollment and as 12 homes were enrolled after June 15, 2000, \$60,000.00 was the security required, which has not been paid by the Applicant to the Program.

Varcoe went on to explain that the 12 homes enrolled with the Program were set forth in a document prepared by the Program and which document was current to the date of its preparation, namely January 26, 2001. This document had been sent to the Applicant with the Program's letter of January 26, 2001. Varcoe confirmed that there was no change as to that document's contents between January 26 and January 29, 2001, the latter date being the compliance date set out in the Tribunal's January 19, 2001 Order. (Exhibit 1, Tab 5)

Varcoe stated that the Tribunal's January 19, 2001 Order further stated that "any existing security deposits held by the Program but now repayable to the Applicant can

be used by the Applicant for the payment of security deposits on these particular homes".

According to Varcoe, the amount the Program received as security deposits from the Applicant was \$85,000.00. The Program repaid \$5,000.00 to De Cicco. The Applicant had enrolled 22 homes on or before June 15, 2000 of which 14 homes were still under first year warranty, and the security deposits in respect of those 14 homes is not repayable to the Applicant at this time. Of the 14 homes still under warranty, the Applicant paid security deposits for 11 homes, but did not pay security deposits for 3 homes. These 3 homes are referred to in the Registrar's Notice of Proposal. Accordingly, the 14 homes enrolled before June 15, 2000 and still under first year warranty require \$70,000.00 in security deposits. Of this the Applicant has paid \$55,000.00. Still outstanding is \$15,000.00 in security deposits for the three homes for which the Applicant had provided no security. The net result according to Varcoe was that the Applicant owes the Program \$30,000.00 in security deposits.

At the end of Varcoe's evidence Vincenzo De Cicco took the stand.

The evidence of Vincenzo De Cicco was that he is the majority shareholder of the Applicant and has been Vice President of the Applicant for the past three years during which time he has been employed by the Applicant.

De Cicco acknowledged that he received the Program's faxed letter to the Applicant on the afternoon of Friday, January 26, 2001. As he disagreed with the Applicant's calculations he instructed agent Cook to write to the Program, which she did by way of her letter dated January 29, 2001. He stated that he calculated that the Applicant owed the Program \$10,000.00 and not the \$30,000.00. He was at a loss as to how the Program had arrived at the figure of \$30,000.00.

Under cross-examination, he stated that the Applicant had received the Tribunal's Order of January 19, 2001. He also stated that he has data available to him "to do the figures and I did them and calculated I had to pay \$10,000.00." He conceded that he did not notify the Program that the Applicant owed it \$10,000.00.

De Cicco stated that when the Applicant received the Program's letter of January 26, 2001, it was then too late on that date to arrange payment through the Applicant's bank. Also, on Monday, January 29, 2001 he did not go to the Applicant's bank to arrange for payment of \$10,000.00 to the Program.

De Cicco further stated that Cook's letter to the Program of January 29, 2001 correctly reflects his instructions to Cook and that that letter did not enquire of the Program how the Program calculated its figures.

FACTS FOUND PROVEN:

The following are the facts found proven based on the evidence, both documentary and oral.

1. On January 19, 2001, the Tribunal issued an Order that the Applicant's application to extend the filing of its appeal be granted on two conditions, the first being:
 1. On or before January 29, 2001, the Applicant pays to the Program a security deposit on those homes that were enrolled after June 15, 2000 and for which no security deposit has yet been paid, provided that any existing security deposits held by the Program but now repayable to the Applicant can be used by the Applicant for the payment of security deposits on these particular homes, and ...
2. The Tribunal's January 19, 2001 Order was sent to and received by the Applicant.
3. The security deposit requirements of the Program, which requirements the Applicant accepted, is \$5,000.00 per home.
4. On January 26, 2001 the Program addressed a letter to the Applicant in which letter it detailed how it calculated that the Applicant owed the Program \$30,000.00 which the Applicant was to pay the Program a security deposit in terms of the Tribunal's January 19, 2001 Order.
5. The Program's letter of January 26, 2001 was faxed to and received by the Applicant on the afternoon of January 26, 2001.
6. Other than Cook's letter of January 31, 2001 addressed to the Program, the Applicant at no time after January 19, 2001 contacted or communicated with the Program or paid to the Program any amount in terms of paragraph 1 of the Tribunal's January 19, 2001 Order.
7. Twelve homes were enrolled by the Applicant with the Program after June 15, 2000.
8. The Applicant was required to establish security for the 12 homes enrolled after June 15, 2000 at \$5,000.00 per home, for a total of \$60,000.00.
9. The Applicant has not paid the Program security deposits for the 12 homes enrolled after June 15, 2000 and is presently indebted to the Program in the sum of \$60,000.00 respecting those 12 homes.
10. There are presently 11 homes that the Applicant had, prior to June 15, 2000, enrolled with the Program and which 11 homes remain under first year warranty, and those security deposits are not at this time refundable to the Applicant.

11. The security deposit required by the Program was \$5,000.00 for each of the 11 homes enrolled by the Applicant prior to June 15, 2000, a total of \$55,000.00.
12. Prior to June 15, 2000, the Program received \$85,000.00 in security deposits from the Applicant.
13. At present, the Applicant's outstanding and unpaid security deposits total \$30,000.00.

DECISION:

The Tribunal, in its January 19, 2001 Order referred to the concern it had as to the Applicant continuing to enroll homes without establishing the required security. That concern was therefore addressed by placing conditions on the Applicant "if he wishes to have the opportunity to appeal the Notice of Proposal".

In terms of the Tribunal's Order of January 19, 2001, the Applicant was given the opportunity to pay the Program the requisite security deposit by January 29, 2001.

Despite the Tribunal having given the Applicant the opportunity to meet the legitimate security deposit requirements, the Applicant has done nothing to comply with the Order. The Applicant's Vincenzo De Cicco, by his own admission when under cross-examination, stated that the Applicant owes \$10,000.00. Despite this admission the Applicant has established no security deposit whether in the sum of \$10,000.00 it admits owing or in any other amount.

Not only did the Applicant not pay or tender payment of \$10,000.00 to the Program but it made no effort to request an explanation of the Program's calculations which had been set forth in the Program's letter of January 26, 2001. The Program had furnished the Applicant with detailed schedules and information in support of its calculations. The attitude of the Applicant as reflected by the letter of Cook - which was written on and in accordance with the Applicant's instructions - is in no way indicative of the Applicant seeking a resolution of the dispute.

Vincenzo De Cicco's conduct in this matter is difficult to understand. In De Cicco's evidence he concedes that the Applicant owes the sum of \$10,000.00 and yet he did not notify the Program of owing it this amount and did nothing to pay that sum to the Program. He had full opportunity on January 29, 2001 to make payment of security in the amount that he admitted owing but chose not to do so.

Nothing was placed before the Tribunal to indicate that repayment of security deposits held by the Program has been unduly delayed or withheld from the Applicant.

The Tribunal had the opportunity of observing Varcoe and De Cicco when they testified, and it has no difficulty in preferring the evidence of Varcoe to that of De Cicco. Varcoe's evidence was given in a straight forward manner while De Cicco was at times evasive in his responses.

The Tribunal accepts the evidence of Varcoe that the calculations of the Program are correct and that the amount owing by the Applicant under paragraph 1 of the January 19, 2001 order is \$30,000.00.

The Applicant's conduct continues to be obstructive as evidenced by the testimony of Vincenzo De Cicco. Even if the calculations of the Program were not correct (which the Tribunal has not found to be the case) the failure of the Applicant to pay what it conceded as owing is not excusable and in and of itself indicated non compliance with the terms of the Tribunal's January 19, 2001 Order.

ORDER:

The Tribunal accordingly finds that the Applicant has not complied with the condition 1 of the Order of the Tribunal of January 19, 2001 and denies the Applicant an extension of time within which to file its appeal under section 7 of the *Licence Appeal Tribunal Act*, 1999.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: May 23, 2001

PREHEARING

DON FOURNIER SERVICE CENTRE INC. AND DONALD FOURNIER

**APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES
91(8)(a)(c) and (e) AND CLAUSES 93(c) OF THE *HIGHWAY
TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED**

**To revoke Don Fournier Service Centre Inc.'s registration as a
Motor Vehicle Inspection Station and Donald Fournier's
registration as a Motor Vehicle Inspection Mechanic**

TRIBUNAL: Alan Holbrook, Member

APPEARANCES: Ronald G. Guertin, Counsel, representing the Applicant

Patrick Moore, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
PRE-HEARING: May 23, 2001 *(By teleconference)*

ORDER

Following attendances on May 23, 2001 at a pre-hearing by teleconference before this Tribunal of Ronald G. Guertin, Counsel on behalf of Don Fournier Service Centre Inc. and Donald Fournier (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Monday, June 25, 2001, and to continue if necessary, on June 26 and 27, 2001, 2001 at a venue in Ottawa to be determined by the Tribunal;

1. The Parties to the hearing are
 - (a) Don Fournier Service Centre Inc.;
 - (b) Donald Fournier; and
 - (c) The Director of Vehicle Inspection Standards
2. The parties present at the pre hearing recorded that there was no resolution of the issues raised in the Director's Notice of Proposal.
3. The parties confirmed that the Applicant has received all of the Ministry of Transportation materials in support of the Director's proposal.

4. The Applicant had asked the Tribunal to schedule the hearing for a date subsequent to the related court date. The Respondent objected on the grounds that public interest and safety would not be served by delaying a decision in this matter by the Tribunal. The Tribunal ruled the hearing before the Tribunal dates will be set as soon as possible, independent of the court proceedings.
5. The Director intends to call at least 8 witnesses. They will give evidence to a number of Safety Standard Certificates issued by the Applicant in violation of the *Highway Traffic Act*. The Director will request that the witnesses be qualified by the Tribunal as expert witnesses in the field of automobile mechanics, and they will give mechanical evidence with respect to those vehicles inspected.
6. The Applicant intends, to call at least 8 witnesses, who will give testimony pertaining to the alleged infractions. In addition, witnesses with automotive engineering background will be called, and the Applicant will ask that they be qualified as experts by the Tribunal. Mr. Donald Fournier will give testimony regarding the allegations related to the Applicant's record keeping.
7. On or before June 4, 2001, each party will, by facsimile, forward to the other party and to the Tribunal a complete list of their witnesses and respective resumes.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Member

RELEASED: May 23, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1605411 OWNED BY: Stanislaw Konefal of: 99 Dowling Avenue, Apartment # 102, Toronto, Ontario M6K 3A2 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: May 5, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

STANISLAW KONEFAL

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Stanislaw Konefal, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 15, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Stanislaw Konefal

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #1605411** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on May 5, 2001.
2. The applicant, **Stanislaw Konefal**, whose name is shown on the plate portion of the permit for the impounded motor vehicle, is the lessee of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(c) of the Highway Traffic Act, stating **that the applicant exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at in respect of which the order was made was not then under suspension.**
5. The Registrar is satisfied, having reviewed the evidence, that the applicant met the due diligence requirement on the date of the rental.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

STANISLAW KONEFAL

REGISTRAR OF MOTOR VEHICLES

(signature of Applicant)

(signature of Registrar)

(date)

(date)

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1502980 OWNED BY: ENTERPRISE RENT A CAR CANADA LIMITED of: 100-7390 Woodbine Avenue, Markham, Ontario L3R 1A5 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: May 12, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

ENTERPRISE RENT A CAR CANADA LIMITED

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Enterprise Rent A Car Canada Limited, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

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

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 23, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Enterprise Rent A Car Canada Limited

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #1502980** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on May 12, 2001.
2. The applicant, **Enterprise Rent A Car Canada Limited**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating **that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received and reviewed the police information, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made. The Registrar does not accept the applicant's argument that Enterprise Rent A Car Canada Limited had exercised due diligence at the time the vehicle was impounded.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

Enterprise Rent A Car Canada Limited

(signature of Applicant)

(signature of Registrar)

(date)

(date)

GREGORCZYK

MACIEJ SEBASTIEN GREGORCZYK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

MACIEJ SEBASTIEN GREGORCZYK, representing himself
YOVANKA McBEAN, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

April 18, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated November 30, 2000, issued by the Registrar of the *Motor Vehicles Dealers Act* (the "Act"), to refuse under the provisions of the Act the registration as a motor vehicle salesperson of Maciej Sebastien Gregorczyk.

The Registrar bases her Proposal on the provisions of Section 6 of the Act as read with paragraph 5(1)(b) thereof.

FACTS:

Evidence was given by Aviva Harari, in house legal counsel to the Registrar and Manager, Ontario Motor Vehicle Industry Council ("OMVIC"), and by Maciej Sebastien Gregorczyk (the "Applicant").

1. The Applicant is 24 years old and resides in Markham, Ontario. He is currently employed as a landscaper.

2. The Applicant has a record of criminal activity:

Date of Offence	Offence	Plea	Disposition and Date
Dec. 29, 1995	Impaired Driving	Guilty	Fine, 6 months probation Prohibited from driving for one year July 4, 1996
Feb. 2, 1996	Fail to Appear	Guilty	Fine – July 4, 1996
Nov. 1, 1997	Robbery	Guilty	convicted, 4 years penitentiary Prohibited use of weapons for life Sept. 8, 1999
Feb. 15, 1999	Assault	Guilty	convicted, 60 days consecutive Sept. 10, 1999.

3. The Applicant applied to OMVIC for registration as a motor vehicle salesperson on October 30, 2000. The Applicant proposed to work for Saturn Saab Isuzu of Thornhill. A sixty day conditional registration was granted to the Applicant pursuant to section 13(3) of Regulation 801 to the Act. Conditional registrations are granted pending verification of applicants' registrations.
4. Question 9 of the application for registration states "Have you ever been found guilty or convicted of an offence under any law or are any charges pending?" (Ex. 4, Tab 3). The Applicant answered in the affirmative indicating "Robbery- Home Invasion financial debt, assault/intent to resist arrest, D.U.I." The Applicant also provided the name and telephone number of his parole officer.
5. By facsimile letter dated November 3, 2000 the Ontario Provincial Police provided to the Registrar a summary of a CPIC Data Banks check on the Applicant, which summary is consistent with the information in paragraph 2 above.
6. By letter dated November 6, 2000 OMVIC wrote to Lee Wittick, General Manager, Roy Foss Motors Ltd. to advise that, based on the criminal convictions listed on the CPIC summary, the Applicant's conditional registration was cancelled.
7. On November 8, 2000, the Applicant wrote to OMVIC in response to the letter to Lee Wittick dated November 6, 2000 to provide an explanation of the circumstances of his criminal convictions.
8. On November 30, 2000 the Registrar issued a Notice of Proposal to refuse Registration under the Act of the Applicant as a motor vehicle salesperson.

9. Ms. Harari testified on behalf of the Registrar in her capacity as legal counsel to the Registrar and Manager. She stated that the past conduct of the Applicant is extremely negative. She states that the Applicant is seeking entry into a regulated industry yet has demonstrated, through his recent criminal record, a flagrant disregard for the law as well as an inability to act with honesty and integrity. Ms. Harari points to the assault against a police officer as particularly troublesome, indicating the Applicant's disrespect for authority. As well, the reason given by the Applicant in a letter submitted to OMVIC for the home invasion robbery in 1997, was to collect a debt. Ms. Harari testified that this indicates to the Registrar a willingness by the Applicant to commit a violent act for monetary gain. Ms. Harari also noted that the month of the Applicant's application for registration (October, 2000) coincided with the month that the Applicant was released from penitentiary.
10. The Applicant's position is basically three-fold. Firstly, he submits that with the exception of the 'fail to appear' charge, he did disclose all of his criminal convictions on the registration application, with the invitation to contact his parole officer for more information. The Applicant believes that it was unjust for OMVIC to grant a sixty day 'conditional' registration in the face of full and frank disclosure of a criminal record. The Tribunal is not without sympathy for the Applicant in this regard. Secondly, the Applicant submits that notwithstanding his criminal record, he is an honest person who has never committed fraud. Accordingly, he states that he poses no risk to a consumer purchasing a vehicle. Moreover the fact that he will be monitored by his parole officer and OMVIC should give greater reassurance that the public will be protected. Thirdly, the Applicant maintains that he has reformed himself. He testified that he has a 1 ½ year old daughter and that he is engaged to be married. He is trained as an automotive technician and he has a "love of cars". He believes that he will succeed in auto sales if just given the chance.

ISSUE:

Does the Registrar have sufficient grounds for refusing the registration of the Applicant as a motor vehicle salesperson, under the provisions of the Act?

THE LAW:

The relevant portions of the *Motor Vehicle Dealers Act* that are applicable to these proceedings are:

Section 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

Section 6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant should be refused.

The question to be determined is whether the Applicant's convictions on the charges of impaired driving, robbery and assault provide the Registrar with reasonable grounds to believe that the Applicant will not carry on business as required by section 5(1)(b) of the Act.

According to the leading decision of Brenner, 19 CRAT SCO Decisions and Orders (1971-1989), the Tribunal should only refuse to direct the Registrar to carry out his proposal if it believes that the Registrar is in error in concluding that reasonable grounds exist for her belief, Brenner 19 CRAT SCO Decisions and Orders (1971-1989).

APPLICATION OF LAW TO FACTS:

The Applicant argues that the 'non fraudulent' nature of his criminal record is a factor which should ameliorate any concern that he will not act with integrity and honesty as a motor vehicle salesperson. On the contrary, this Tribunal is very concerned that the motivation behind the home invasion robbery was a financial debt. The violent nature of this act, coupled with the assault conviction, indicate a wanton disregard by the Applicant for the rule of law. As was stated in the Cooke (Re) decision, (1999) O.C.R.A.T.D. No. 4, para. 21:

"The convictions for forgery, theft, false pretences, uttering and the fraudulent use of a credit card are by no stretch of the imagination other than convictions that directly relate to a lack of honesty and integrity on the part of the Applicant. In fact, convictions relating to such offences clearly indicate a non acceptance of the rule of law of an ordered society – a society that accepts and embraces the rule of law."

It is vital that the Applicant show through a recent and sufficiently long course of conduct that he is a person to be trusted and not unfit to be registered under this Act. The Applicant is unable to satisfy this test. The Applicant's most recent offence date is February, 1999. His most recent conviction date is September, 1999. Clearly, insufficient time has passed since his conviction less than two years ago. Further, apart from a vague reference to attending some family counselling, no cogent evidence was adduced by the Applicant to establish that he has taken steps to gain insight into his past conduct. It is the Tribunal's finding that a greater amount of time is needed to persuade the Tribunal that the Applicant has established a new and reliable course of honest conduct in all of his dealings.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Act, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of Maciej Sebastien Gregorczyk.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: May 23, 2001

MOGHADDAM, ALIREZA and JKA MOTORS LTD.

JKA MOTORS LTD. AND ALIREZA MOGHADDAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DOUGLAS MACKINTOSH, VICE-CHAIR

APPEARANCES:

G. PETER ABRAHAMS, Counsel, representing the Applicants
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

May 18, 2001

Toronto

REVISED ORDER

Following attendances on May 18, 2001 at a hearing before the Licence Appeal Tribunal of G. Peter Abrahams, Counsel for JKA Motors Ltd. and Alireza Moghaddam (the "Applicants") and Aviva R. Harari, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"),

After the hearing of evidence in this matter, rather than adjourning to another date for submissions from counsel, it became preferable to require written submissions.

Accordingly, on consent, both parties are ordered to make submissions as follows:

1. Within thirty days from May 18, 2001, counsel for the Registrar will serve on the Applicant and file with the Tribunal the Registrar's written submission.
2. Within fifteen days thereafter, counsel for the Applicant will serve on the Registrar and file with the Tribunal the Applicant's written submission.
3. Within ten days thereafter, counsel for the Registrar will serve on the Applicant and file with the Tribunal any written reply the Registrar wishes to make.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: May 25, 2001

KIRK

GARY AND CINDY KIRK

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

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

GARY AND CINDY KIRK, appearing on their own behalf
KAREN JONES, Counsel representing the Ontario New
Home Warranty Program
MARCELLO GRANNACE, agent representing the Added
Party, First View Properties Inc.

DATE OF
HEARING: May 2 & 3, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from the decision dated November 6, 2000 of the Ontario New Home Warranty Program ("the Program") denying the claim of the Gary and Cindy Kirk (the "Applicants") for breach of the Vendor's warranty under the *Ontario New Home Warranties Plan Act*. The Applicants were seeking an order that the deficiencies be repaired and did not claim financial compensation. As set out herein, the Tribunal found that the Applicants are entitled to succeed in part in their claim against the Program.

FACTS:

It is not disputed by the parties that the Applicants' home was built by the Vendor, First View Properties Inc. ("First View") and sold to the Applicants with a closing date of September 29, 1998. The date on the Certificate of Completion is September 28, 1998. A Conciliation Inspection was requested by the Applicants and took place on May 25, 2000.

A Conciliation Reinspection was done on October 16, 2000. Numerous items were repaired by the builder and an impasse was reached on the issue of the landing on the staircase, the gaps on two risers on the staircase, the veneer on the staircase, the colour of the brick and mortar, the damage to the family room ceiling, and the area below the brick beside the garage doors on the front of the house.

WITNESSES FOR THE APPLICANT

Mr. Gary Kirk testified that he did not wish financial compensation for his claim but was seeking to have the deficiencies satisfactorily repaired as he did not have the skill to do it himself. There were four parts to his claim and he dealt with each separately.

The first issue was the staircase leading from the main floor to the second floor of the home. He explained that he had paid approximately \$1,800.00 extra to have an "L" shaped oak staircase, and provided the stain himself. When the staircase was installed, he found that it was oak veneer rather than solid oak, but he did not complain about it as the Agreement of Purchase and Sale did not specify solid oak.

The first problem with the staircase he described was that the landing between the two parts of the staircase had been left as particle board, and he was unable to do the repairs himself. In the Agreement of Purchase and Sale, the builder gave him a rebate for installing the flooring in the first floor of the house. He and his brother-in-law installed hardwood themselves, however he was not able to install the hardwood on the landing due to the height of the "nosing". Although he did not know the cost of installing the proper size of nosing, he knew that it was a large job involving re-installing the pickets from the handrail. He stated that he was not told that he would be left with an unfinished landing and assumed that it would have been finished as part of the staircase.

The second problem with the staircase Mr. Kirk described was that the veneer was peeling off. He told Joseph Grannace, who was one of the owners of First View, and he told Mr. Kirk to note it on the Pre-Delivery Inspection Form (Exhibit 3, Tab 2, page 2, Item 2), Mr. Kirk assumed that it would be fixed.

The third problem with the staircase was that there were two gaps of up to a quarter inch between the risers and stairs on the eighth and ninth stair. He stated that these were visible, and became even more apparent when the basement light was on. When he discussed this matter with Marcello Grannace, he was told that the builder had changed stair companies.

The second item was the issue of water damage in the ceiling. The main bathroom was above the family room, and there was obvious water damage on the ceiling of the family room. It appears to have become wet and the drywall tape had started to pull away in an "L" shaped pattern. Over time, the granular surface of the ceiling began to crumble. On two occasions, the builder sent tradesmen to replace something involving the bathtub drain, but the repair was not successful. When the Warranty Representative, Mr. Gibson came to do the inspection, Mr. Kirk offered to run water in the bathtub to demonstrate the problem, but he was told that it was not needed. Mr. Kirk assumed that Mr. Gibson could see the problem in the pictures and that it would be found to be warranted and would be repaired. There was also an area around the bathtub without silicone caulking. When the Applicants' claim was refused, Mr. Kirk asked Mr. Gibson to come and take a second look, and Mr. Gibson advised him that a second Warranty Representative would come to give a second opinion. When Mr. Gibson came back on October 16, 2000 he was by himself and there was no second opinion. A water test was done on an area outside where a leak was repaired, but Gibson again did not want to do a water test of the bathtub. Mr. Kirk testified that he is afraid to have the bathtub

fixed as it would void his warranty, and he does not allow children to use the shower in that bathtub very often.

The third item was bricks missing just above grade on each side of the garage door opening. Mr. Kirk complained that the area was done in rough concrete and the builder had promised either to parge it properly or face it with brick. Mr. Kirk testified that the brickwork on homes built by First View is generally very good but this was not up to standard and people commented on how bad it looked. He assumed it would be repaired and did not put off moving in to wait for it to be completed. In his opinion, the job was not done in a workmanlike manner.

The last item was the colour of the brickwork. On the Certificate of Completion and Possession (Exhibit 3, Tab 2) he noted that it was necessary to dye the outside of the house before winter. He stated that his neighbor had the same problem and produced a photograph (Exhibit 4g) of the neighbors house showing the colour of the brick after it had been re-stained over a 5 date period. When he saw the problem in the neighbor's home corrected, he assumed that they could do the same at his home but they did not. Mr. Kirk testified that two men came to do the work in the middle of August 1999 but it was very hot and they only stayed for part of 2 days and never came back. He disagreed with the Warranty Report (Exhibit 3, Tab 7) in which Mr. Gibson stated that:

"The builder had Brampton Brick perform dye colouring to the entire brick exterior of the house prior to this inspection."

The witness produced a series of photographs (Exhibit 4,a, b, c, d, e, f) showing the colour variations in the mortar between the bricks. In his opinion, these colour variations were not acceptable, and he wanted the house to be dyed like the neighbor's house.

In cross-examination, he explained that he works for Standard Auto Glass and has no expertise in carpentry or brick laying. Mr. Kirk agreed that the original stairs in the Agreement of Purchase and Sale (Exhibit 3 Tab 1) prior to his upgrade was a circular staircase from the main floor with broadloomed treads and risers (Schedule A # 39), and that the flooring shown for the stairs (Schedule A, # 45) was to be broadloom. He agreed that he and his brother-in-law installed the flooring prior to the closing of the home, and that there was no mention of the landing on the Certificate of Completion and Possession (Exhibit 3, Tab 2).

There were no pictures of the veneer coming away from the stairs, and he agreed that he could not say whether the gaps on the risers were caused by shrinkage. He maintained his position that he sees the gaps all the time and that people have commented on them. Mr. Kirk explained that if he had known that the landing would not be finished he would have asked for a different height of 'nosing' to accommodate the flooring he used on the main floor of the home.

Mr. Kirk stated that the photographs (Exhibit 4, l, m) showing the damaged ceiling were taken by his wife at the end of July 2000 and properly showed the condition of the ceiling at that time. He did not agree that the area looked the same at the first and second inspections as small pieces continue to fall off the ceiling, and he denied that he told Mr. Gibson that he did not know if there was a leak. Initially, his children used the bathroom and shower when they first moved into the home. He did not see water on the floor after they used the shower, and he had even left a towel on the floor to see if there

was water. Finally, he ended up watching his children to ensure that they did not get water on the floor. Mr. Kirk stated that he knew that there was not a leak in a pipe feeding water into the system as it would cause of continuous drip. Based on his tests, the leak seemed to be a problem with outgoing water. He did not recall Mr. Gibson saying that he would have to look under the bathtub to determine what type of problem there was.

When Mr. Kirk was cross-examined about the "missing bricks" to the bottom at the garage door, he stated that he disagreed that the job was up to industry standards as the quality of the work was below the standard of good workmanship provided in other homes by First View. He also confirmed that the photographs (Exhibit 4, k and j) were taken from approximately 10 to 15 feet away although no actual measurement was made.

Mr. Kirk agreed that no remedial work was done on his bricks until August 1999. He disagreed that the colour variation on his home was acceptable and said he had never seen it that bad on other houses. He agreed that there was no mention of tinting the bricks in the Agreement of Purchase and Sale and that he had not paid for the tinting that was carried out. Mr. Kirk explained that the Warranty Representative Mr. Gibson had been late in arriving for the initial inspection and did not get to his home until approximately noon. Although he did not leave until between 4:30 p.m. and 5:00 p.m. Mr. Kirk assumed that Mr. Gibson had been very rushed due to the number of errors in the report.

WITNESSES FOR THE PROGRAM

Mr. Crawford Lance Gibson testified on behalf of the Program. He stated that he has been a Warranty Representative since December 1, 1999, and prior to that has extensive experience in the building industry. In 1975 he obtained a certificate from Fanshaw College as a manufacturing technician, and in 1977 / 78 qualified as a welder and fitter at Conestoga College. He worked as a welder for General Motors in their locomotive division and moved to the armored vehicle division where he became a supervisor. The company moved him to the position in Alberta where he left that employment and worked for a private building company as the New Home Warranty Representative to ensure compliance with provincial new home warranty legislation. Following that he worked for WINALTA SHELTERS INC. which was a company that built custom homes from blueprints. He then worked as a carpenter's helper for the Department of National Defense and was accredited as a carpenter based on 16,000 hours of experience. When he moved to Ontario, he did small renovations then began to work as a project manager for I.C.M. which was a Colorado based company that did renovations for SCOTTS and PIZZA HUT franchisees. Mr. Gibson then worked for the DAVID C. RICHARDSON CONSTRUCTION COMPANY which specialized in large renovation projects and was licensed for work on historical buildings. On December 1, 1999 he began work with the Program on a one year renewable contract.

Mr. Gibson testified that he was late for the first inspection of the home and arrived at approximately noon, then spent the rest of the day going through the list of complaints. He started the process by sitting down with the parties to determine what issues were unresolved and to explain the process. During this inspection, Mr. and Mrs. Kirk and Mr. Marcello Grannace were present.

Mr. Gibson stated that he examined the staircase which he found to be "L" shaped with a very dark stain on an oak veneer. He put his hand on it and felt slight imperfections, and could not see the wood under the veneer. When he looked for the gaps he saw one on the 8th riser but did not see the one on the 9th riser until later. Both of these gaps, were similar. Mr. Kirk turned off the light in the basement and he could then see the gaps more clearly. He described them as being the thickness of a dime or a nickel on one side, and narrowing to no gap on the other side. The stairs did not squeak and there appeared to be no signs of movement where they joined the wall. As required for an "L" shaped staircase, there was a landing between the two sets of stairs. The landing was covered with a 5/8 inch thick board and there was a "nosing" around it. Mr. Kirk complained that there was no finished flooring on the landing but Mr. Gibson determined that the flooring was the responsibility of Mr. Kirk who was to supply the flooring for the main floor of the house. His understanding was that the landing does not form part of the staircase as the requirements in the building code for support and bracing treat it as part of the floor. On that basis, he found no defect in workmanship or materials.

Mr. Gibson testified that during the first inspection he looked at the damaged area of the family room ceiling and noted that it was finished with an acoustical textured material. He stated that the taped joints had separated as the compound had apparently become wet, and there was obvious water damage although the drywall in the ceiling was not sagging. This damage was in an "L" shape and was in a 4 ft. by 10 ft. area. There was no indication that it was still damp, and he saw no signs of water damage on the hardwood floor below it. When he was at the house he did go to look at the washroom. Mr. Kirk offered to do a water test by running water in the tub, but Mr. Kirk told him that if they did do a test and the item was found not to be warranted, the Applicants would be responsible for the damage. At the reinspection, the Applicants again offered to do a water test but Mr. Gibson did not do it as he did not know where the water was leaking from and a Warranty Representative was not permitted to do destructive testing which would have been the only way to expose the area for proper examination. Mr. Gibson testified that he advised Mr. Kirk that the area could only be properly examined if the drywall was opened. He did not express an opinion at the house as to whether it was a breach of warranty as he does not tell homeowners of his decision during the inspection. His recollection was that the Applicants did not know when the leak started, or when it became visible as a mark on the ceiling. He remembers Mr. Kirk telling him that it only seemed to occur when the children used the shower. When he examined the bathtub, he noticed one area where the ceramic backsplash met the deck in which a 6 inch area of caulking appeared to have been a repaired but had shrunk and did not form a seal. It is normal for caulking to shrink and crack, and he was advised by the builder that they had repaired the area though it was the owner's responsibility. He could not tell if there was water penetration as a result of this problem. There was no indication that the bathtub was otherwise improperly installed. The drain seemed secure and there was no indication of a problem with the seal around the drain basket. It did not appear that there was frequent seepage of water, as there were no signs of mold in the damaged area, and this would be visible if there was constant exposure to water. Mr. Gibson said that he could not determine what the cause of the water seepage was and could not find the builder at fault. Secondly, he considered it to be possibly secondary damage and not a defect of workmanship and material. If it was an issue of improper maintenance due to the homeowner not maintaining the caulking, it would be excluded from the warranty. During the re-inspection on October 16, 2000, the damage appeared to be the

same as before, and he was advised that the family was not using the washroom as often. According to the builder, a service man had already checked the integrity of the drain.

Mr. Gibson testified that he looked at the corner areas beside the garage doors to determine if there was missing brickwork. The areas were filled in with cement and smoothed with a trowel. He stated that if the area had been faced with brick, the frost would cause the brick to fall off. In his opinion the appearance of the work is such that it would not be visible from the street and it was acceptable.

Mr. Gibson testified that colour variation is common for clay bricks and some discolouration occurs during the drying process. He looked at the entire house during the reinspection and saw a colour variation which he described as minor. The mortar had been mixed by hand and the colour was not fully consistent. In his opinion, there was no defect in workmanship or materials as these variations can take place depending upon conditions under which the mortar is mixed. He agreed that he had made a mistake in the decision letter when he said that the mortar had been raked, and indicated that the front of the home had been raked but that the sides and back had been done with a concave tool. Mr. Gibson stated that the home blended well into the subdivision, and there was nothing "gross" about it. He found that the colour variations in the brick and mortar were acceptable.

In cross-examination, Mr. Kirk reviewed Mr. Gibson's experience level and the nature of his contract. On the question of the stairs, Mr. Gibson maintained that he did not remember the veneer flaking off and did not find it noticeable although he admitted that it was hard to assess due to the dark colour. He agreed that if it was flaking off, it would be a serious matter. Mr. Gibson explained that he considered the landing as part of the main floor, and therefore covered by the amendment to the Agreement of Purchase and Sale which required the Applicants to supply and install the flooring on the main floor. He testified that landings must meet the same requirements for spans, means of support, joist spacing, bridging and strapping as the other floors of the house and their purpose is to provide a secure footing and break the fall of anyone on the flight of stairs. Section 9.8 of the Ontario Building Code (Exhibit 5) deals with the construction requirements for stairs, and section 9.8.4.2 sets out the situations in which landings are required, but it does not directly say that the landing forms part of the floor.

Mr. Gibson testified that the drywall on the ceiling and family room was still detached from the ceiling and he did not probe into the drywall as he not allowed to carry out "destructive testing", and did not direct the homeowner to open part of the ceiling to permit him to determine the exact cause of the leak. He knew that this was a major issue for the Applicants. He agreed that he probably said that it was not necessary to show him a water test with the bathtub drain because it would not prove where the leak was, even if he saw that there was water as there could be several sources. He repeated that there was a deteriorated area of caulking approximately six inches long, which could have been tested but was not. He agreed that the builder did not provide proof of a repair and also agreed that even though the drain basket did not feel loose, it could leak if it had been over tightened when it was installed or repaired. In Mr. Gibson's opinion, the problem remained hidden in the floor and he could not conclude that it was a defect in workmanship or materials. Mr. Gibson explained that caulking naturally dries and cracks and is considered a maintenance item and the responsibility of the

homeowner, and accordingly he referred to improper maintenance by the Applicants in his Conciliation Inspection Report.

Mr. Gibson testified that the areas beside the garage doors which the Applicants claim should be faced with brick, are finished in an acceptable manner despite the gaps and dents. In his opinion this method of repair is acceptable and not uncommon when the builder is dealing with differences in elevations. He was told by the builder that there were bricks or partial bricks behind the mortar and according to the building code there is to be a separation between the grass and bricks in any event.

Mr. Gibson stated that the differences in the colour of the brick and mortar were from light red to medium red or medium red to dark red and is only a minor variation. When he was shown the photographs of the house (Exhibits 4c, e, f), he repeated his opinion that the colour variation on the house was acceptable. During his attendances at the home, he approached from the front and saw that the home appeared to fit into the neighborhood. He did not observe the home from the road to see how the colour of the brick and mortar compared with other homes in the area and could not say that he closely examined the brick and mortar from the backyard. Since he began his employment with the Program, Mr. Gibson has never seen an Agreement of Purchase and Sale that required a house to be the tinted.

Mr. Gibson agreed that on the second appointment for inspection, he told the Applicants that there would be a second person coming with him, however that person became unavailable and it was necessary for him to do the reinspection on his own.

Mr. Marcello Grannace testified that he is one of the owners of First View Properties Inc. The company began as a family business in 1988 in Barrie, Ontario, and after over 12 years of business has constructed more than 1000 homes. Prior to starting the company, he had no experience in the construction field and primarily oversees the documentation and customer service for the company. His brother Joe Grannace is one of the five owners, and deals mainly construction issues. All of the owners take part in the business and deal with problems as they arise. The company has an excellent rating as a builder from the Program and had no prior chargeable conciliations.

Mr. Grannace testified that according to item number 7 in the Agreement of Purchase and Sale (Exhibit 3, Tab 1) the builder has architectural control of the colour of the brick even though the purchasers are allowed to select the colour of the brick for the home. Mr. Grannace agreed that the homeowner had paid for the upgraded stairs and explained that the original staircase would have been built with "carpet grade" wood. He explained that if a circular staircase was used, it is installed as one piece. For an "L" shaped staircase, however the builder receives two sets of stairs and builds a landing between the two when they are installed. The landing is structurally the same as a floor in the house. He explained that the stairs were installed and finished before the flooring was put in by the homeowner, and no complaints were received by the builder until well after the floor was installed. The witness could not remember if the Applicants were permitted to move in before or after the flooring was installed on the main floor of the home. On the Certificate of Completion there was no mention of a problem with the landing. Mr. Grannace did not remember if he was in the home prior to the closing date, but he did attend the Conciliation Inspection, and he did not see anything unusual about the stairs. Although he saw gaps in the risers, he attributed this to normal shrinkage and did not consider it unusual. When the light was on in the basement, the gaps were more

visible and this was accentuated by the dark stain on the stairs. In his opinion, the workmanship and materials on the stairs were of excellent quality.

Mr. Grannace stated that he had sent a service man or a plumber to the Applicants' home when he received the complaint about the leak and the damage to the ceiling in the family room. He did not know what steps were taken but explained that the normal procedure would be to tighten the drain basket, check the overflow, and run a bead of caulking where necessary. In this case, he had received a complaint that the tub was leaking, sent a repairman, and received the note back from the repairman with the notation "done". Unless the problem is more serious, he does not receive a report with more detail. During the Conciliation Inspection, he saw that the tape was peeling and there were signs of water damage. In his opinion, it appeared to be a "one time thing" as repeated water leaks would produce mold and a dark stain. When he looked at the area around the tub, he did not see any evidence of water penetration and said that there were no corner cracks or silicone pulling away. He did not see the 6 inch area of silicone described by Mr. Gibson, and he described in the area as having been repaired. The area around the drain and faucet looked fine to him, and he found the workmanship and materials to be acceptable. During the second inspection he stated that the only difference in the damaged ceiling was that some of the stippling had fallen away and attributed this to vibration caused by people walking on the floor above it. He did not recall the discussion of what had caused the problem. This confirmed his belief that it was not an ongoing problem as it did not get worse, and mold had not formed. In his opinion, if there was a problem with the bathtub drain, it should have been evident immediately, and he said that the duration of the showering should not matter. The other possibility in his opinion was that water could be seeping through cracks in the caulking.

Mr. Grannace explained that bricks were not supposed to extend to the level of the ground, and they were not able to run another course of bricks in the area beside the garage doors. His understanding was that some partial bricks would be used, and covered with mortar. This was an acceptable method of dealing with differences in elevations. He did not consider it to be unsightly when he observed it while approaching the home. He expected that the homeowners would see it as they did not like it, and their attention would be drawn to it.

The brick used in home is a clay brick produced by the Brampton Brick Company, and Mr. Grannace explained that it is common to have some variation even in bricks of the same colour. The mortar used was dyed by the bricklayers, and it is also common to have a variation in the colour of the mortar as it can be affected by various factors such as exposure to sun and the amount of humidity. He explained that the neighbour's home was dyed by the Brampton Brick Company but that is an unusual procedure. It was necessary as other repairs were done incorrectly, and the only way to correct the situation was to dye the brick and mortar on the entire home. His recollection was that the Applicants had sent him a note saying that they were unhappy with the colour in a couple places. Even though he thought that the colour was acceptable prior to the closing of the transaction, he sent a tinting company to the Applicants' home and told them to do as much as possible to satisfy the customers. The complaint by the Applicants was primarily colour variations in the mortar, and in his opinion the colour differences were acceptable.

In cross-examination, Mr. Grannace explained that it was important for his company to have good customer relations and do everything possible to provide fast service for customer complaints. Some items are dealt with at the end of the first year, and the company will often repair problems caused by shrinkage and other things beyond the scope of their warranty obligations.

Mr. Grannace stated that he was not present for the Pre Delivery Inspection, but it would be normal for the builder's representative to write down a customer's complaint even if the representative did not see the problem personally. He said that he did not know that the landing was a problem until a year after the Applicants moved into the house. In his experience, the gaps occur commonly in wood due to natural shrinkage and are normally not seen as they are usually covered by a carpet. These gaps are not a defect, and are easily repaired with a bead of "Dap" the same colour as the stairs. As far as changing the "nosing", this would be an expensive job as it would involve the pickets, and would be more than he would be willing to do as a good will gesture to accommodate the homeowners.

Mr. Grannace testified that he is not a plumber and sent a service man to deal with the problem of the leak when he was contacted by the Applicants. The service man was capable of doing minor repairs and would have checked the overflow, the drain basket, and the caulking, but he would not have cut into the drywall to examine the enclosed parts of the plumbing. There was a notation on the paperwork received from the service man that nothing was found to be wrong but there was no indication of what was done. When Mr. Grannace saw the damage to the ceiling during the first inspection, he thought there had been an accidental spill of water in the washroom, but he had no idea of what had happened or if there was a leak, exactly where it was. At time of the second inspection, the situation had not changed. He repeated that during the first inspection everything "looked fine" and he did not see cracks or shrinkage in the caulking. There were no marks on the floor under the ceiling damage to show that there had been a leak onto the floor. This examination of the ceiling was done while standing on the floor below the damage, and he did not run water in the tub to see if there was still a problem. He explained that if there was a leak around the drain, and the tub was used once or twice per week the water would pool and would not have time to dry with the result that it would drain through the crack in the ceiling. Mold would also form and dark stained areas would be visible.

Mr. Grannace testified that he has used the same bricklayers for a long time and considered the areas beside the garage doors to have been finished in a workmanlike manner. In his opinion, it would not be reasonable to face the disputed areas with slices of brick as they would fall off or crack when exposed to frost or winter conditions.

Mr. Grannace stated that is not normal to refer to tinting bricks or mortar in an Agreement of Purchase and Sale. He knew that the house was bricked in June or July, and he knew that tint work was done on the Applicant's home, but they were not satisfied. Mr. Grannace assumed that Brampton Brick had done the work and commented that they guarantee their work and no invoice would have been sent. When he was shown the photographs of the house (Exhibit 4), he did not see a noticeable shade variation. Under cross-examination he agreed that there was a slight variation but he considered it normal.

In redirect examination, he explained that he had tried to resolve issues before the Conciliation Inspection and when he tried to gain entry to the home for repairs, it was refused by the homeowners.

FACTS FOUND PROVEN:

The Tribunal finds that there are small gaps in two of the risers on the stairs. These are not immediately obvious but become visible when the light in basement is turned on. Both gaps are small and there is no evidence that they are not consistent with the normal shrinkage of materials. There is a landing between the two flights of stairs in the L shaped staircase. No hardwood flooring has been installed on the landing and it is finished with a board suitable for sub flooring. The height of the nosing around the landing will not accommodate strips of the hardwood flooring installed by the Applicant on the main floor of the home and the pickets for the railing are attached to the nosing. This landing was completed by the builder prior to the Applicants taking possession of the house and was not mentioned on the Certificate of Completion and Possession. The construction characteristics of the landing meet the requirements in the Ontario Building Code for a floor. Under the terms of the Agreement of Purchase and Sale, the floors and stairs were to be carpeted, but the Applicants agreed that no flooring would be installed by the builder on the main floor except for ceramic tile in the foyer and powder room. This Tribunal accepts the evidence of the Applicant that some of the veneer on the stair case is not smooth, but accepts the evidence that the wood core of the stairs is not visible and finds that there are minor surface defects only.

The areas beside the garage doors below the first course of brick are found to be coated with mortar and have a very rough, unfinished and uneven surface. This is not immediately apparent from the street but becomes apparent to anyone approaching it although not a part of the house that would immediately draw the attention of a casual observer. There is no evidence that it does not function properly, and the Tribunal accepts the evidence that facing this area with pieces of brick as suggested by the Applicant would not be a suitable method of construction.

The Tribunal finds that the colour of the brickwork on the home is not uniform and there are variations in the colour of the bricks and mortar as described by the witnesses. When the colour variations are compared with the neighbour's home, they are more noticeable. That home has undergone an extensive staining process by the brick manufacturer leaving a consistency of colour which is as perfect as can be achieved by the installer's expert workmen.

The Tribunal finds that the damage to the ceiling in the family room was caused by water from the bathroom on the floor directly above it. The damage has remained basically consistent since it was originally noted, and the only change has been that particles have flaked off of the ceiling. The drywall tape has not apparently pulled away from the ceiling any more. There has been no sagging of the drywall and there is no indication of the formation of mold to indicate continuous dampness. The Tribunal finds that the drain basket was inspected and found to be apparently intact, and the caulking on the side of the tub in one area had pulled away so that it no longer formed a proper seal. The leak could come from several sources, and is found to be from water leaving the bathtub. This could be due to an improper seal in the drain basket, or due to the shrinkage of the caulking, or from water spilling onto the floor.

ISSUES:

Are there defects in workmanship or materials such that there was a Breach of Warranty under the Act, and if so, do the Applicants have a cause of action against the builder for damages suffered as a result of the Breach of Warranty?

APPLICABLE LAW:

Section 1 of the *Ontario New Home Warranties Plan Act* states:

"home means",

- (a) a self-contained one family dwelling, detached or attached to one or more others by a common wall,
- (b) a building composed of one or more than one and not more than two self-contained, one family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or
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and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 of the *Ontario New Home Warranties Plan Act* states:

13.(1) Every vendor of a home warrants to the owner,

(b) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

(c) that the home is free of major structural defects as defined by the regulations; and

(d) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design and work supplied by the owner;

- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 of the *Ontario New Home Warranties Plan Act* States:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four year after the warranty expires or such longer time under such conditions as are prescribed,

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

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in the mitigation of damages claimed under subsection (1).

Regulation 892, Section 1, of the *Ontario New Home Warranties Plan Act* states:

"major structural defect" means for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended.

including significant damage due to soil movement, major cracks in basement walls collapse or serious distortion of joints or roof structure, and chemical failure of chemicals, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners, and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Regulation 892, Section 4, of the Ontario New Home Warranties Plan Act states:

(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

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Regulation 892, Section 6, of the Ontario New Home Warranties Plan Act states:

.....

(3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to the owner out of the guarantee fund in respect of a claim made after August 1, 1989 under clause 14 (1)(b) or (c) of the Act is \$100,000.00.

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CASELAW:

Re: BREEN [1999] O.C.R.A.T.D No. 86

In this case, the Applicants claimed that there was a mark on a cupboard door, and that the original front door was defective. The Tribunal found that the mark on the cupboard door was only visible on extremely close inspection and the homeowners had refused the repairs offered by the builder. Similarly the builder had offered to repair the front door even though they had already made a repair and the homeowners had refused a further repair.

The Tribunal found that the mark on the cupboard door was trivial and that the front door had been properly repaired. Although aesthetics is a consideration, the standard is acceptability and not perfection. Even if the Applicants had proven their case, the Tribunal found that their refusal to allow repairs would disentitle them from compensation under the Act.

BALDASSARRE (RE) [1998] O.C.R.A.T.D. No. 83

In this matter the Applicant claimed that there were defects in the home resulting from defective workmanship and materials supplied by the vendor. The Applicant complained that there were lines on the drywall caused by protruding studs in the area of the main stairwell; drywall was exposed at the entrance of the dining room; floor joices were improperly installed causing a visible deflection in the flooring; the bricks on the exterior of the home were chipped, cracked and defective, with cracked mortar inconsistent colour having repairs of major cracks in the mortar inconsistent in colour; was a leak in basement; and cracks in basement floor. The Tribunal found that the Applicant had not discharged the onus of proof. It was not possible for the Tribunal to find that the problems with the drywall and the floor were not caused by the normal shrinkage of materials. In the alternative, the Tribunal found that most claims failed as the Applicant had denied the builder access to the home to try to rectify the defects when the builder had offered to do so. The Applicant was also found to have put no evidence before the Tribunal of any damages suffered.

SAPORITO (RE) [1999] O.C.R.A.T.D. No. 166

In this matter the Applicants claimed that there were a number of deficiencies, some of which were repaired by the builder. The builder claimed that the Applicants had refused entry to the premises for repairs to be made and had also harassed the tradesmen who were sent to conduct repairs. There were complaints by the Applicant that there were excessive colour variations in the mahogany wood trim, and that the nail heads were not properly covered. The Tribunal found that this colour variations were a natural characteristic of the wood and the builder had properly attended to the nail heads. Pictures were produced which showed that the nosing around of the railings on the stairs were not noticeably uneven and there was not an unacceptable height differential between the nosing and the parkay flooring. No building experts were produced by the Applicants to substantiate their position, and the only witnesses with experience in the building field gave evidence of the favour of the builder. There was evidence that a fractious relationship had developed between the builder and homeowner. Perfection was not a reasonable expectation for the homeowner and allowances must be made for minor imperfections. The Tribunal quoted from the case of TEITELMAN (1987) 16 CRAT 179 at page 181:

"The Teitelmans were not the authors of the defects and the Tribunal understands that they a constant source of irritation to them. However, they must accept the fact that no house, new or old, is perfect or is warranted to be perfect. Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonable acceptable levels. The limited warranty provided by the Ontario New Home Warranties Plan Act recognize these facts and this Tribunal is obliged to make findings in accordance with the statutory provisions and not otherwise."

The Tribunal concluded that the Applicants had no cause of action has no breach of warranty was proven.

MISSIOS (RE) Licence Appeal Tribunal, May 5, 2000 (Unreported)

In this matter the Applicants complained of defects of workmanship and materials in the construction and installation of the staircase in their home. They complained that it was poorly finished with varnish, it squeaked excessively, the oak veneer risers should have been solid oak, it had chips and dents, it was stained, there were in nails on the railing, and the railing did not match. The Applicants did not provide expert evidence, and the only expert evidence was provided on behalf of the builder. The Tribunal found that the staircase was to be solid oak as well as veneer, that it is constructed in a workmanlike manner, that the imperfections in the wood had occurred naturally or were due to external means and had been properly remedied, there were no squeaks or stains, and that the differences in the colour of the stairs and the railing occurred naturally due to the grain of the oak and was acceptable. Although the builder had tried to accommodate the Applicant it was not possible as the homeowner insisted on near perfection in both workmanship and materials. The Tribunal accepted the ratios in the cases of TEITELMAN (1987) 16 CRAT at page 181 and SAPORITA (1999) CRAT which held that the standard is not perfection and that the Applicant must be realistic in their expectations.

ROTUNDO (RE) [1996] O.C.R.A.T.D. No. 81

In this matter the Applicants complained that defective brick was used in the construction of the home. They selected the brick from a sample board and a colour card provided by the vendor. When it was delivered, the Applicants immediately complained about the colour and the texture. An expert was retained by the Applicants who testified that the colour of only about 20% of the bricks in the home worked within the acceptable margin set by the sample board. Another expert from a company specializing in the colour treatment of masonry products testified for the Program that the range in colour was within acceptable limits and there was no improper grouping of similarly coloured bricks causing aesthetic deficiencies. In his opinion, the Applicant's dissatisfaction with the colour was only a matter of personal preference. Further evidence was called that the bricks used in the construction of the home had passed the normal inspection process. The issue for the Tribunal was whether the colour range rendered the bricks defective materials used in the construction of the home and therefore a warrantable and compensable item under the Act. The Tribunal found that the brick conformed to the proper standards which could be reasonably expected by the purchaser of a new home and that a range of colour variations would be expected. Although the colour variation was greater than in the nearby homes, it was not sufficient to render the bricks defective in any way. The Tribunal concluded that to hold the builder to a standard of uniformity sought by the Applicants would be unrealistic.

GORSCAK (RE) [1999] O.C.R.A.T.D No. 22

In this matter the builder had contracted with the Applicants to use "genuine clay brick" in the construction of the home. After they made their complaint, the Applicants refused to permit the builder access to the home prior to the inspection by the Program, and an offer of repair was refused prior to the issuance of the decision letter by the Program. The home was inspected by Canada Brick (the manufacturer of the bricks) and an opinion was provided which stated that some of the brick used on the home did not match but were within the proper colour range, and offered to colour treat those bricks. Despite this offer, the Applicants removed some of the bricks and they were brought as exhibits to the Tribunal. There was also a complaint that the colour of the mortar varied from light gray to dark gray to light brown. An offer had been made to correct the colour differences in the mortar, but it was rejected by the Applicant. The Tribunal found that the texture and quality of the two types of brick installed on the Applicant's home were the same and even though there was a variation in colour, it was acceptable. Both types of brick used were "genuine clay brick" and the use of the second type was a substitution of a material of equal quality and value as permitted under the the Act. The Tribunal ordered that repairs to the mortar offered to the Applicant be carried out.

APPLICATION OF LAW TO FACTS:

In the matter of the staircase, the two small gaps in the risers have been found to be consistent with normal shrinkage and are not caused by defects in workmanship or materials. The problem with the landing arose when it was found that the hardwood flooring selected by the Applicants was not the correct thickness for the nosing. It is unclear if the landing is part of the main floor and therefore the responsibility of the homeowner to provide floor covering, or if it is part of the second floor of the home in which case it is the responsibility of the builder to provide floor covering (carpeting).

There is no proof for either position, and as the onus falls on the Applicants the burden of proof is not met.

The Tribunal has found that some of the surface of the veneer on the staircase is rough, but there was no proof that the veneer is coming away from the wood. There is no proof of a defect in the workmanship and materials.

Although the mortar finish beside the garage doors at ground level is structurally sound, the Tribunal finds that it does not appear to look finished and there is a defect in workmanship although the materials are adequate.

The Tribunal finds that the colour variation on the brick and mortar on the Applicants' home is noticeable especially on very close inspection but when viewed from a reasonable distance is acceptable even though it does not meet the highest standards of the workmanship of the neighboring home which was subject to the brick and mortar tinting process by the manufacturer of the brick. The standard to be applied is not perfection upon close examination, and the onus of proof has not been met.

The Tribunal finds that there are at least three possible sources for the escape of water from the bathroom which caused the damage to the ceiling in the family room. If the source is a leak in the drain, it would be the responsibility of the builder. However, if it is caused by water seeping into the area where the caulking has shrunk, or by water spilled onto the floor, it would not be the responsibility of the builder and there would be no defect in workmanship or materials. The Applicants have not proven that the source of the water is a defect in workmanship or materials, and they have therefore not met the onus of proving that there is a breach of warranty under the Act.

DECISION:

Therefore by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal allows the claim in part and directs the Ontario New Home Warranty Program to do or arrange the following worked to be done in the Applicants' home no later than July 10, 2001:

1. To have the areas of cement on each side of each of the two garage doors finished to a smooth and even surface.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair, Presiding

RELEASED: May 25, 2001

MED - 0519

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA, Respondent
Representative for the Minister

No one appearing for the Applicant

DATE OF
HEARING: May 16, 2001
Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

PRELIMINARY ISSUES:

At 8:20 a.m. on May 16, 2001, the day of the appeal, the Tribunal's office received a voice mail message from the Applicant stating he did not feel well this morning and would not be coming to present this appeal. He further stated the appeal should go ahead without him and let him know the results. A supervisor contacted the Applicant to confirm the message and to advise him that the appeal would proceed without him being present.

The Tribunal decided to open the Hearing at the appointed time, recessed for 30 minutes to ensure the Applicant was not coming and then proceeded with the Respondent's evidence.

FACTS:

The Applicant is a forty two year old bus and streetcar driver with the TTC who had his driver's licence downgraded under section 32(12)(b)(i) of the *Highway Traffic Act* because a medical report from his family physician, Physician # 1, filed for a classified licence, indicated he no longer met the medical standards. The Applicant had held a "CZ" licence which was downgraded to a class "G" on September 19, 2000.

The Applicant had suffered a flue-like illness 2 years previously and when examined was found to be in cardiac failure with ventricular premature beats and episodes of ventricular tachycardia. This was diagnosed to be dilated cardiomyopathy. A Muga ejection fraction in April 1999 was 24% but one in June 1998 was only 18%. The recommended standard by the CMA is greater than 30%. Medications prescribed were allopurinol, aminodarone, amiloride, Vasotec, Coumadin, lanoxin and zaroxylyn.

In November 2000 an Echo Doppler test reported the Applicant's left ventricular function to be a Grade III. The CMA's Guide for Physicians "Medical Fitness to Drive", recommended that commercial drivers with cardiomyopathy and a grade III left ventricular function should be disqualified.

Physician # 2, a consultant cardiologist from the Toronto General, examined the Applicant and ordered most of the tests. He stated he had concerns about recommending upgrading the Applicant's licence because of the ambient arrhythmia's and the large number of medications, which could produce momentary hypotension or even possibly be arrhythmogenic because of potassium and other electrolyte disturbances.

The Medical Advisory Committee notified the Applicant in February 2001 that his waiver application would be reconsidered with a satisfactory cardiac assessment indicating he met requirements of CCS Class 1 and LV ejection fraction greater than 35%. The reason being, with a LV of 24%, cardiac arrhythmia is of serious concern and does not meet the requirements for waiver consideration.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

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

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

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

Regulation 340/94, Section 17 and 18 states:

- 17.
 - (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
 - (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
 - (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full

recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.

- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

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

APPLICATION OF THE LAW TO FACTS:

Section 32(12)(b)(i) of the *Highway Traffic Act* empowers the Minister to "...change the class or classes in respect of which the licence is issued". The Minister originally downgraded the Applicant's licence after receiving an unsolicited Medical Condition report, from the Applicant's family Physician # 1. It stated the Applicant suffers from cardiovascular disease as a result of viral myocarditis.

Regulation 390/94 of Section 14(b) is clear in that:

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

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

Section 17 states:

17.(1) Qualifications required by an applicant for a holder of a class A, B, C, D, E or F drivers licence are that the applicant or holder,

.....

(b) is not taking any drug that could, in the dosage prescribed impair his or her ability to drive a motor vehicle of the applicable class safely;

.....

(d) has not established medical history of heart disease including arrhythmia...likely to interfere with the safe driving of a motor vehicle of the applicable class;

As a result of viral infection, the Applicant comes under both sections 14(b) and 17(1). He has a dilated cardiomyopathy with cardiac failure and nonsustained ventricular tachycardia, frequent premature beats and isolated ventricular couplets. Assessment based on functional classification of left ventricular function and presence of ventricular arrhythmia is class III, which is the lowest.

The drugs being taken in an effort to control the cardiac rhythm can create their own problems such as hypotension, loss of potassium and other electrolyte disturbances that Physician # 2 brought out.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 12, 2001 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: May 17, 2001

ELLIOTT

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

IN THE MATTER OF
KEITH GORDON ELLIOTT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 28, 2000

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

KEITH GORDON ELLIOTT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on June 27, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Wednesday, June 13, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 28, 2001

DONALD E. SWALM

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

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

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

DONALD E. SWALM, Applicant
unrepresented

DATE OF HEARING: May 25, 2001

DECISION RELEASED: May 29, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on May 25, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner: Donald E. Swalm (the "Applicant")
Motor Vehicle: 1999 Dodge Dakota, plate no. 881 5EY(the "impounded vehicle")
Date of Appeal: May 4, 2001

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on May 25, 2001 and proceeded as an electronic hearing.

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

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

ISSUE:

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

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

My truck (1999 Dodge Dakota) was taken off the road and stored for the winter at my x wifes residence in Barrie Ont. I live in Niagara Falls Ont. My 24 yr old son, Jeffrey who lives in the Barrie area, went to my wife's residence during the night, went thru her belongings while she slept, found the keys and stole the vehicle. (Altho, not with malicious intent for profit). In no way would I condone this act, as I had removed the insurance (PL & PD) for the winter, from the truck and in the event of an accident I could be sued for everything I've worked for, for 40 years.

The following is a summary of the Applicant's affirmed testimony.

The Applicant purchased the impounded vehicle with the intent of using it only during the summer months. The Applicant obtained a tag for the vehicle that was issued on June 30, 1999 and expired on September 23, 1999. To date, no further tags have been

issued for this vehicle. The Applicant stores the impounded vehicle in the driveway at his ex-wife's home who resides in Barrie, Ontario. When the impounded vehicle was stored in 1999, the Applicant removed all insurance on it except for "fire and theft".

The Applicant's wife hid the keys to the impounded vehicle in one of her dresser drawers in her bedroom. On the evening the vehicle was impounded, and as stated above, Jeffrey, the Applicant's 24 year-old son, "went through his mother's belongings while she slept, found the keys and stole the vehicle." The Applicant testified that his ex-wife has been diagnosed with cancer and has undergone chemotherapy. Therefore, she may not have heard her son in her room due to the side effects of this disease and/or its treatment. Jeffrey has not lived with the Applicant for approximately 11 years. Jeffrey resides in Innisfil, Ontario.

When the Applicant's ex-wife awoke, she realized the impounded vehicle was gone and called the police to report it stolen. The police at this point advised her that her son, Jeffrey, had been arrested and the vehicle had been impounded. The police prepared a full report on the incident.

When the Applicant was asked what charges were laid against his son Jeffrey, the Applicant replied that he did not know, but that his younger son, Brad, told him that Jeffrey was charged with "impaired" and "taken without consent".

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit 3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Jeffrey C. Swalm;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence "Ability Impaired" under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 1, 2003.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

The Tribunal found that the Applicant's son took the Applicant's vehicle without the Applicant's prior knowledge or consent. However, there is no evidence before the Tribunal that the actions on the part of his son constituted theft of the vehicle.

The Applicant attended at the police station in Barrie, Ontario approximately one week after the vehicle was impounded and his son, Jeffrey, was arrested. The Applicant spoke to the police officer involved in this matter. The police officer provided him with the incident report and the Applicant signed it. When the Tribunal asked why he did not charge his son with “theft”, he replied that he wasn't sure he could have done that.

The Applicant did not believe his son intended to deprive him of the benefit of ownership (or possession) permanently or committed this crime with “malicious intent for profit”. He feels that his son was out on a “joy ride and had to “go somewhere to get something”.

In the Applicant's testimony, he advised the Tribunal that this was not the first time Jeffrey had done something like this. Jeffrey had once before, taken the Applicant's

boat for a ride without the Applicant's knowledge or consent. The fact remains that the Applicant did not properly store the vehicle in a secure location, as this was not the first time something like this has happened.

In further testimony, it was revealed that the vehicle was purchased with the intent of giving it to the Applicant's younger son when he successfully obtained a valid driver's licence.

The Tribunal sympathizes with the Applicant wherein he feels that he is the victim of circumstance. He continues to pay the monthly premiums on the impounded vehicle as well as now having to bear the burden of paying the towing and impoundment costs. Jeffrey is currently employed at a roofing company, but the Applicant is of the opinion that it is unlikely that his son will pay him back. The Tribunal would like to point out to the Applicant that he may pursue compensation from his son, as is stated in Section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

The Applicant's appeal is that the vehicle was stolen by his son, but this has not been substantiated by evidence.

Therefore, the Tribunal finds that the Applicant has insufficient grounds for appeal under section 50.3(3)(a).

DECISION:

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

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: May 29, 2001

MED - 0567

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

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

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

Applicant,
unrepresented

DATE OF
HEARING: May 24, 2001 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

Exhibit # 1 - Decision letter from Ministry of Transportation, Dated November 7, 2000.

Exhibit # 2 - Notice of Appeal Form received at the Tribunal April 24, 2001.

Exhibit # 3 - Tabulated documents from the Ministry of Transportation (1-11), Dated May 8, 2001.

Exhibit # 4 - Fax received from Applicant May 18, 2001 with attached blood test results.

FACTS:

The Applicant, a fifty three-year-old construction safety officer, had a 10-15 year history of heavy alcohol consumption. Two days before his daughter's wedding on October 29, 2000, he made a decision to quit drinking alcohol and consulted a friend about the "AA" program. At the wedding, he suffered a full-blown grand mal seizure and was taken to the Joseph Brant Hospital in a confused state. The emergency physician, Physician # 1, notified the Ministry of the seizure and checked off "alcohol and drug abuse" and "situation is a serious road safety risk".

The Ministry notified the Applicant November 7, 2000, that his driver's licence was being suspended.

Physician # 1 referred him to a neurologist, Physician # 2. A neurological examination, an EEG and a CT scan of his brain, were all normal. The Applicant was discharged October 31, 2000 with a diagnosis of " Grand mal seizure - alcohol withdrawal type".

The Applicant then consulted Physician # 3, a specialist in Addiction Medicine on December 21, 2000 and began attending AA meetings 4 times each week. Physician # 3 advised him to abstain from alcohol completely, for his own health and safety, not just to have his licence reinstated. The Applicant maintained that his last drink was on October 27, 2000, and promised he would see his family physician every month for MCV and GGT blood tests.

The Applicant testified he had previously attempted to quit drinking a couple of times, but abstinence only lasted a couple of weeks. He and his wife both stated that they were positive he would be successful this time. She gave evidence that he did all of his drinking at home, during the evenings and on weekends. He did not drink and drive and required his car to get to work.

ISSUES:

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

LAW:

Regulation 340/94, Section 14 states:

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

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

Section 47(1) states:

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

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

Section 50 of the Act states:

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

APPLICATION OF THE LAW TO FACTS:

The Registrar of Motor Vehicles was empowered under Section 47(1) of the *Highway Traffic Act* to "---suspend or cancel" a driver's licence for "any -----sufficient reason----". An unsolicited Medical Condition Report was received from Physician # 1, an emergency physician at the Joseph Brant Hospital, dated October 29, 2000, advising the Ministry that the Applicant had suffered a seizure on that date, as a result of alcohol or drug abuse. This was sufficient for the Registrar to act.

The seizure appears to have been Grand mal in type and the result of alcohol withdrawal after long term use. The Applicant admitted in evidence to increased alcohol consumption over the past ten to fifteen years and stopping two days before the seizure occurred.

The Canadian Medical Association's "Guide for Physicians in Determining Medical Fitness to Drive" recommends "-patients with a diagnosis of alcohol dependence, including those with alcohol withdrawal induced seizures, should not be allowed to drive any type of motor vehicle until they remain alcohol free and seizure free for 12 months".

Three physicians, who attended the Applicant, advised him he could possibly have his licence returned after he established 12 months of abstinence from alcohol. He felt, that since he was not driving when the seizure occurred and since he was determined to quit drinking, he should not be penalized by a guideline for physicians. Physician # 3, the Addictions specialist, informed the Applicant that he would support his licence reinstatement in September or October, 2001, if he abided by the guidelines.

The Applicant appears to have determination, good insight into his problem and family support, so should be able to be complete this period successfully and never return to alcohol. However, the medical evidence before this Tribunal supports continued abstinence for the immediate future.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 16, 200 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

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

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: May 29, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
47(1) of the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Friday,
May 25, 2001, at Kingston, Ontario;

AND WHEREAS the Applicant's counsel requested an adjournment of the hearing in
order to obtain additional medical information;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Friday, June 22, 2001 at the Frontenac
Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 24, 2000

SHAH, AHMAD o/a BEST CHOICE AUTO SALE

AHMAD SHAH O/A BEST CHOICE AUTO SALE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ANTHONY E. BAK, counsel, representing the Applicant
A. MICHAEL ROTHE, counsel, representing the Registrar,
Motor Vehicle Dealers Act,

DATES OF

HEARING: March 6, 2001 and April 18, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Ahmad Shah ("Shah") operating as Best Choice Auto Sale ("Best Choice") from a Notice of Proposal (the "Proposal") dated December 5, 2000 as amplified by the Notice of Further and Other Particulars dated February 16, 2001 (the "Further Particulars"). The Proposal issued by the Registrar proposes to revoke the registration of Shah as a salesperson under the *Motor Vehicle Dealers Act* (the "Act").

The Proposal was issued in terms of Section 7(1) of the Act.

THE EVIDENCE:

The evidence presented to the Tribunal by the Registrar consisted of both documentary and oral evidence, all of which the Registrar contends warrant the revocation of Shah's registration as a motor vehicle salesperson.

The allegations of the Registrar are set out in the Proposal (Exhibit 3, Tab 1) and the Further Particulars (Exhibit 3, Tab 2).

The particulars to the Proposal read as follows:

PARTICULARS

The reasons for this proposal are:

1. Ahmad Shah o/a Best Choice Auto Sale is currently registered as a motor vehicle dealer. He was first registered on or about June 10, 1992.
2. On or about April 3, 1999 Ahmad Shah o/a Best Choice Auto Sale purchased a 1989 Honda Accord (VIN: JHMCA5526KC810069) with an odometer reading of 197,146kms from Crown Auto Used Cars. On or about October 30, 1999 Ahmad Shah o/a Best Choice Auto Sale sold a 1989 Honda Accord (VIN: JHMCA5526KC810069) to Qais Azizi with an odometer reading of 147,000kms.
3. It has come to the Registrar's attention that a 1989 Honda Civic (VIN: JHMED3609KS803611) was purchased by Ahmad Shah o/a Best Choice Auto Sale with an odometer reading in excess of 200,000kms. On or about February 17, 2000 Ahmad Shah o/a Best Choice Auto Sale sold a 1989 Honda Civic (VIN: JHMED3609KS803611) to Malak Zaki with an odometer reading of 148,082kms.
4. On or about March 3, 2000 Ahmad Shah o/a Best Choice Auto Sale purchased a 1989 Honda Accord (VIN: JHMCA5624KC808027) with an odometer reading of 367,447kms from CGU Insurance Company of Canada at Impact Auto Auctions. On or about June 26, 2000 Ahmad Shah o/a Best Choice Auto Sale sold a 1989 Honda Accord (VIN: JHMCA562AKC808027) to Thayalan Arumugarajah with an odometer reading of 167,887 kms.
5. Ahmad Shah o/a Best Choice Auto Sale has provided false documentation to the Registrar relating to a 1989 Honda Civic (VIN: JHMED3609KS803611).
6. Ahmad Shah o/a Best Choice Auto Sale failed to disclose pertinent material facts about the vehicles he was selling to purchasers.

(Exhibit 1)

The Further Particulars read as follows:

FURTHER PARTICULARS

It is further alleged as follows:

1. That Ahmad Shah o/a Best Choice Auto Sale (hereinafter referred to as the "Dealer"), breached the Registrar's terms and conditions, he signed and agreed to on or about March 10, 1999.

2. On or about October 10, 2000, the Dealer purchased a 1992 Toyota Camry (VIN: JT2SK11FXN0029789), through Impact Auto Auctions, who specialize in salvage and stolen recovery vehicles. On or about November 24, 2000, the Dealer sold the vehicle to Masoud Golbazi and failed to disclose all material facts.

(Exhibit 3, Tab 2)

The oral evidence in support of the Registrar's allegations consisted of the testimony of Qais Azizi ("Azizi"), Malak Zaki ("Zaki"), Jennifer Andrew ("Andrew") and Laura Gordon ("Gordon"). Their evidence is reviewed hereunder.

QAIS AZIZI

Azizi stated he is 19 years of age. On October 29, 1999 when he purchased the 1989 Honda Accord, the only document he obtained from the salesperson at Best Choice was a hand written document reading as follows:

I sold Yousofzai the Honda Accord Ex. For \$2500 cert + emission with 147,000 km and cerial JHMCA5526KC810069 on Oct/29/99 to Qais Azizi.
"Ahmad Shah"

(Exhibit 3, Tab 11)

Azizi went on to state that the bill of sale in respect of the purchase of the Honda from Best Choice was signed by him, and he identified his signature on that document when it was shown to him during cross-examination by the Registrar's counsel (Exhibit 7). However, he denied that he received a copy of this bill of sale from Shah either at the time of purchase or later. Azizi stated that while he did sign the bill of sale, at that time that document had no handwritten information filled in on it other than that his name, address, driver's licence number and the words Honda Accord ADX and blue. Other than that, there was nothing else filled in on that document. (Exhibit 3, Tab 8) He was told by the salesperson before placing his signature on the bill of sale that the motor vehicle had been involved in a "minor fender bumper".

He further testified that he recently received from the Ontario Motor Vehicle Industry Council ("OMVIC") a document (Exhibit 3, Tab 10) with a request that he complete and return that document to OMVIC. This he did. When completing the document, he wrote in that the odometer reading as indicated on the bill of sale was 147,000 kms and that he paid \$2,500.00 cash to Best Choice in respect of the purchase of the Honda vehicle.

MALAK ZAKI

Zaki stated in evidence that he purchased a 1989 Honda Civic from Best Choice. In negotiating the purchase, he dealt with Shah's brother who represented Best Choice. Shah's brother told him there was "no problem" with the vehicle and that he had himself used it for a while. The purchase price of the vehicle was \$4,000.00 which sum he paid in cash. At the time of purchase, the odometer reading of the vehicle was "150 something". Subsequent to the purchase, Zaki spent about \$1,000.00 on repairs to the vehicle. Prior to purchasing the vehicle, he received only two documents from Best Choice which were a hand written receipt for a \$200.00 deposit paid on February 17, 2000 and a debit slip dated February 19, 2000 showing that \$1,600.00 had been paid

from his chequing account to Best Choice. (Exhibit 3, Tab 15). When Zaki was shown a copy of a bill of sale by Shah's counsel (Exhibit 3, Tab 13), he stated that the "purchaser's signature" thereon was not his although it "looks like my signature". He also denied having been given a copy of this bill of sale by Best Choice at the time of the sale or any time later. Under cross-examination, he did testify that the "distance travelled" by the vehicle at the time of sale could have been 147,210 kms.

Zaki further stated that OMVIC recently sent a document to him for his completion and return. (Exhibit 3, Tab 14) He completed the document in his handwriting and returned it to OMVIC. He explained that the purchase price of \$5,000.00 he wrote in that document included \$1,000.00 he subsequently paid to have the vehicle repaired by a third party. The vehicle's purchase price was in fact \$4,000.00.

JENNIFER ANDREW

Andrew testified that she is presently employed by OMVIC where she has worked for three years. For the last year she has been employed in the capacity as an inspector.

She stated that pursuant to a complaint to OMVIC, she proceeded on July 20, 2000 to Best Choice's premises at 2359 Danforth Avenue, Toronto. The purpose of her visit was to inspect the books and records of Best Choice to ensure compliance with the Act and its regulations. On July 20, 2000 there were no books and records at Best Choice. On July 25, 2000 she returned to Best Choice, spoke with Shah and inspected Best Choice's books and records which were then made available to her. She removed certain documents to OMVIC's offices and there made copies of such documents.

Andrew stated that among the documents she removed from Best Choice on July 25, 2000 was the bill of sale in the Azizi transaction (Exhibit 3, Tab 8) and the wholesale buyer's car order and agreement reflecting the purchase by Best Choice of three motor vehicles including the motor vehicle subsequently sold by Best Choice to Azizi (Exhibit 3, Tab 9). This latter motor vehicle, she identified as being the first vehicle listed on the wholesale buyer's car order and agreement. The distance travelled by this vehicle is shown on that document as 197,146 kms at the time of its purchase by Best Choice. This document also had written on it across its face the words "three above cars is insurance write off accident repair - sold as is". The signature of the Purchaser on that document is that of Shah.

Andrew further testified that when she inspected the original bill of sale regarding the sale of the 1989 Honda Accord from Best Choice to Azizi, she noticed that that original had a different hand writing on the left hand side under "optional equipment" and that the "distance travelled" appeared not to be 197,422 kms but rather appeared to be 147,422 kms.

Andrew further testified that she obtained the document at Exhibit 3, Tab 16 from Best Choice during her inspection of the records of the latter. She identified this document as pertaining to the Zaki vehicle.

LAURA GORDON

Gordon testified that she has been the Director of Compliance at OMVIC since 1997. She explained that OMVIC is a non-profit corporation which oversees compliance with

the Act, investigates consumer's complaints and attempts to mediate and resolve disputes between motor vehicle dealers and consumers.

Gordon briefly described the various documents in the Registrar's book of disclosure (Exhibit 3). She explained the various computerized print outs from the records of the Ministry of Transportation which formed a portion of the documents contained in the Registrar's Book of Disclosure. She also testified that Shah has two brothers one of whom, was the subject of a hearing before this Tribunal when his registration under the Act was revoked pursuant to the Tribunal's order and decision.

Gordon then dealt with two complaints made to OMVIC by consumers. Pursuant to these two complaints by Thayalan and Golbazi, Gordon met with Mr. and Mrs. Thayalan at OMVIC's offices on July 20, 2000. Gordon stated she made notes of her interview with the Thayalans and read from and referred to her notes when testifying. After meeting with the Thayalans, Gordon met in OMVIC's offices with Shah. Gordon's evidence was as follows:

Thayalan Vehicle

Gordon stated that the bill of sale dated June 26, 2000 between Best Choice and Thayalan Arumugarajah (Thayalan") was obtained by Andrew from Shah following a complaint made to OMVIC by Thayalan. This bill of sale relates to a 1989 Honda Accord EX with VIN # JHMCA56Z4KC80827, (Exhibit 3, Tab 21). Also obtained by OMVIC from Best Choice was the bill of sale of this motor vehicle when Impact Auto Sales of Stouffville sold it to Best Choice on March 14, 2000. That bill of sale reflected that the vehicle had an odometer reading of "367,447", that the vehicle was branded as salvage and was sold at the Impact auction on behalf of C.G.U. Group Canada Ltd. which Gordon identified as an Insurance Company. (Exhibit 3, Tab 24) She also testified that she is familiar with Impact Auto Auction whose business is the selling of accident write off motor vehicles on behalf of insurance companies which acquire motor vehicles after having paid out the registered owners thereof. The vehicles sold by Impact are those which the insurance companies decide are worth less than the cost of repairs.

Thayalan informed Gordon that he had seen a Honda motor vehicle advertised in the "Auto Trader" publication of June 22-28, 2000. From the advertisement he believed the seller was a member of the public who owned the vehicle. He called the telephone number in the advertisement and spoke to someone who he later came to know as Anisa Ebadi, the wife of Shah. Ebadi told Thayalan that the advertised vehicle had about 160,000 kms recorded on it and could be seen at a certain address, namely 31 Sierra Drive, to which the Thayalan and his wife proceeded on June 23, 2000. At the address the Thayalans met with Ebadi who told them she had owned the vehicle for 3 years and was selling it as she was pregnant and wished to purchase furniture with the proceeds of the sale. Thayalan then gave Ebadi a deposit of \$600.00, and a few days later Shah delivered the car to the Thayalans' home when the balance of the purchase price was paid by Thayalan to Shah. The Thayalans were then given a used car information package by Shah from which Thayalan observed that the vehicle was a rebuilt vehicle. Thayalan questioned Shah regarding this information as to the vehicle being a rebuild. Shah denied any knowledge of the vehicle being a rebuild and stated he had purchased the vehicle from one Richard Lynn.

Disturbed by the fact that the information package referred to the vehicle as a rebuild, Thayalan told Shah he wanted the deal cancelled and his money returned. Shah refused to do so and insisted on retaining \$500.00. On the information package which Thayalan retained, he observed Best Choice to be the owner of the motor vehicle. Thayalan's wife ascertained Best Choice's telephone number and called that number. Shah answered the telephone and confirmed that Best Choice was the owner of the vehicle and persisted in his refusal to refund the purchase price to Thayalan as he insisted he needed \$500.00 for taxes.

Thayalan then contacted OMVIC and informed OMVIC of his complaint.

Pursuant to OMVIC being informed of Thayalan's complaints, OMVIC contacted Shah and requested a copy of the bill of sale between Best Choice and Thayalan.

Gordon went on to state that shortly after OMVIC's request to Shah for a copy of the bill of sale, Shah, according to what Thayalan told her, went to the latter with \$3,700.00 in cash which Shah offered as a refund to Thayalan. At that meeting, Shah produced an unsigned bill of sale in respect of the 1989 Honda Accord. (Exhibit 3, Tab 21) Shah insisted that Thayalan sign the bill of sale and write on it the word "cancelled". Thayalan refused the \$3,700.00 tendered by Shah and refused either to sign the bill of sale or to write cancelled across the face of the bill of sale.

Subsequently, on July 20, 2000 the matter was resolved as a result of OMVIC's intercession. It was then that Thayalan and Shah attended OMVIC's offices and the matter was settled by Shah refunding the \$4,000.00 purchase price to Thayalan and Thayalan returning the vehicle's keys to Shah. At this time, both Shah and Thayalan signed a letter acknowledging the cancellation of the deal and the refund of \$4,000.00 (Exhibit 4).

Gordon expressed concern that the bill of sale placed before Thayalan by Shah when he requested it be signed and cancelled was the first occasion Thayalan saw a bill of sale in connection with the transaction. After Thayalan had left OMVIC's offices, Gordon spoke with Shah in OMVIC's offices. Shah could give her no explanation why Shah's wife, Enisa Ebadi, was attempting to sell the vehicle to Thayalan when, in fact, Best Choice had purchased the vehicle from Impact and the transaction had gone through Best Choice's RIN number in the Ministry of Transportation's records (Exhibit 3, Tab 24).

Golbazi Vehicle

Gordon testified that Shah had supplied OMVIC with a copy of the bill of sale between Best Choice and Masoud Golbazi relating to a 1992 Toyota Camry. This bill of sale was obtained by OMVIC following a complaint by Golbazi to OMVIC (Exhibit 3, Tab 26).

Golbazi had advised Gordon that he was concerned that the Toyota Camry motor vehicle had been involved in a collision. He was given no bill of sale from Best Choice, the vendor of that vehicle. He told Gordon he had signed a blank bill of sale with Best Choice. When Gordon queried why he would do this, he replied that he trusted Shah. He told Gordon that at the time of the transaction he did not know the vehicle had been in an accident let alone written off.

Gordon stated that OMVIC obtained a copy of a condition report from Impact Auto Auctions of Stouffville. She concluded from this report that the Toyota Camry had suffered damage to its front, right hand side and rear (Exhibit 5).

Gordon further stated that when she spoke with Shah following upon Golbazi's complaint, Shah agreed to refund \$9,250.00 to Golbazi which was the purchase price of the Camry.

Gordon referred to the Ministry of Transportation's VIN history of the Camry vehicle (Exhibit 3, Tab 26). She explained that the Camry had been branded as stolen on this VIN history and that it had been transferred from The Personal Insurance Company of Canada prior to that company transferring title to Best Choice on November 8, 2000. On November 25, 2000 the Camry was sold under a bill of sale to Golbazi (Exhibit 3, Tab 25).

When Gordon was shown the condition report on the Golbazi vehicle (Exhibit 5), she stated that she could not determine the extent of the damage to the vehicle.

Under cross-examination, Gordon stated that an insurance write off vehicle could include, for example, where an insurance company had paid out its insured for the vehicle and had taken title to that vehicle; that a salvage vehicle and theft recovery vehicle could include the situation where an insurance company had paid out the owner of the vehicle and had then taken title to it. She further stated that when an insured vehicle is written off as stolen, its owner being paid out by its insurer and the insurer then taking title to the vehicle upon its recovery, it may be possible that such theft recovery vehicle could be in the same condition as it was prior to its theft.

Shah was the only witness for the Applicant. Shah's testimony was as follows.

Although Shah could not remember signing the terms and conditions dated March 10, 1999 (Exhibit 3, Tab 5), he did acknowledge that the signature appearing thereon was his signature.

Qais Azizi Vehicle

Shah acknowledged that he signed, as Purchaser, the Wholesale Buyer's Car Order and Agreement (Exhibit 3, Tab 9) when he purchased the Honda Accord that was subsequently sold by him to Azizi. He acknowledged having received the aforesaid agreement at the time of his purchase of the three motor vehicles listed therein and that the first of the three vehicles purchased under that agreement for \$850.00 was the 1989 Honda Accord, the vehicle he subsequently sold to Azizi. He also acknowledged that the agreement stated that the vehicle at the time of his purchasing it had travelled a distance of 197,146 kms.

He further stated that he subsequently sold the Honda Accord to Azizi under a bill of sale (Exhibit 3, Tab 8) for \$950.00 and that that bill of sale indicated that the motor vehicle had then travelled 197,422 kms and that the vehicle was an insurance write off.

Shah went on to state further that his brother, who was not employed by him at Best Choice and who was under psychiatric supervision, did occasionally visit the premises of Best Choice and without Shah's knowledge or authority gave Azizi a handwritten

document (in his brother's handwriting) and under his brother's signature recording that the Honda had been sold to Azizi (Exhibit 3, Tab 11).

Shah under cross-examination, denied Azizi's testimony that the latter signed the bill of sale when that document was blank.

Malak Zaki Vehicle

Shah testified that the bill of sale (Exhibit 3, Tab 13) bears his signature and that Zaki was given a copy of this document on conclusion of the sale. He also stated that the distance traveled by the vehicle, namely 147,210 kms, was written on the bill of sale when he prepared such bill and that there was disclosure on the bill that the vehicle was an "insurance write off".

Thayalan Vehicle

Shah handed in a photocopy of the bill of sale between Shah and Thayalan (Exhibit 10) which Shah stated was part of Best Choice's records. He also tendered as evidence from Best Choice's records the original bill of sale between Best Choice and Anisa Ebadi who he acknowledged as his spouse. Both these bills of sale referred to same Honda motor vehicle.

Shah testified that he did sell this Honda motor vehicle to his wife Anisa Ebadi and confirmed ownership was transferred into her name on April 25, 2000. He stated that prior to selling the Honda to Ebadi he had obtained ownership thereof on March 10, 2000 from an insurance company. After Ebadi obtained ownership in the Honda from Shah she transferred ownership therein back to Shah on June 26, 2000 and on that date Shah transferred ownership to Thayalan.

Shah stated that the advertisement that was placed in the Auto Trader which Thayalan had referred to with Ebadi's telephone number within that advertisement was placed by a friend of Shah who had Shah's permission to use Ebadi's telephone number.

After the sale of the Honda to Thayalan the latter approached Shah and stated he did not like the car and complained about damage to the left rear door that Thayalan insisted Shah repair. As such damage occurred after Thayalan took delivery of the Honda, Shah refused to repair the door. This was when Thayalan complained to OMVIC. As Shah wished to avoid trouble, he returned the full purchase price of the Honda to Thayalan although at that stage Thayalan had already enjoyed the use of the vehicle for one month. After taking back the vehicle from Thayalan, Shah sold it to Sarah Mousair some seven weeks later for \$3,500.00. Shah contended that Thayalan's signature does not appear on the bill of sale when Shah sold him the vehicle (Exhibit 10) as Thayalan refused to sign it.

In cross-examination, it was put to Shah that the copy of the bill of sale (Exhibit 3, Tab 21) relating to the Honda vehicle reflected the distance travelled by it as 167,887 kms. Shah explained that the bill of sale had been prepared in duplicate, the duplicate copy being a carbon copy of the original and that the figure "3" in 367,887 kms did not adequately come through on the carbon copy leaving the impression that there is a "1" where the "3" should have been. The original was given to Thayalan.

Golbazi Vehicle

Shah stated that when he concluded the sale of the Toyota Camry to Golbazi, Golbazi refused to accept the copy of the bill of sale when Shah attempted to give it to him and insisted that he be given the original bill of sale. This Shah did and retained the copy in Best Choice's records. When Gordon spoke with him about this sale, Shah agreed to refund the \$9,250.00 paid by Golbazi for the vehicle and did refund that sum.

FACTS FOUND PROVEN:

Based upon the evidence placed before the Tribunal, the following are the facts found to have been proven.

1. Shah is presently registered under the Act as a motor vehicle dealer and carries on business as sole proprietor of Best Choice.
2. On April 3, 1999 Shah as Purchaser entered into a written Wholesale Buyer's Car Order Agreement with Crown Auto Used Cars ("Crown") as vendor in terms of which Shah purchased a 1989 Honda Accord EX motor vehicle (the "Accord") for \$850.00. At the time of purchase of the vehicle, it was disclosed by Crown to Shah that the Honda motor vehicle had travelled a distance of 197,146 kms. and was an "insurance write off accident repair".
3. On October 30, 1999 Shah entered into a written bill of sale with Azizi in relation to the Accord, referred to in paragraph 2 above, in terms of which he sold that motor vehicle to Azizi for \$950.00. The bill of sale recorded that the vehicle had travelled a distance of 197,422 kms. and was an "insurance write off accident repair". The signature on the bill of sale, as purchaser of the vehicle, was Azizi.
4. On February 17, 2000 Shah as Vendor entered into a written bill of sale with Zaki as purchaser of a 1989 Honda Civic motor vehicle (the "Civic") for \$460.00. The distance travelled by the Civic was recorded on that bill of sale as 147,210 kms.
5. On March 14, 2000 Shah purchased a 1989 Honda Accord EX (the "EX") from Impact Auto Auctions of Stouffville when the odometer reading of that motor vehicle was disclosed by Impact on the bill of sale to Shah was 367,447 kms. The vehicle was branded as "salvage" on the Impact bill of sale.
6. On April 24, 2000 Shah sold the EX to his wife Anisa Ebadi by a written bill of sale whereby title to the vehicle was registered in the name of Ebadi on April 25, 2000. The bill of sale reflected that the motor vehicle was an "insurance write off, accident repair".
7. Thayalan spoke with Anisa Ebadi on or about June 23, 2000 upon which date Thayalan went to 31 Sierra Drive where he inspected the EX.

8. On June 23, 2000, Thayalan gave Ebadi the sum of \$600.00 as a deposit on the EX.
9. On June 26, 2000 title to the EX was transferred from Ebadi to Shah who on June 26, 2000 caused title to the vehicle to be registered in Thayalan's name. pursuant to the sale of that motor vehicle to Thayalan for \$4,000.00.
10. At the time of the sale by Shah to Thayalan, Shah failed to provide Thayalan with a duplicate copy of the bill of sale with Thayalan's signature thereon, as purchaser.
11. At or about the time that Shah made refund of \$4,000.00 to Thayalan he presented Thayalan with a bill of sale in respect of the sale of the EX and requested that Thayalan sign the bill of sale and write across the face of the bill of sale the word "cancelled". Thayalan refused to sign the bill of sale and also refused to write "cancelled" across the face of the bill of sale.
12. Shah failed to act with honesty, and integrity when he attempted to create a bill of sale and presented it to Thayalan for Thayalan's signature and when Shah required Thayalan write the word "cancelled" thereon.
13. Shah refunded \$4,000.00 to Thayalan being the purchase price paid to him by Thayalan and thereafter resold the EX to Sarah Mousair.
14. Shah handed Golbazi, at the time of the sale of the Toyota Camry to Golbazi, the original bill of sale for that motor vehicle.

THE LAW:

The Act's relevant portions are:

Section 5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

Section 6.(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle

the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

.....

Section 7.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

.....

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of Shah ought to be revoked based upon Shah having carried on activities in contravention of the Act and Regulations and which past conduct affords reasonable grounds for belief that he will not carry on business in compliance with Section 5 of the Act.

The Divisional Court decision released April 7, 1983 of *Brenner*, reported in 19 CRAT 58, held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. Southey J. for the Court reviewed the authority of the Tribunal under section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar under *Brenner* at Section 5(1)(b) of the that Act. He states at page 60:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law

and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give

him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in this case Southey J. sent it back for a rehearing, however, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court quashed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

The Tribunal's analysis of the evidence before the Tribunal and the Tribunal's conclusions pursuant to the analysis follow.

Qais Azizi Vehicle

Azizi testified that when he affixed his signature to the bill of sale (Exhibit 3, Tab 10) the only portions of that document completed in handwriting were his name, address, driver's licence number and the words Honda Accord ADX and blue. When asked why he would sign an incomplete document he stated that "it was a matter of trust", inferring that he trusted Shah as to the completion of the document.

When OMVIC sent him a questionnaire for completion (Exhibit 3, Tab 10) some considerable time after the sale of the vehicle to him, he stated on that questionnaire that he had "forgotten" the distance travelled by the vehicle at the time of purchase.

Having observed Azizi when he testified, the Tribunal noted the uncertainty with which he answered questions put to him which indicated to the Tribunal that he no longer remembered events with clarity. The crux of the Registrar's case respecting this allegation is the motor vehicle's odometer reading at the time of its sale to Azizi. His indecision when giving evidence coupled with his prior statement that he had "forgotten" the distance travelled by the vehicle at the time of purchase leads the Tribunal to discount his evidence. Such unreliable and uncorroborated testimony does not discharge the Registrar's onus respecting the Qais Azizi vehicle.

Malak Zaki Vehicle

Zaki testified under cross-examination that at the time he purchased the 1989 Honda Civic motor vehicle, the distance on the odometer could have, at time of purchase, been 147,210 kms. The Registrar contended that at the time of that purchase the vehicle had an odometer reading "in excess of 200,000 kms".

The evidence of the Registrar does not support of the allegation that at the time of the Zaki purchase the odometer was in excess of 200,000 kilometers. That evidence shows that the Honda Civic was sold to Shah by one Ricci Aleandra (Exhibit 3, Tab 16). The Ministry of Transportation's records tendered by the Registrar (Exhibit 3, Tab 20) confirm that Ricci transferred titled to Shah prior to Shah selling the vehicle to Zaki. The Tribunal would have imagined that Ricci would have been subpoenaed to give evidence before the Tribunal to confirm the distance travelled by the vehicle at the time of sale. No such evidence was produced and Ricci did not testify. The only evidence the Registrar produced to support his allegation that the vehicle had travelled "in excess of 200,000 kms." was an undated handwritten note (Exhibit 3, Tab 18) from "Peter" at Finch Car Clinic that one "Rizi Pallinare" had sold a "white Honda" to him with a "high mileage over 300,000 kms. which he sold to "Sam at Sunoco for parts". In addition to the aforementioned undated handwritten note, the Registrar tendered in evidence an undated handwritten note (Exhibit 3, Tab 19) from one S. D'Angelo in which D'Angelo stated that he sold a "white Honda Civic 4 doors for scrap parts km. about 200,000".

There is nothing in the two indicated handwritten notes that connect the vehicle or vehicles referred to in those notes with the Honda Civic motor vehicle sold by Shah to Zaki. There are no VIN numbers mentioned and the notes give no information as to details of the Honda referred to in those notes as being the same Honda as sold to Zaki. Neither "Peter" nor "D'Angelo" gave evidence at the hearing, the Registrar being apparently content to rely on the vague documents he tendered in evidence.

The evidence tendered by the Registrar is so vague, ambiguous and unhelpful in establishing that the vehicle sold to Zaki had travelled over 200,000 kms. when Shah purchased it, that the Tribunal cannot find that the Registrar has discharged the onus that rests upon him with respect to the Malak Zaki vehicle.

Thayalan Vehicle

Thayalan did not testify at the hearing, and the best evidence regarding Thayalan's allegations was not presented. The Registrar relied upon hearsay evidence presented by Gordon, Director of Compliance with OMVIC. The Tribunal is entitled to receive hearsay evidence and to place what weight it believes should be attributed to such hearsay evidence.

The evidence of Gordon was given in a straightforward manner and was a detailed recounting by her from an interview held at OMVIC's offices with Thayalan and his wife. Gordon read from notes which she made at the time of her interviewing the Thayalans. Gordon's evidence, although hearsay, is accepted in its entirety by this Tribunal as being an honest and credible relating of information given to her by the Thayalans.

Of particular importance to the testimony of Gordon was her having spoken to Shah in OMVIC's offices after her meeting with Thayalan earlier that day. Shah was asked by Gordon why Ebadi had attempted to sell the Honda to Thayalan when Shah, operating as Best Choice, was, in fact, the owner of that vehicle. He could give Gordon no explanation. This aspect of Shah's evidence was not questioned by Shah's counsel in his cross-examination of Gordon. Gordon's evidence on this particular aspect, being uncontested, is accepted by the Tribunal.

Furthermore, it is clear from the documentary evidence adduced by the Registrar that Shah purchased this vehicle from an insurance company and took title thereto on March 23, 2000. (Exhibit 3, Tab 24) It is further apparent from the documentary evidence, which was not contested by Shah's counsel, that Shah transferred title to the vehicle to his wife Ebadi on April 25, 2000 and that she retained title until June 26, 2000 on which date Ebadi transferred title to the vehicle back to Shah who in turn transferred title to Thayalan. During the period of April 25, 2000 and June 26, 2000 when Ebadi had title, she offered the vehicle to Thayalan for sale on June 22, 2000 and met with him on June 23, 2000 when she received the \$600.00 deposit from Thayalan. Some three days later, on June 26, 2000, Thayalan paid the balance of the vehicle's purchase price. It was on that date that Ebadi transferred title back to Shah who in turn transferred title to Thayalan.

Accordingly, the Tribunal finds that the version presented through Gordon's evidence is entirely credible and acceptable. Thayalan was lead to Ebadi through the advertisement in the Auto Trader of June 22, 2000 and spoke with and paid to Ebadi the \$600.00 deposit. The Tribunal finds that Ebadi was nothing more than a front for Shah. Shah's evidence that a friend of his placed the advertisement which Thayalan saw in the Auto Trader is rejected as so unlikely a scenario as to be unbelievable.

Having found the testimony of Gordon, although hearsay, to be credible the Tribunal attributes considerable weight thereto and much prefers her evidence to that of Shah.

Insofar as Azizi, Zaki and Thayalan vehicle's odometer readings are concerned, the Tribunal is cognizant of the decision of the *Coates v. Registrar of Motor Vehicle Dealers and Salesman* 65 O.R. (2d) 526 in which it was held that clear and convincing proof based on cogent evidence would be necessary to support cancellation of registration. The Tribunal is not reasonably satisfied that the evidence of Azizi and Zaki is convincing enough to sustain the revocation of Shah's registration. Azizi's and Zaki's evidence was insufficiently convincing having regard to the nature and consequences of the facts to be proved, the seriousness of the allegations and the gravity of the consequences that will follow from a finding supportive of the Registrar's proposal.

As to the Thayalan allegations, the Tribunal is of the opinion that the detailed evidence of Gordon, viewed in the totality of the circumstances and the documentary evidence presented, supports the belief of the Tribunal that Shah's conduct was without integrity and that such conduct is likely to reoccur in the future to the detriment of the public.

Golbazi Vehicle

As to the Golbazi allegations, it is again noted that the Registrar failed to call Golbazi to testify and chose to rely on the hearsay evidence of Gordon. There was no indication Golbazi could not attend the hearing. Shah contested the Registrar's evidence that he failed to give Golbazi a copy of the bill of sale. Shah contended he gave Golbazi the original bill of sale as requested by Golbazi and retained the carbon copy which he gave to OMVIC.

In the absence of Golbazi's viva voce evidence and the opportunity to allow cross-examination of Golbazi, there is no opportunity to test Golbazi's allegations. Unlike the evidence in the Thayalan matter, Gordon's evidence was directly disputed by Shah. Accordingly, the Tribunal is unable to make a finding in favour of the Registrar when the Registrar precludes cross-examination of Golbazi by not having him testify and, when Shah directly contradicted the hearsay evidence of Gordon. Furthermore, for the Registrar to rely solely on Impact Auto Auction's written schematic drawing (Exhibit 5) in no way satisfactorily proves there was material damage to the vehicle when Shah purchased it at auction, nor does the drawing in any way indicate the nature and extent of damage. The damage could have consisted of nothing more than scrapes or scratches.

There is a conflict between the evidence of Gordon and the evidence of Shah as to whether Shah gave Golbazi a bill of sale for the vehicle. Shah stated he gave the original bill of sale to Golbazi and Gordon says this was not the case. Shah specifically dealt with and contradicted Gordon's hearsay evidence and on this basis the Tribunal accepts the evidence of Shah.

The Tribunal does not therefore agree with the Registrar's conclusion that Shah failed to disclose all material facts to Golbazi in the bill of sale.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) and (5) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to refrain from carrying out the Registrar's proposal dated December 5, 2000 to revoke the registration of Ahmad Shah o/a Best Choice Auto Sale and orders that the following terms and conditions be attached to the registration of Ahmad Shah o/a Best Choice Auto Sale.

- 1) By no later than 5:00 p.m. on the next business day immediately following upon the day a bill of sale is executed by Ahmad Shah o/a Best Choice Auto Sale and a purchaser, Ahmad Shah shall by prepaid registered mail send a true, complete and signed copy of such bill of sale to the Ontario Motor Vehicle Industry Council ("OMVIC") at 36 York Mills Road, Suite 110, North York, Ontario, M2P 2E9.
- 2) Ahmad Shah shall, at his cost and expense, forthwith enroll in the first available Automotive Certification Course offered by Georgian College of Applied Arts and Technology, Barrie, Ontario.

- 3) Ahmad Shah shall fully complete and successfully pass all tests/or examinations required to meet the criteria set by Georgian College for a passing grade no later than December 31, 2001.
- 4) Ahmad Shah shall, by prepaid registered mail, advise OMVIC in writing within 7 days of his enrollment in the course and notify OMVIC of his Georgian College student identification number no later than September 31, 2001.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 11, 2001

KELLY'S ALE HOUSE AND GRILL INC.-DISS

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

KELLY'S ALE HOUSE AND GRILL INC.

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor
Vehicles made pursuant to section 55.1 of the *Highway Traffic Act*
of an Order to Impound a motor vehicle for a period of 45 days
dated April 6, 2001

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

KELLY'S ALE HOUSE AND GRILL INC.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Kelly's Ale House and Grill Inc. (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of that Act, dated April 6, 2001 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to pay the filing fee within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated April 6, 2001, to impound the Kelly's Ale House and Grill Inc.'s motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: June 4, 2001

JOEL LEFORT

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

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

TRIBUNAL:	ANTOINE AOUAD, M.D., Presiding member	
APPEARANCES:	BRIGITTE HAMMOND, Representative for the Registrar of Motor Vehicles	
	JOEL LEFORT, Applicant unrepresented	
DATE OF HEARING:	May 29, 2001	Windsor
DECISION RELEASED:	June 6, 2001	

REASONS FOR DECISION

A hearing was held on May 29, 2001, at Windsor, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

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

BACKGROUND:

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

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

Owner: Joel Lefort (the "Applicant")
Motor Vehicle: 1997 Chevrolet Cavalier Z24, plate no. AJTJ855 (the "vehicle")
Date of Appeal: May 9, 2001

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

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

This matter came before this Tribunal on May 29, 2001 and proceeded as an oral hearing.

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

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

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

ISSUE:

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

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

5/07/01
windsor,ont

To license appeal tribunal:

My vehicle has been impounded last weekend April 29/2001, because the driver (a friend) having suspended license. I didn't know about his situation and I didn't ask because I seen him driving a car just a few days before. I was in the passenger side because I had a few drinks earlier on, and I know better than to drive.

Still today, I don't know why the police stop us but he did. I need my car to go to work, for I work outside of town where there is no bus. I don't have my ownership because Chatham towing has it and I,m not getting any cooperation from them.

Thank you for your time,
Joel Lefort

At the hearing the Applicant elected to make a statement rather than testify under oath.

The Applicant stated that rather than drive under the influence, he asked his friend to drive.

The Applicant was not aware that his friend's driver's licence was suspended as he had seen his friend driving before and had seen his licence on that occasion. The Applicant did notice that his friend's address was wrong but did not see any other signs that the licence might be suspended.

As for losses, the Applicant claims that lost one week off work due to lack of transportation at the time, but other than that, incurred no other expenses due to the impoundment of the vehicle.

The Applicant admitted to using his father's van when said vehicle is not needed by his father. Whenever, possible the Applicant gets a ride from a friend to take him to and from work. Public transportation is available to the Applicant.

In reply to questions posed by the Respondent the Applicant confirmed that he has not inquired into the possibility of renting another vehicle and that health and safety are not a concern.

Although shown a statement from the Ministry of Transport indicating he owns another vehicle, with a license plate which expired in January, the Applicant denied ownership of the vehicle described in the Ministry's abstract.

The Applicant is aware that he may sue Steven Mathies for reimbursement of expenses assumed as a result of the impoundment.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Steven J. Mathies;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 12, 2001.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing, the Respondent asked the Tribunal to confirm the decision of the Registrar and uphold the suspension, on the grounds that "due diligence requires an Applicant to do more than look at a driver's license. The Ministry of Transportation has a number which can be called to obtain information on the validity of the licenses of motorists on the roads.

As for hardship the Respondent maintains that the Applicant's testimony amounted to inconvenience but did not constitute hardship.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the

particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

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

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

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

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

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

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

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

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

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

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

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the due diligence and exceptional hardship grounds of appeal as provided in subsection 50.2(3)(c) and 50.2(3)(b) and(d) of the Act, respectively.

The Tribunal will address the matter of due diligence first, and address the meaning of “due diligence” as raised by the Respondent.

The Respondent quoted the definition of “due diligence” from the 6th edition of Blacks Law Dictionary, which the Tribunal transcribed as follows: “Due diligence, such a measure of prudence, activity, assiduity as is properly to be expected from and ordinarily exercised by a reasonable and prudent man under the circumstances, not measured by any absolute standard but depending on the relative facts of the case.”

Although interpretation is always subjective, in order to justify its decision, the Tribunal receives assistance from two significant criteria in this definition. First, it is clear that the measure of “due diligence “ is, as also described in the Notice of Appeal, that “all reasonable efforts” be made. Further, it is noted that due diligence is “not measured by any absolute standard but depending on the relative facts of the case.” The circumstances surrounding this case are that the Applicant decided he had too much to drink and prudently asked his friend to drive him home. He did look at his friend's driver's licence and noticed that the address was wrong. This was notice that the friend's licence was not current.

The Respondent contends that the Applicant did not exercise proper due diligence in that he failed to do more than look at that his friend's license.

Section 50.2 (3) (c) is clear in the requirement:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

This Tribunal has previously adjudicated that in order to exercise proper due diligence the owner of a motor vehicle must physically see the driver’s license of the prospect driver immediately prior to allowing the car to be driven by the individual. The Applicant stated he did so, and the Tribunal has no reason to disbelieve him. This may be enough in some cases to be due diligence and in other cases not enough; this depends on the circumstances. The Tribunal has relatively little evidence as to the circumstances of the friendship between the owner and the driver. It appears that the friendship was not close enough for the owner to learn that the driver had been convicted of driving a motor vehicle with over the legal limit of alcohol in his blood. However, when the owner saw that the driver’s licence was not current, merely seeing it does not amount to a reasonable effort to confirm its validity, and is not enough to establish due diligence.

The Respondent would have the Applicant call a 1 900 number available to the public. The Tribunal does not believe that it is necessary to decide what the owner might have done to establish due diligence. It is only necessary to find that the particular inquiry the owner made in this case does or does not amount to due diligence. As stated above, merely relying on a licence known by the owner not to be current does not amount to due diligence in this case.

The Tribunal is not satisfied that the criteria for due diligence as set out in Section 50.2(3)(c) was met.

With respect to exceptional hardship under subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Tribunal will not comment on whether or not the Applicant owns another vehicle, as the information concerning the possible ownership of another vehicle was presented at the hearing and not within the allotted time for disclosure.

The Applicant stated that he is able to drive his father’s van, and also that he is driven to work by a friend. Thus the criteria of Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 requiring that no alternative is available to the Applicant does not apply.

Is the loss immediate, significant and lasting?

The Applicant stated that he lost one week off work, but that other than that he incurred no incidental or any other out of pocket expenses. In fact he has been working over time.

The Applicant does not meet the criteria of subsection 22(3)(b) O. Reg. 574, as amended which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the impoundment will be borne by the owner of the vehicle.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

On the evidence, the impact of the loss on the owner will not be a result of the loss affecting the suspended driver.

The owner has an alternative to the impounded vehicle and the loss is not immediate, significant and lasting. The criteria set out in section 22(3)(d) of O. Reg. 574, as amended, being cumulative, the Tribunal may not consider the Applicant's loss as being exceptional hardship under section 50.2(3) of the Act.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: June 6, 2001

BARRY R. COPPARD

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

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

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

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

BARRY R. COPPARD, Applicant
unrepresented

DATE OF HEARING: May 28, 2001

DECISION RELEASED: June 6, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on May 28, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Barry R. Coppard (the “Applicant”)
Motor Vehicle: 1995 Ford F150, plate no. 339 55E (the “vehicle”)
Date of Appeal: May 3, 2001

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

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

This matter came before this Tribunal on May 28, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

To Whom it may concern:

The impounded vehicle is used to transport me and my other son (Mark) to work. There is another vehicle in the household, however neither me nor Mark are able to be insured to drive the said vehicle. It was requested by the insurance company that I sign a waiver declaring that I do not drive the vehicle.

I live in an area that has no public transportation system, therefore I cannot exercise this option. There are no family members that live near by or that have a vehicle that I could use.

As a chef my work shifts are very different than those of the owner of the other vehicle and not able to get a ride from them. There are no other staff members where I work that

live in my area to be able to use that option. I am not in a position to rent or purchase another vehicle, I still have to make payments on the truck as it is not paid for.

I am paid hourly and if I miss work I do not get paid thus diminishing my wage by the amount of time that I miss. I do not have any savings to fall back on, I also incur living expenses such as, cost of housing, Life insurance, Truck payment, and Truck insurance. There is no extra cash flow to be able to pay the \$4,500 impound fee that the Police Officer said that it would be to get the truck back from the pound. My son Mark is dependent on a ride to and from work and is not in a position to be able to rent or purchase another vehicle. The used vehicle that he purchased blew up on the highway and is not repairable. We have searched Canada the US and overseas for a replacement engine. Apparently the manufacture decided to put a different type of motor in that year model than they had previously or since used. Consequently he is left with a vehicle that he cannot even get towed to the wreckers as there is a loan outstanding on it which he still has to pay and no usable vehicle.

I am in a losing situation, I cannot afford to get the truck back but it is not paid for, I would still have a payment with the possibility of no vehicle.

At the hearing, the Applicant testified that the loss of the impounded vehicle has caused severe hardship, in that both the Applicant and his son have faced difficulty in getting to work. According to the Applicant there is no public transportation available in the area. In order to get to work the Applicant has relied on his friends to drive him and his wife to pick him up at night. However the Applicant stated that he has been forced to cut his shifts back an hour as his wife likes to go to bed early.

The other person normally using the vehicle is the Applicant's son, who has now been taking taxis to work. The son does own another vehicle but it would cost approximately \$3,500.00 to repair as said vehicle has no engine.

The Applicant has admitted to losing only one day of work due to the impoundment, but confirmed that he has lost approximately an hour every day, which reduces his pay.

From previous experience the Applicant believes that the cost of renting a vehicle would be prohibitive, but admitted in cross-examination that no attempt has been made to ascertain the cost of so doing.

The Applicant further testified that the family's health has not been, nor would it be at risk, due to the loss of the vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Colin Coppard;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol Content in Excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 17, 2001.

The Respondent offered no evidence other than the documentation offered prior to the hearing.

In closing, the Respondent reiterated the criteria for hardship and asked that the Tribunal confirm the decision of the Registrar as the Applicant's testimony amounted to proof of inconvenience which did not constitute hardship.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a

permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

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

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that there has not been much of a problem getting to and from work, as he has relied on the assistance of a friend and his wife.

As the Applicant has alternate methods of transportation available, the Applicant has failed to show there is not an alternative to the impounded vehicle, as required by the provisions of section 22 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

There is no doubt that the Applicant has incurred some losses. Nonetheless said losses amount to a day and several hours off work, which albeit apparently significant to the Applicant, cannot be considered long lasting.

The Applicant has not satisfied the Tribunal that he has in fact incurred any loss of income or extra expenses which could be considered hardship.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne not only by the owner of the vehicle but also by his son, who was not the suspended driver, but is the person ordinarily transported in the motor vehicle.

However, the Applicant testified that his son has been taking taxis and has not missed time off work.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of Subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon a person other than the suspended driver. As the clause is cumulative, the Applicant is also required to meet the other requirements of section 22(3). However, the Applicant does not meet the criteria of no alternative being available to the impounded vehicle or that the loss is significant and lasting also set out in 22(3)(d). The Tribunal may not consider any such loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship as required under section 50.2(3) of the Act.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: June 6, 2001

BALKO DRYWALL INC.

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

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

TRIBUNAL: ELMER MERKLEY,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

STEVE BALJKO, Agent for Applicant
unrepresented

DATE OF HEARING: June 1, 2001

DECISION RELEASED: June 7, 2001

London

REASONS FOR DECISION

A hearing was held on June 1, 2001, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Balko Drywall Inc. (the “Applicant”)
Motor Vehicle: 2000 Chevrolet Astro Van, plate no. 397 5HZ (the “vehicle”)
Date of Appeal: May 17, 2001

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

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

This matter came before this Tribunal on June 1, 2001 and proceeded as an oral hearing.

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

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

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

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

- The employee has been with us for over 3 years.
- We were not aware of his suspension.
- The van is used by this employee and one other.
- It was recently purchased because of the need for an extra vehicle.
- The van is necessary every day to do service work and spraying of ceilings at various locations in and around the London area.

- The van is necessary for storages of certain materials which saves time for all employees. No driving to storage to load equipment and materials and returning to unload and change equipment for different type job.

"Steve Baljko"

Balko Drywall Inc. was represented by the President, Mr. Steve Baljko. Mr. Baljko testified that he operates Balko Drywall Inc. located at 170 Parkview Drive in Dorchester, Ontario. His company employs approximately twenty-two employees and grossed \$ 2.6 million this past year. He stated his son, Matthew Baljko, an employee of Balko Drywall Inc., was driving the currently impounded vehicle without the benefit of a valid driver's licence. The impounded vehicle is used to transport ceiling spray equipment within a sixty kilometer radius of Dorchester, Ontario. The spray equipment is weather sensitive and must be transported in a van type vehicle or be covered with a tarpaulin if it is carried in an open pickup truck. While he has two other company-owned pickup type vehicles, one is used by himself for business purposes and an older unit is used solely for job clean up. He stated a fourth company-owned vehicle is a sport utility model, and is normally in the possession of his wife.

In his testimony, Mr. Baljko stated that he has access to a friend's vehicle during the impoundment period but considerable time is lost transferring the equipment and covering the material while travelling to and from job sites. The manual transfer of the spray equipment from truck to truck has the potential to cause a health and safety issue due to the heavy lifting involved.

Mr. Baljko testified that he is well aware that a rental unit can be obtained similar to the impounded model for about \$47.00 per day of use. However, it becomes a major inconvenience shifting the equipment and assigning different vehicles to employees during the impoundment period.

Balko Drywall Inc. has not lost any business opportunities during the impoundment period. Nevertheless, the impoundment, as well as his son's driver's licence suspension, has been a major inconvenience during this busy time of year. Mr. Baljko stated that his company has no policy in place to ensure that employees who drive company vehicles hold a valid driver's licence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Matthew Baljko;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 20, 2002.
5. Copy of the Ministry of Transportation records indicating that the driver of the impounded vehicle and son of Mr. Steve Baljko owns a 1994 Ford pickup truck.

The Respondent submits that the Applicant has not lost any business opportunities during the impoundment period or made an effort to investigate all the possible alternatives to the impounded vehicle. It was pointed out by the Respondent that Mr. Baljko's son's vehicle may be available during the impoundment period. Mr. Baljko stated that this was not an option based on economics and, the insurance problems it could create for his company.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

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

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

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

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

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

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

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

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

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

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

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

APPLICATION OF LAW TO FACTS:

The issue to be considered in the appeal is to determine whether “exceptional hardship” will result from the Registrar’s order to impound the vehicle.

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

Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment. The Applicant in this case argued that the impoundment is causing the company major inconvenience and lost time shifting the spraying equipment from truck to truck and covering the load during inclement weather.

Mr. Baljko, representing the Applicant, readily admits that his company has not lost any business opportunities during the impoundment period.

Mr. Baljko testified that he has access to his friend's pickup truck during the impoundment period and has not investigated or pursued any other options for an alternative suitable vehicle.

The Tribunal finds that the Applicant has not established "exceptional hardship" as prescribed under Section 50.2(3)(d) of the Act.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: June 7, 2001

LI-EXHP

LI LI

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

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

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

LI LI, Applicant
unrepresented

DATE OF HEARING: June 5, 2001

DECISION RELEASED: June 14, 2001

Toronto

REASONS FOR DECISION

A hearing was held on June 5, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Li li (the "Applicant")
Motor Vehicle: 2001 Nissan Pathfinder, plate no. AJFH 078 (the "vehicle")
Date of Appeal: May 14, 2001

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

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

This matter came before this Tribunal on June 5, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals, which were entered into evidence as exhibit #3.

The hearing proceeded.

ISSUE:

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

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

Because of the worke, I'm the Holistic Practitioner, I got pathents oll over the city, And sametimes I got appontment in sarborough and then anather and Mesissaga and thes's my a reguloir pathents. Also thes's is my own business and by the Bus I cannot travel these for distance and I will lose my business. Because this my responsibility to see my patients regularly. If I lose this job, I can not pay mortgage or car payments.
"Li Li"

The Applicant testified that Iouri Mriazew, the driver of her vehicle at the time of the impoundment, had been hired by her to do some painting work at her residence. Mr. Mriazew was a friend of one of the Applicant's friends, and just prior the impoundment, the Applicant had left the keys to her vehicle on a table in her house. The Applicant had left her house with another friend, and at that time, Mr. Mriazew drove her vehicle and was subsequently stopped by the police and the vehicle was impounded.

The Applicant further testified that she and a partner run a Holistic clinic in the North West end of Toronto. The Applicant relies upon her vehicle for basic transportation, as well as for getting to and from the residences of her various patients that rely on her for house calls.

Since the Applicant has lost her vehicle, she has had to rely upon public transit for transportation to her clinic from her residence in the East end of Toronto, and has been unable to maintain her house call appointment schedule to its full extent. The Applicant has managed to obtain transportation on a sporadic basis from her friends when they are available. The Applicant testified that she believed taxi's were too expensive for her, and has made inquiries to a rental company, but found that the cost would also be too expensive for her.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Iouri Mriazew;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 3, 2002.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

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

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

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

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

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

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

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

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

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

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

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under

- suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). In this case, the Applicant's house call services as a practitioner had been affected, however the Tribunal was not satisfied that the impact of this temporary loss of this aspect of her business was in fact significant and lasting as prescribed by the Act.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. The oral testimony of the Applicant was that she had investigated renting as an alternative to the impounded vehicle, yet not taxi cabs. She stated that these alternatives were not affordable for her, however, no supporting evidence was presented that would support that claim.

The Applicant has been able to maintain the daily activities of her business and through the use of various alternatives that she had at hand. These include the use of public transit to transport her to and from her clinic, as well as the occasional use of a friend's vehicle. The Tribunal recognizes that the Applicant has been inconvenienced by the loss of her vehicle, however no evidence was heard that would support a finding of exceptional hardship, nor a loss that was significant or lasting, as required by the Act.

Therefore, the Tribunal finds that the Applicant has failed to meet the requirements of section 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

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

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: June 14, 2001

**HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by
Enterprise Rent-A-Car to appeal the decision
of the Registrar of Motor Vehicles pursuant to
Section 55.1 of the *Highway Traffic Act*;

AND IN THE MATTER of

ENTERPRISE RENT-A-CAR

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a hearing in the above matter was scheduled to be held on Friday, June 28, 2001 at the Tribunal;

AND WHEREAS a letter was filed, dated June 12, 2001, by the Respondent requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard at 9:30 a.m., on Wednesday, June 20, 2001 at the Licence Appeal Tribunal, 1 St. Clair Avenue W., 12th Floor, Toronto, Ontario,

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

LENWORTH MORRIS

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

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

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

LENWORTH MORRIS, Applicant
Unrepresented, by electronic (telephone conference)

DATE OF HEARING: June 7, 2001

DECISION RELEASED: June 14, 2001 Toronto

REASONS FOR DECISION

A hearing was held on June 7, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

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

BACKGROUND:

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

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

Owner: Lenworth Morris (the "Applicant")
Motor Vehicle: 1989 Chrysler Daytona, plate no. AJLR 289 (the "vehicle")
Date of Appeal: May 16, 2001

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

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on June 7, 2001 and proceeded as an electronic hearing (telephone conference).

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

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

The hearing proceeded.

ISSUE:

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

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

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

FACTS:

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

Evidence for the Applicant

A summary of the Applicant's evidence follows.

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

The lost of my car result in the lost of my job. I went to sleep and wake up to find my car was gone I phane the Police and my Girl Friend was arested for driving the car under suspension and when I went to the Police station to get my car I was told my car was impounded for 45 days. My old address was in Scarbrough now I live in Witby with my Girdfriend one child. My Girl friend does not work. So the lost of my car could cost us

our place of resedent. My Girl Friend has nevery had a licence to drive. I lost one week of work bue to lost of my car, I talk to my boss at work and explaine my problem and he told me that he would try to keep my job for a cuple weeks.

The Applicant, Mr. Morris was affirmed and gave oral testimony. He stated that on that particular evening, he had come home from work, ate his dinner and went to sleep at about 10:00 p.m. When he awoke around 5:00 a.m., he found his girlfriend and his car were not there. According to the Applicant, he telephoned the police. The police informed him that they had his girlfriend in custody and had arrested her for driving while under suspension and that his vehicle had been impounded. The Applicant then testified that he told the police that his girlfriend did not have his permission to use his car as she does not possess a driver's licence. Mr Morris did not understand why she was not charged with theft of his vehicle. Mr. Morris was not able to produce a police report indicating that the vehicle was in fact stolen. According to Mr. Morris, he has had to take time off of work to look after his daughter as the child's mother was incarcerated and received a six month sentence which was to be served on weekends. He stated that he was residing at his mother's home where he would be able to get to work using public transportation.

Evidence for the Registrar

A summary of the Registrar evidence follows.

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

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ms. Danyelle Murphy;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 14, 2004.

LAW:

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

Subsection 55.1(3) of the Act states:

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

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

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

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

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

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

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

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section(s) 50.2(3)(a) and (d).

For appeal under 50.2(3)(a):

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S., Colo, 338F.2d 787,788*. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430*.

For appeal under 50(3)(d):

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

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

There are two issues to be considered in this appeal and it is dealt with hereunder.

(a) Stolen Vehicle:

The evidence before the Tribunal establishes that the Applicant was aware that the driver, Ms. Danyelle Murphy was not in possession of a driver's licence and in fact, the Applicant testified that he was usually very careful about where he hid his keys, so she would not take the car. The Applicant testified that he had called the police and reported his vehicle stolen but was not able to substantiate this claim as no police report was submitted.

The Tribunal therefore can find no evidence that the vehicle was in fact stolen as per Section 50.2(3)(a).

(b) Exceptional Hardship:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship as per Section 55.2(3)(d)?

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicant in this case has argued that the impoundment will result in hardships as described in Section 22(2). In order for his claims to be considered under Section 22(2), he must have demonstrated that all of Section 22(3) has been met. Furthermore Section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle.

The Applicant testified that he has missed two weeks of work however this was due to the fact that he did not have a sitter for his daughter as the child's mother who would have normally looked after the child was incarcerated and not available. The Applicant has also testified that he has moved to his mother's residence so that he would have access to his work via the local transit system. He has been able to attend work.

The Tribunal finds that the Applicant has found an alternative vehicle to attend work, namely public transportation.

The Applicant has failed to meet the criteria as described in Section 22(4) of Regulation 632/98.

The Tribunal does acknowledge that the Applicant will suffer from a certain amount of inconvenience however after having weighed all of the evidence presented before it, the Tribunal finds that the Applicant will not suffer exceptional hardship, as circumscribed by regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: June 14, 2001

BAKKE'S TRUCKING LTD.

BAKKE'S TRUCKING LTD.

Appeal under Section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from an Order of the Registrar of Motor Vehicles pursuant to Section 82.1 of that Act.

TO APPEAL AN ORDER TO SUSPEND AND IMPOUND A COMMERCIAL MOTOR VEHICLE OR TRAILER

TRIBUNAL: ALAN HOLBROOK, Presiding Member
ELMER MERKLEY, Member

APPEARANCES: PATRICK MOORE, Counsel for Respondent

BAKKE'S TRUCKING LTD., Applicant
RONALD GARLICK, Agent for Applicant

DATE OF HEARING: June 6, 2001 North Bay

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by Bakke's Trucking Ltd. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Respondent") pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

EXHIBITS:

- Exhibit 1 – Order to Impound and Suspend dated April 27, 2001 issued by the Registrar of Motor Vehicles.
- Exhibit 2 – Notice of Appeal Form received at the Tribunal May 7, 2001, filed by the Applicant.
- Exhibit 3 – Respondents Record Book (Blue Bound Book)
- Exhibit 4 – Applicants Submissions Bakke's Trucking Ltd. (Faxed Copy)
- Exhibit 5 – Brake Defect Check List.

PRELIMINARY MATTERS:

Mr. Patrick Moore, counsel for the Respondent stated there was an omission from the original submissions, a copy of a Brake Defect Checklist, and requested it be entered as evidence. Mr. Ronald Garlick, Agent for the Applicant, presented a bound, indexed copy of his original submissions to the Tribunal.

RULING ON THE MOTION:

The Brake Defect Checklist was accepted and marked as Exhibit 5, with no objections. The indexed copy of the Applicants Submissions was accepted and marked as exhibit 6 with no objections.

FACTS:

On April 27, 2001 at approximately 1:35 p.m. a 1994 Freightliner registered to Bakke's Truck Rental Ltd. (Ontario licence number PL2679) was detained for a Level 1 inspection at the South Bound Wasi Inspection Station, in North Himsworth by MTO, Enforcement Officer Mark Tremblay.

The unit was a 3-axle power unit drawing a 1985 Timmins, 5-axle trailer, (Ontario licence number P46291).

The driver was Thomas G. Page, who assisted Officer Mark Tremblay with the inspection. Defects were found, in the brakes and air systems and the trailer was detained.

Officer Mark Tremblay was the first witness for the Respondent.

He testified that while he was weighing the truck he did a visual check of the brake slack adjustors and decided to do a level one inspection based on his observations.

Officer Tremblay stated that the driver, Thomas Page, understood and complied with instructions during the inspection.

It was established during the inspection that the trailer was equipped with an airbrake system with type 20, short stroke, clamp type air brake chambers on the first two axles (lift axles) and type 30, short stroke, clamp type air brake chambers on the three rear most axles (non lift axles).

Officer Tremblay testified that he used the "mark and measure" method to measure push rod travel and found seven of ten brake slack adjustors more than $\frac{1}{4}$ inch out of adjustment which indicates a critical defect according to the *Highway Traffic Act*, Reg 512/97 section 7.

Officer Tremblay explained that to "mark and measure " he used soap stone to mark the push rods at the face of the brake chamber with the brakes released and then had Mr.

Page apply a full brake application with the system charged to between 90 and 100 pounds per square inch and Officer Tremblay then measured the "travel" with a steel ruler.

Officer Tremblay then called Enforcement Officer Bryan Jean to assist him to do a second inspection of the brake system. The two officers used the "Fixed Point Measuring Method" and they used a digital tape measure, which was equipped with a mechanical tape measure built into it. The results of this inspection by Officer Tremblay can be found in Exhibit 3 Page 6 and Officer Jean's results in Exhibit 5.

Officer Tremblay explained that with the "Fixed Point Measuring Method" they measured from the air brake chamber face to the clevis pin on the slack adjuster with the brakes released and again with the brakes applied and then he and Officer Jean separately determined the differences in the two sets of numbers which determined the push rod travel.

During the second inspection by both officers they had placed MTO air gauges on the glad hands of the air system between the tractor and trailer to verify the air pressure in the system. Both officers were under the trailer and observed the measurements and verified the accuracy of the measurements as they were taken. The two officers also used callipers to verify the size of the brake chambers. The engine was shut off.

The second inspection was done with the assistance of the driver, Mr. Page.

After the second inspection of the brakes both officers agreed there was a critical defect and a Notice To Registrar Of Critical Defect Inspection was completed and faxed to the MTO (Exhibit 3 Page 2), by Officer Tremblay. Mr. Page was advised of the situation. Some discrepancies were noted between the first inspection and the second inspection in the push rod travel and Officer Tremblay explained to the Tribunal that the Fixed Point Method is more accurate and those results were used for the purposes of the impoundment.

Mr. Tremblay testified that he noted some brakes were warm and others cool indicating to him that some of the brakes were not fully functional.

The driver and the company were charged with operating an unsafe vehicle and the trailer impounded.

Officer Tremblay observed a service vehicle arrive with two men, (Mr. Ken Adams, Service Supervisor for Bakke's Trucking Ltd. and Mr. Dale Kitching, a mechanic for Bakke's Trucking Ltd.) and later Mr. Garlick, Bakke's Trucking, Safety and Compliance Manager, arrived. Mr. Tremblay spoke with them and observed them working under the trailer.

A copy of the impound order and an appeal booklet was given to Mr. Garlick.

Under cross-examination by Mr. Garlick Officer Tremblay stated he didn't observe any smoke or signs of over heating of the brakes.

He chose to do a Level One inspection after visually checking the slack adjusters while the truck crossed the scale plate at the inspection station. Officer Tremblay stated that a visual inspection is not accurate but is a good way to see if more detailed

measurements are required. Officer Tremblay's original notes of the measurements can be found in Exhibit 3 Page 7.

Officer Tremblay filled out all reports and signed them and Officer Jean verified the details and signed them. No further notes were taken.

Officer Tremblay was asked if he noticed any brakes "bottomed out" or "cammed over" which would indicate excessive travel. He stated he had not.

Mr. Garlick asked why two different methods of measuring had been used and was told, by Officer Tremblay, the first method of mark and measure was used because it is quicker and the second is used if an impoundment is possible because it takes longer but is more accurate.

When asked by Mr. Garlick, why he would not re measure, or at least observe Bakke's employees re measure, the slack adjuster travel, Officer Tremblay stated he had measured the slack adjuster travel two times. Officer Jean had verified the results of the second inspection and he was satisfied with the accuracy of the measurements and the methods they had used. In conversation with Mr. Garlick they discussed differences in the slack adjuster travel as measured by Officers Tremblay and Jean and ones taken by Mr. Adams and Mr. Kitching.

Officer Tremblay stated he did not have confidence in the method Mr. Adams was using to apply the brakes, with a pinch bar as opposed to using air pressure from the trucks air system and this would explain any discrepancies.

Mr. Garlick suggested the brakes be adjusted; the trailer moved to Bakke's yard, unloaded and then surrendered voluntarily, empty, to the Impoundment yard. Officer Tremblay denied this request for procedural reasons.

Enforcement Officer Bryan Jean was then called to testify as the Respondent's second witness.

Officer Jean testified he was called by Officer Tremblay and told there was a possible critical defect situation and that Officer Tremblay was requesting assistance. This was prior to the second measuring of the slack adjuster travel by the two Officers.

Officer Jean attended the Southbound Inspection Station where he and Officer Tremblay then performed the second inspection, with the driver Thomas Page's assistance. This time they used the Fixed Point Method of measuring.

Officer Jean testified they lay head to head on creepers under the trailer so both officers could read the digital tape and verify the measurements were accurate.

Officer Tremblay used the MTO "Brake defect checklist" form to write the measurements on, leaving the "Push-rod Travel" sections blank.

When all measurements were obtained both officers returned to the Inspection Station Office and photocopied the "Push-rod Travel" form and then separately did the math to determine the amount of travel of the push-rods, fill in that section of the form and then compared results to ensure the accuracy. Exhibits 3 page 6 was Officer Tremblay's form and Exhibit 5 Officer Jean's copy.

Officer Tremblay at this time proceeded to process the critical defect forms.

Under cross-examination Officer Jean stated that he agreed impoundment is a harsh penalty.

He also stated that as enforcement officers they have no discretion once they find a possible critical defect. The process is that they fill out the appropriate forms and submit them to the MTO office for a final decision to impound. This procedure is laid out in the HTA.

He also stated that they could not allow the trailer to be moved, by the carrier, for unloading and surrendered at a later time, as was suggested by Mr. Garlick, because the procedure is clearly laid out in the *Highway Traffic Act* Regulations.

Doug Reece was then called to testify for the Respondent as their third witness.

He testified he was an Enforcement Officer, Certified Truck And Car Mechanic, Enforcement Programs Advisor, and an Investigator with the Ontario Ministry Of Transportation. In addition he had worked as a mechanic in the private sector and worked at Inspection Stations, as an Enforcement Officer. In 1994 he was a Special Investigator into wheel separations and was an instructor for the C.V.S.A program. He had also attended various courses presented by manufacturers of truck braking systems. He had been declared an expert witness and testified as such before the Licence Appeal Tribunal and in Ontario Courts in the past.

Mr. Moore asked that the Tribunal declare him as an expert witness. There were no objections by the Applicant and he was so declared.

Mr. Reece testified that Officers Jean and Tremblay used approved methods of measuring the slack adjuster travel as laid out in the Reg 512 of the Highway Traffic Act and the Driver's Guide to Push Rod Stroke Inspection and Adjustment (found in Exhibit 3 page 17 and Exhibit 4 page 5).

He further testified that the method used by Bakke's mechanics (using a pinch bar instead of air pressure to apply the brakes) did not reproduce the same conditions as would be found in a full brake application and therefore was not an accurate way to check slack adjuster travel.

During examination and cross-examination, Mr. Reece explained that there are many ways to check pushrod travel.

In Mr. Reece's opinion; visual inspection, as used by Officer Tremblay while the truck was crossing the scale, is the quickest and easiest but also least accurate. In this method the relative position of the slack adjuster and the push rod are compared to see if they are at approximately 90 degrees of angle.

The mark and measure method used by Bakke's, in which the inspector uses a pry bar to force the push rod out of the air chamber to simulate a brake application, then measure the travel is a useful *guide* to see if further adjustment is necessary. This method, in Mr. Reece's opinion, does not apply enough force on the brake components to be accurate. Mr. Garlick challenged this opinion.

The mark and measure method using the trucks air supply and a full brake application is quite accurate and used in roadside inspections with CVSA approval.

However to maintain fairness and the most accuracy in the case of critical defect impoundments, the MTO verifies push rod travel with the use of the Point to Point Measure Method using the trucks air supply and a full brake application. There are other methods of checking for correct adjustment discussed in the Drivers Guide To Pushrod Stroke Inspection And Adjustment. But they were not brought before the Tribunal for discussion.

There was some discussion of the paragraph entitled "Check Free Travel" in Exhibit 3 page 36, in which the use of a pinch bar is used, but the Tribunal established that Free Travel or Free Stroke and Full Brake Application are two different tests and not necessarily related as described in the paragraph "Applied Stroke" on page 28 of Exhibit 3.

The first witness for the Applicant was Mr. Kitching a mechanic for Bakke's Trucking Ltd. Mr. Adams the maintenance supervisor at the time of the impoundment would have been called also but is no longer with the company. Both Mr. Adams and Mr. Kitching attended the Inspection station on the day of the impoundment with Mr. Garlick.

Mr. Kitching testified he is a licenced mechanic Class T (heavy trucks) and works for Bakke's Trucking Ltd. On the day of the impoundment, he and Mr. Adams went to the Inspection Station and after Mr. Garlick arrived, Mr. Kitching was instructed to assist Mr. Adams measure the push rod travel on the trailer in question. They used a 2-½ foot pinch bar to simulate a brake application and used the mark and measure method. Mr. Adams marked down the measurements. Mr. Adams then presented them to Mr. Garlick. Mr. Garlick then spoke to Officer Tremblay.

Mr. Kitching testified he often used the pinch bar method and was not aware of any problems resulting from using this method of checking air brakes nor had he ever be made aware or disciplined for any problems resulting from his work. Mr. Kitching testified he was instructed later to assist Mr. Adams to measure the pushrod travel again, this time using a full brake application from the trucks air brake system. Also they were instructed to photograph the procedure so that the results could be seen in the pictures. One brake was measured. Several attempts to photograph the results failed and the procedure was abandoned.

Mr. Kitching was then instructed to repair an airline and remove the licence plate from the trailer, which was surrendered to Officer Tremblay.

In cross-examination, Mr. Kitching stated he did not know how much pressure would be exerted on the brake components using a 2-½ foot bar. The physics were outside his area of expertise.

Asked why a full air brake application using the trucks air system and a mark and measure method was not completed if they were disputing Officer Tremblay's measurements, Mr. Kitching stated that it was not his decision to make.

The next witness for the Applicant was Mr. Garlick who is Bakke's safety and compliance manager.

Mr. Garlick testified that Bakke's Trucking Ltd. had not had an out of service violation related to brakes for three years. The company has been in business since 1972. They run 40 company power units with 5 owner operators and 65 trailers and have invested millions of dollars in up grading equipment in the last several years. The trailer had had a full brake job less than 5000 miles prior to the impoundment. The company has three full time mechanics plus the maintenance supervisor and two shop labourers. They run all 48 U.S. states and across Canada.

Mr. Garlick testified he is certified to adjust brakes and instruct brake adjustment training. He was trained and certified by the Ontario Trucking Association.

Mr. Garlick testified he was confident in the method of using a pry bar to simulate a full air brake application for the purpose of measuring push rod travel.

Upon arriving at the truck inspection station, Mr. Garlick testified he spoke to Mr. Adams and Officer Tremblay and then instructed his mechanics to check the pushrod travel but not make any adjustments at this time. He approached Officer Tremblay and asked if he would observe the measuring to verify the results. Officer Tremblay refused stating he had measured twice already and was confident he had done so accurately.

When discrepancies were found Mr. Garlick approached officer Tremblay once more and discussed the results and again invited Officer Tremblay to observe. Officer Tremblay expressed doubts about the method of measuring being used and refused again to take part.

Mr. Kitching, Mr. Adams and Mr. Garlick then made an attempt to measure using the full air brake application and mark and measure method and photograph the procedure. As Mr. Kitching testified to earlier, after failing to get clear enough photographs the attempt was abandoned after one brake was checked.

The Respondent then asked if Mr. Reece could be recalled to clarify some points.

Mr. Reece restated that in his opinion the pinch bar method could not exert enough force on the brake system to provide for accurate measurements.

Under cross-examination, Mr. Reese stated that he was not at the inspection station and did not know the condition of the trailer.

ISSUES:

Should the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle or trailer be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;
 - or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Counsel may make regulations,
 - (a) prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

PART II

CRITICAL DEFECTS

INTERPRETATION

- 5.(1) In this Part,
 - “broken”, when used to refer to a vehicle component, means that the component or any of its sub-components is split into more than one part;
 - “cracked”, when used to refer to a vehicle component, means that the component is not broken but has a split that penetrates completely through the component or any of its sub-components;
 - “steering axle” means any axle of a commercial motor vehicle that is controlled by the driver to provide direction to the motor vehicle.
- (2) For the purposes of an inspection for critical defects under section 82.1 of the Act,
 - (a) a liftable axle, being an axle that is designed to be adjusted vertically and to lift its tires from contact with the surface of the highway when in a raised position, shall be considered part of a vehicle;
 - (b) a conversion unit shall be considered part of the vehicle that it converts; and
 - (c) a trailer converter dolly, if carrying a trailer, shall be considered part of that trailer.

BRAKES

- 6. In sections 7 and 8, “rotor” includes a disc.

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.
- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:
1. A drum or rotor is cracked, broken or missing.
 2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
 3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
 4. The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

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Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)
12	5 11/16" (144.46mm)	1 3/8" (34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)
16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)

20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid . . .	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)
30 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid . . .	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)

Bolt Type Chamber Data		
Type	Outside Diameter	
A	6 15/16" (176.21mm)	1 3/8" (34.93mm)
B	9 3/16" (233.36mm)	1 3/4" (44.45mm)
C	8 1/16" (204.79mm)	1 3/4" (44.45mm)
D	5 1/4" (133.35mm)	1 1/4" (31.75mm)
E	6 3/16" (157.16mm)	1 3/8" (34.93mm)
F	11" (279.4mm)	2 1/4" (57.15mm)
G	9 7/8" (250.83mm)	2"

		(50.8mm)
Rotochamber Type Chamber Data		
Type	Outside Diameter	
9	4 9/32" (108.74mm)	1 1/2" (38.1mm)
12	4 13/16" (122.23mm)	1 1/2" (38.1mm)
16	5 13/32" (137.32mm)	2" (50.8mm)
20	5 15/16" (150.81mm)	2" (50.8mm)
24	6 13/32" (162.72mm)	2" (50.8mm)
30	7 1/16" (179.39mm)	2 1/4" (57.15mm)
36	7 5/8" (193.68mm)	2 3/4" (69.85mm)
50	8 7/8" (225.43mm)	3" (76.2mm)
Tie Rod Piston Type Chamber Data		
Type	Outside Diameter	
30 Long Stroke with Square Inlet Port	6 1/2" (165.1mm)	2 1/2" (63.5mm)
DD-3 Type Chamber Data		
Type	Outside Diameter	
30	8 1/8" (206.37mm)	2 1/4" (57.15mm)

The Tribunal must determine if the Registrar has established that the Applicants' vehicle had a critical defect as defined under Regulation 517/97 of the *Highway Traffic Act*. This matter involves Air Brake and section 7 and Schedule 1 of Regulation 517/97 set out the method for the measurement of travel of a push rod and permitted travel distance. There is a critical defect if more than 50% of the wheel brakes of a vehicle exceed 1/4 inch travel beyond that permitted under Schedule 1.

APPLICATION OF LAW FACTS:

The Ministry of Transportation measurements found the Applicant's trailer to have a critical defect. The Applicant's measurements found the trailer to be in an Out of Service position.

Officer Trembley initially measured by the mark and measure method and then had Officer Jean assist and verify the results of a second measuring using the Fixed Point measuring method. Both inspections were done with a full brake application using the truck's air brake system. Section 7(1) of Regulation 512/97 of the *Highway Traffic Act* states:

7(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 69 Kpa), the park brakes released and the service brake occlusion fully applied.
(emphasis added)

Applicant presented its evidence in a clear and credible manner and demonstrated that it is concerned for safety and is diligent in its maintenance. The Applicant disagreed with the method used to measure travel of a push rod out of a service brake chamber.

The evidence of the Applicant's mechanic is based on using a pinch bar to simulate a full brake application to provide the measurement of travel of a push rod out of the service brake chamber. Although using a pinch bar may give an indication of travel, the Tribunal finds that the use of the truck's air brake system is the methodology required by section 7(1) of Regulation 512/97. Accordingly, the Tribunal accepts the evidence of Officer's Trembley and Jean over that of the Applicant with respect to the travel of the push rods. The majority of the travel of push rods exceeding the limits prescribed in Schedule 1 of Regulation 512/97 the Ministry of Transportation has established that the Applicant's trailer had the critical defect, which is the basis for the impoundment under the *Highway Traffic Act*.

DECISION:

Upon the application by Bakke's Trucking Ltd. (the "Applicant") to appeal the order to impound and suspend dated April 27, 2001 of the Registrar of Motor Vehicles ("Registrar") to impound and suspend a commercial motor vehicle or trailer pursuant to Section 50.3 of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Registrar to impound and suspend the commercial motor vehicle or trailer of the Applicant be confirmed.

LICENCE APPEAL TRIBUNAL

Alan Holbrook,
Presiding Member

Elmer Merkley,
Member

WHITE-DISS

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

SHELLEY WHITE

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor
Vehicles made pursuant to section 55.1 of the *Highway Traffic Act*
of an Order to Impound a motor vehicle for a period of 45 days
dated March 15, 2001

AND IN THE MATTER of a requirement for a hearing respecting
the said ORDER

SHELLEY WHITE

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Shelley White (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of that Act, dated March 15, 2001 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated March 15, 2001, to impound Shelley White's motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: June 15, 2001

MED - 0575

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JOHN CARMICHAEL, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: June 1, 2001

Ottawa

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit 1 – Notice of Appeal, May 2, 2001.
- Exhibit 2 – MTO documents, Tabs 1-12.
- Exhibit 3 – Applicant's documents, Tabs 1-5, Received May 30, 2001.
- Exhibit 4 – Case Study, Medical Advisory Committee, MTO May 30, 2001.
- Exhibit 5 – Letter Physician # 1 May 22, 2001.
- Exhibit 6 – Law Society of Upper Canada Report, October 6, 1999.

FACTS:

On October 27, 1997 the Applicant was notified by the Ministry of Transportation that her Driver's licence was to be suspended and that official notice of suspension was to follow. (Exhibit 2, Tab 2). This suspension was the result of a letter written by Physician

2, Acting Head, Acute Care, Inpatient Psychiatric Service, Ottawa Civic Hospital (Exhibit 2, Tab 1). Physician # 2 stated that she had recently treated the Applicant and based on her observations and medical opinion diagnosed the Applicant as suffering from a "Bipolar Affective Disorder". It was her further opinion that the Applicant should not operate a vehicle at this time.

On July 9, 1999 the Applicant submitted a Ministry of Transportation Medical Report completed by Physician # 3, family physician. Both the history and physical examinations were reported negative (Exhibit 2, Tab 3).

In January 1999, the Applicant underwent a psychological assessment "The Minnesota Report", interpreted by James N. Butcher PhD. (Exhibit 2, Tab 5). The report states the Client's clinical profile "is within normal limits". The observer qualifies the accuracy of the clinical profile, stating that "the client attempted to put herself in an overly positive light by minimising faults and denying psychological problems" and is "unlikely to seek psychological treatment or to cooperate fully with treatment if it is implemented"

On February 13, 2001 the Ministry of Transportation received a letter from Physician # 4 psychiatrist (Exhibit 2, Tab 9, Tab11). Physician # 4 reported that he had seen the Applicant on two recent occasions. He found "no psychiatric evidence of impairment of her ability to drive" and expressed his willingness to discuss his findings with the Ministry.

On April 11, 2001 the Applicant was again examined by Physician # 3. Family physician (Exhibit 2, Tab11b, Tab11e). The completed Ministry of Transportation Medical Report again states the history and physical examination to be normal.

At the Hearing, the Applicant submitted a letter from Physician # 1, family practitioner dated May 22, 2001 (Exhibit 5). Physician # 1 states that he saw the applicant on 5 occasions between July, 1997 and January, 1998. Physician # 1's letter states that there is no documentation in her office medical file pertaining to the Applicant's ability to drive.

The Tribunal has no evidence of any other medical, particularly psychiatric assessment since the Applicant's licence suspension, October 1997.

The Ministry in its submission calls attention to 2 Administrative Review – Medical Suspension reports (Exhibit 2, Tabs 6 & 11) in which the Applicant's answers contain an element of denial and are occasionally contrary to the known facts. In its final summation, the Ministry provided a Law Society report dated October 6, 1999 (Exhibit 6) contradicting the Applicants claim of good standing in that society (Exhibit 5, Tab 3).

The Applicant denied receiving official notice of her licence suspension. She also denied awareness of Physician # 2's letter despite Physician # 2 stating that the Applicant had been informed and despite the Applicant's later attempt to contact Physician # 2 to obtain a copy of the letter. The Applicant has been apprehended twice for driving with her licence suspended. She states that she was not aware of the suspension and is appealing these convictions. The Applicant stated that she had a Quebec driver's licence during this time.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant submitted that section 47(1) of the *Highway Traffic Act* is not applicable in this instance, that the information received in Dr. Cole's letter did not comply with

section 15(1) of Regulation 574 under the *Highway Traffic Act*, and that *Acker v. N.B. (Registrar of Motor Vehicles)* (1991), 34 M.V.R. (2d) 101, 11 N.B.R. (2d) 77, 300 A.P.R. 77, 84 D.L.R. (4th) 555 (C.A.) should be followed by the Tribunal in this case.

Under section 47 of the Act, the Registrar may suspend a driver's licence for sufficient reason. As set out below, the Tribunal finds sufficient reason for the Registrar's decision in the case.

As to Section 15(1) of Regulation 574 under the Act, that is a requirement relating to a medical report applicable to an appeal under section 50.1 of the Act and not applicable to an appeal as this case is, under section 50 following a decision by the Registrar under section 47.

The Tribunal also notes that *Acker v. N.B. (Registrar of Motor Vehicles)* is a decision based on the particular facts and law in that case and, accordingly, is not binding on this Tribunal.

Bipolar Affective Disorder is a well-defined psychiatric diagnosis. The condition is characterised by intermittent episodes of depression and mania. The frequency of the attacks varies from patient to patient and are unpredictable. During the interval between attacks, the patient is usually perfectly normal and emotionally stable. Many such patients play prominent and responsible roles in society. Bipolar Affective Disorder can be effectively controlled in most instances with appropriate medication. The concern here is that a patient while driving during a period of depression or more particularly acute mania may behave in such a manner as to endanger him/her self or others. The Tribunal in this case must decide if the conclusion of Physician # 2 that the Applicant not operate a motor vehicle has been displaced by the evidence brought forward by the Applicant.

The Tribunal found the details of the Applicant's argument confusing and frequently contradictory. The Applicant's principal argument to have her licence restated is based on her membership in two law societies, her responsible and intellectually demanding role in society and her long accident free driving record. The Tribunal has considered these points but they are not determinative of the issue at hand, but the medical evidence is of significant importance. Physician #2's opinion is clearly that the Applicant should not operate a motor vehicle.

The medical reports by the family Physician # 3 both report a negative history, (including psychiatric disorders) and physical examination. However, the physical exam should be expected to be negative, and the medical history is incorrect. Physician # 1's letter of May 22, 2001 does not provide any information concerning the Applicant's psychiatric status.

The profile validity comments made by James N. Blutcher, PhD accompanying the Minnesota Report suggest continuing psychological or psychiatric problems and does not draw a conclusion respecting the specific issue of the Applicant's ability to operate a motor vehicle.

Physician # 4's letter of February 13, 2001 states that he finds no psychiatric evidence of her inability to drive. While this may be correct on any given day between episodes, he makes no reference to the applicant's past psychiatric history, specifically the current status of her Bipolar Affective Disorder and its treatment, if any. The Tribunal did not

have the opportunity to hear direct evidence from Physician # 4 to clarify whether his findings have general application.

It is the opinion of the Tribunal that the opinion of Physician # 2 that the Applicant not operate a motor vehicle has not been displaced by the evidence brought forward by the Applicant.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 23, 1997 of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

John Carmichael, M.D., Presiding Member

RELEASED: June 8, 2001

ADLS - 0587

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: June 8, 2001 Toronto

DECISION

A hearing was held on June 8, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: June 11, 2001

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: June 8, 2001

DECISION
RELEASED: June 11, 2001 Toronto

REASONS FOR DECISION

A hearing was held on June 8, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 11, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic*

Act was dated April 26, 2001, and was received by the Tribunal on May 9, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant, attempted to enter into evidence, a pair of shoes he claims he was wearing on the evening that he was allegedly assaulted. It was pointed out to the Applicant that his appeal was based on presentation of evidence to show that he had a medical condition that precluded him from providing the requested sample of his breath. As no relevance was shown, the shoes were not entered into evidence. There were no other preliminary matters and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder.
- b) Exhibit # 2 Notice of Appeal Received May 9, 2001.

By the Respondent:

- a) Exhibit # 3 MTO Submissions.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant was charged with failing to provide a breath sample and subsequently was given a 90-day administrative licence suspension on March 31, 2001.

According to the Applicant, he had been attacked earlier in the evening and was beaten with aluminium baseball bats about the head, arms, legs and feet. He was initially interviewed by the police and sent home by cab. The reason for the cab, was that the police believed that the Applicant was intoxicated and was not able to operate his motor vehicle. However, the Applicant testified that he left the scene by cab, went to his friends house about a twenty minute drive and then returned to "help the police to catch the criminals". The Applicant was seen driving his vehicle westbound on Lakeshore Blvd by police and was pulled over. The Applicant stated to police, " I know I should not have been driving, did you arrest those guys?, you did not catch those guys, I am the criminal".

The Applicant was advised of his right to counsel as well he was read the breath demand. The Applicant was transported to 22 Division where he was seen by the Sergeant. The Applicant after initially refusing medical treatment, stated that he wanted to go to hospital. The Applicant was transported to St. Joseph's' where he was placed in a treatment room. The Breathalyser technician, Police Officer # 1 was dispatched to the hospital to obtain an a sample of the Applicants' breath for analysis. According to the sworn Affidavit of Police Officer # 1, he arrived at St. Joseph's' Hospital at 04:10hrs. Police Officer # 1 stated the while he was attempting to set up the equipment, the Applicant would not sit down and was disturbing the set up. As a result , the Applicant was cuffed to the chair.

According to the observations of Police Officer # 1, the Applicant was impaired and presented with the odour of an alcoholic beverage on his breath, has bloodshot and glassy eyes and dilated pupils. When asked by Police Officer # 1 if the Applicant suffered from any medical conditions, the Applicant responded "None of your business". According to the testimony, the Applicant was belligerent and uncooperative. The Applicant was made aware of the consequences of not providing a breath sample . The Applicant responded with "I don't care what you demand, I ain't blowing nothing."

The Applicant was so charged and released on a promise to appear. He was also given the 90 day Administrative Drivers Licence Suspension Appeal notice. The Applicant was released from St. Joseph's' Hospital and was taken by police to the Islington/Bloor subway station.

Both officers, Police Officer # 2 and Police Officer # 3 took the stand, were sworn and gave testimony. There testimony confirmed the above sequence of events.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The evidence submitted by the Applicant does not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The physicians report submitted with the appeal (Exhibit # 2) was left blank. When questioned by the Tribunal, the Applicant stated he did not know that he had to fill the form out. What was submitted was an emergency room sheet, triage & ambulatory care flow sheet and X-ray report.

The information contained in these reports did not substantiate the Applicants' claim that that he had a medical condition that precluded him from providing a breath sample. The report(s) fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act* in the following respects: There is no indication that the Physician, Physician # 1 was aware that the information may be used in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act. There are no details with respect to physical examination findings, no treatment prescribed and the patient was released.

The Tribunal after very careful review of the medical information, the Tribunal attaches very little weight to these reports.

Reviewing the foregoing facts, the Tribunal finds that the Applicant did not relate a medical condition to Regulation 574 and Section 59(1)(2)(b).

The evidence does not support the Applicant's position that he refused to provide an adequate sample of breath for a medical reason. The evidence submitted suggests to the Tribunal that the actions of the Applicant were more indicative of the applicant having no intention of providing a proper breath sample. The evidence presented clearly shows that the Applicant flatly refused to provide a sample when requested. The Applicant would not converse with the police about his conditions and would only respond with "I ain't blowin anything."

DECISION:

The Applicant has not discharged the onus of establishing a valid medical reason for his failure to provide a breath sample when demanded under Section 254 of the Criminal code (Canada).

Upon the application by the Applicant to appeal the suspension order dated March 31, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: June 14, 2001

LATIMER-TIME

MARGARET JEAN LATIMER

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by
Margaret Jean Latimer seeking an extension of
the time for this Applicant to commence this
appeal from an impoundment order of the
Registrar under Section 55.1 of the Highway
Traffic Act;

AND IN THE MATTER of

MARGARET JEAN LATIMER

APPLICANT

-and-

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Nives Montano, Presiding Member

APPEARANCES: Kim Grosskurth,
Representative for the Registrar of Motor Vehicles

Margaret Jean Latimer, Applicant

DATE OF
MOTION: June 15, 2001

By teleconference

ORDER

A motion was heard by teleconference on June 15, 2001, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

- a) Photocopy of Notice of Appeal dated May 18, 2001 and signed by the Applicant, accompanied by Owner's Position, stamped "received May 18, 2001 Licence Appeal Tribunal";
- b) Photocopy of a letter dated June 9, 1999 from D.V.Krishnaprasad, F.R.C.P.C. (Psychiatrist) outlining the Applicant's diagnosis;
- c) Photocopy of description of "Manic Depressive Illness";
- d) Photocopy of The Arthritis Association webpage describing "Fibromyalgia"; and
- e) Photocopy of description on "Flashbacks"; and
- f) Photocopy of letter from Ministry of Transportation signed by Kim Grosskurth, Team Leader, dated May 23, 2001, stamped "received May 24, 2001" at Licence Appeal Tribunal not consenting to the extension.

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to an order of the Registrar issued under section 55.1 of the Highway Traffic Act R.S.O. 1990, c. H.8 as amended (the "Act").

The motor vehicle was order impounded on April 11, 2001 while being driven by Tyler Edson, whose driver's licence was under suspension at the time of the impoundment. Mr. Edson took the vehicle without the knowledge or consent of the Applicant.

The Applicant's Notice of Appeal to the impoundment was dated May 18, 2001 and was received by the Tribunal by facsimile on May 18, 2001, 37 days after the vehicle was impounded. The motion presently before the Tribunal is for an order requesting an extension of the time for the filing of the Notice of Appeal.

The following is the Applicant's testimony and explanation for not filing an appeal of the impoundment of its vehicle within the required 15 days.

The Applicant is a 32 year-old mother of 4 children who is currently separated from her second husband. The Applicant is unemployed and is currently receiving social assistance. Her husband is employed as a truck driver who was "never home". The current financial arrangement is that he pays the mortgage on the home she is living in, in lieu of support. He is the biological father of the youngest child. The Applicant's first husband is an alcoholic, the father of her first 3 children, and she does not hear from him for long periods of time.

Four years ago, the Applicant was diagnosed with Fibromyalgia as well as chronic fatigue disorder. She was also diagnosed with Chronic Post Traumatic Stress Disorder as well as Recurrent flashbacks. Approximately 3 days out of 7 she is bedridden due to the soreness in her body and chronic fatigue. She is currently under the care of an

occupational therapist, 2 personal support workers, a psychiatrist, her family doctor and a neurosurgeon.

On the day the vehicle was impounded, Mr. Edson was babysitting the Applicant's 2-year-old child while the Applicant was bedridden. She was fully aware that he was a suspended driver and did not permit him or give her consent to have care and control of her vehicle. She received a call from Mr. Edson who "called from the Esso station after he was caught" and advised her that her van was being impounded.

The Applicant testified that she did not recall receiving the Order to Impound by mail, but found the "yellow copy" left by Mr. Edson in her home some time later. She was unsure whom to call or how to fill out a Notice of Appeal, and notwithstanding her current physical ailments, time lapsed and the Appeal was filed in May with the assistance of her occupational therapist and personal support worker who lent her the money for the filing fee.

The Applicant testified that she has made numerous attempts in laying charges against Mr. Edson for taking her vehicle, but Officer Sinclair, the impounding officer, has not returned her phone calls.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that she, acting in good faith, was unable through accident, illness or other cause beyond her control to bring the appeal within the prescribed 15 days in circumstances where the

Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time.

The criteria listed in Section 20(7), which the Tribunal should consider in granting an extension, are matters outside the Applicant's control.

The Applicant's Notice of Appeal to the impoundment was dated May 18, 2001. The Tribunal received it on May 18, 2001, 37 days into the impoundment period, and 22 days past the appeal deadline date prescribed by Section 20(1) of Regulation 632/98 made under the Highway Traffic Act. The motion presently before the Tribunal is for an order, in terms of section 20(7) of the above regulation, for an extension of the time for the filing of the Notice of Appeal.

The owner of a vehicle needed to expeditiously inquire and/or file the necessary paperwork for an appeal process as stipulated on the reverse of the Notice to Registrar within a fifteen day time period. But as stated in her testimony, a number of reasons were given to preclude a timely filing including finding the "yellow copy" of the Notice to Registrar in her home some time after the impoundment. Due to her medical condition, her personal care worker and occupational therapist assisted the Applicant in preparing the necessary forms to file this appeal. Although the Applicant is on social assistance and is suffering financially, her personal care worker lent her the money to proceed with this appeal. The Tribunal is of the view that the Applicant provided a satisfactory reason as to why there was a delay in completing and delivering the appeal.

Due to the uniqueness of this particular case, the Tribunal is satisfied that the evidence before it is sufficient to show that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days.

The evidence presented does establish that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of accident, illness or other cause beyond the Applicant's control. As well, under section 7 of the *Licence Appeal Tribunal Act*, 1999, "... if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may, extend the time for giving the notice either before or after the expiration of the limitation of time so limit".

ORDER:

Accordingly, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is granted.

LICENCE APPEAL TRIBUNAL

Nives Montano,
Presiding Member

RELEASED: June 19, 2001

RUTH ANNE RILEY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

RUTH ANNE RILEY, Applicant

MARK PETERS, Solicitor for the Applicant

DATE OF HEARING: June 13, 2001

DECISION RELEASED: June 19, 2001

London

REASONS FOR DECISION

A hearing was held on June 13, 2001, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Ruth Anne Riley (the "Applicant")
Motor Vehicle: 1994 Pontiac Grand Prix, plate no. AHVW 491 (the "vehicle")
Date of Appeal: May 23, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on June 13, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Notice of Appeal - Ruth Riley - OWNER'S POSITION

- 1) I am Appealing the Impoundment of the vehicle I own on the Grounds that it is causing and will continue to cause exceptional hardship (I have never had a vehicle owned by me impounded before)
- 2) The exceptional hardship relates mainly to the services I provide to my client through my position as a Homemaker
- 3) My Client relies on me to provide homemaking services on a daily basis and since my car was impounded I have missed 5 working days so far out of 10 working days since it was impounded

- 4) My Client is an elderly woman who suffers from Diabetes and other illnesses and is an amputee
- 5) She has been designated a Homemaker because of her needs and it is hard for her to find someone to replace me especially given our close relationship
- 6) I live mostly during the week in London with my common-law husband
- 7) Although not a responsibility of my job, I take my client grocery shopping at least once or twice a week as well as make short runs for her for items she runs out of frequently
- 8) When she can not find a medical driver I take her to her doctors and other medical appointments
- 9) I also frequently pick up her Insulin and other prescriptions as well as other medical supplies for her
- 10) My Client has no one else to rely on for her in home and almost all of her out of home needs
- 11) I would also like to explain the circumstances by which my car was impounded
- 12) I know my common law husband is under suspension from driving and we have an understanding that he is not allowed to drive my car
- 13) Mr. Bear often stays at a trailer next to where I provide Homemaking services and also visits at times with myself and my client
- 14) On the day my car was impounded I went with my client and her medical driver to a doctor's appointment
- 15) I had not thought that I had left my car keys hanging up in my Client's home
- 16) While we were gone Mr. Bear came to the house and took my keys and my car and was soon after that pulled over by the O.P.P.
- 17) I am very upset over this but am aware that Mr. Bear has been charged once again for driving while prohibited and he will have to deal with that under the law

The Applicant, Ruth Anne Riley was affirmed and gave testimony. The testimony provided corroborated her written submissions provided by her solicitor, Mr. Mark Peters.

During the Applicant's testimony it came to light that the client referred to in the submissions, is also the Applicants' mother and had been providing homemaker duties for the past eleven years to her. When asked by the Respondent if this was allowed by the Chippawa Thames Band, the Applicant indicated that it was, even though the representative for the Respondent, Ms. Hammond, provided a statement which had been provided to the Ministry from the Chippawa Thames Band indicating that it is in direct opposition to the written guidelines to provide services for family members. Ms. Riley did not provide this Tribunal with any corroborating statements from the Council with regard to this situation.

Ms. Riley also indicated that "my client has no one else to rely on for her in home and almost all of her out of home needs." During testimony, Ms. Riley acknowledged that Ms. Riley's sister Judy has provided transportation for both herself and her mother. As well, Ms. Riley has a brother, who also resides in the mother's home. There is also a

friend who has provided transportation for Ms. Riley. When questioned by the Respondent with respect to an alternative vehicle, Ms. Riley stated flat out that it was too expensive to take a taxi, costing \$50.00 dollars or more. When asked how she knew this, the Applicant said "someone told me, I did not check this out but it may be hearsay". When asked about renting a vehicle, again the Applicant said it would be too costly, even though she did not investigate the possibility.

Mr. Peters referred to missed work (Exhibit # 2), "My client relies on me to providing homemaking services on a daily basis and since by car was impounded I have missed 5 working days so far out of 10 working days since it was impounded." Ms. Riley during testimony stated that she sometimes stays in a trailer located next to her mother/clients' home. The available of living quarters' in such close proximity to her employment would certainly have mitigated her losses with respect to attending at her work place. When questioned if the use of her vehicle was a requirement of her job, the Applicant indicated that it was not.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Dwight Bear;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 12, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that

was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

There is only one issue to be considered in this appeal and is dealt with hereunder.

a) Exceptional Hardship:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship as per Section 55.2(3)(d)?

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

The Applicants' solicitor has argued that the impoundment will result in hardships as described in Section 22(2). In order for her claim to be considered under Section 22(2), she must have demonstrated that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle.

The Applicant testified she initially lost time from work because of the loss of her vehicle but has managed to find alternative transportation to and from London to her work. She has also stated that she has available living accommodations next to her work. She has not considered either taxi or vehicle rentals believing that they are too costly. However she has not actively inquired into either their availability or cost.

The Tribunal was asked to consider Section 22(2)(a), (b), (c) and (d). However this section is only to be considered if it were shown that no alternative to the impounded vehicle was available.

The Applicant has managed to find rides back and forth to her work, through relatives and friends. Albeit a great inconvenience and imposition upon herself, friends and relatives, the Applicant has managed to continue work. Exceptional hardship has not been demonstrated.

In consideration of all of the evidence presented, the Tribunal finds that the Applicant, Ruth Anne Riley, has not demonstrated exceptional hardship as circumscribed by Section 22 of Ontario Regulation 632/98 amending Ontario Regulation 574 under the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: June 19, 2001

MARTENS-STLN

MARK MARTENS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH KOPROWSKI,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

MARK MARTENS, Applicant
by Written submission only

DATE OF HEARING: June 15, 2001

DECISION RELEASED: June 20, 2001 Written

REASONS FOR DECISION

A written hearing was held on June 15, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Mark Martens (the "Applicant")
Motor Vehicle: 1988 Dodge Minicargo Van, plate no. 2X6 877 (the "vehicle")
Date of Appeal: May 24, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on June 15, 2001 and proceeded as a written hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

On or about may 11 I reported to the city police of Sarnia my minivan stolen officer Stewart Bremner #94 investigating occurrence # 2728637. On that date several other vehicles were either broken into and items stolen in my yard at home. The vehicle (plate # ZX6877) was driven by Randy Osborne who took it unlawfully from my yard. He has been charged by Const: Chrystal Jones Point Edward O.P.P. 519-336-8691. Please enquire with them as to the charges (I cannot get those) I respectfully request the return of my vehicle as I have nothing to do with this person at all.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Randy Osborn;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 27, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The burden of proof is on the Applicant to establish whether the impounded vehicle had, in fact, been stolen.

This Tribunal finds, on the evidence of the Applicant, that the driver of the Applicant's vehicle took the vehicle. The Applicant states, in his evidence, that the vehicle had been taken unlawfully, but he does not explain why he felt that this was the case. There is absolutely nothing in the Applicant's material that explains the circumstances under which the vehicle had been taken.

Had the driver ever used the vehicle before? Where was the Applicant at the time the vehicle was driven by the driver? How secure had the Applicant made the vehicle? Where had the keys been left? What time of day was it when the vehicle had been taken? Had the Applicant known the driver before this incident took place? What was the driver's intent?

In short, without evidence to answer these, and similar questions, although the vehicle had been taken, the evidence of the Applicant falls far short of the evidence necessary to enable this Tribunal to conclude that the vehicle had been taken, as the definition, quoted above, from Black's Law Dictionary requires, **"with the intent to deprive the owner of the benefit of ownership (or possession) permanently."**(emphasis is added).

The Tribunal may sympathize with the Applicant, nevertheless, it must agree with the position of the Respondent, as put forward in its Submissions (Exhibit #3). The Respondent concludes, as does this Tribunal, that there is no evidence to prove that the Applicant's vehicle had been stolen at the time of the impoundment. The Applicant has not satisfied his burden of proof.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski, Presiding Member

RELEASED: June 20, 2001

ENTERPRISE RENT-A-CAR CANADA LIMITED

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding member
RICHARD C. DELANEY, Member

APPEARANCES: RICHARD G. HEPNER,
Counsel for Applicant, Enterprise Rent-A-Car Canada Limited

PATRICK MOORE,
Counsel for the Registrar of Motor Vehicles

DATE OF HEARING: June 20, 2001

DECISION RELEASED: June 25, 2001 Toronto

REASONS FOR DECISION

A hearing was held on June 20, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Enterprise Rent-A-Car Canada Limited (the "Applicant")
Motor Vehicle:	2000 Toyota Echo, plate no. AHZN 655 (the "vehicle")
Date of Appeal:	June 4, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance. Although the Applicant did not file its appeal within the time prescribed by section 20(1) of the Ontario Regulation 632/98 under the Act, the Registrar consented to the late filing.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on June 20, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit # 8) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Schedule "A"

Owner's Position on Appeal

This appeal is brought outside of the 15 day time frame mandated by the Act with respect to the timing of the application for appeal. The Appellant respectfully requests an extension to allow for the filing of the appeal for the following reasons:

The owner in this instance is a large corporate company known as Enterprise Rent-A-Car. The appellant upon being notified of its vehicle being impounded wished to consider its legal options and rights. Being a large corporate entity the decision to appeal was not made quickly as there was a cost benefit ratio that had to be considered by various levels of bureaucracy within the company. This was particularly so as Enterprise in the past had appealed two previous orders impounding their vehicles and had lost.

In light of this fact, and the fact that this was their third infraction (vehicle now to be seized for 180 days) they were facing serious economic costs due to the vehicle being impounded for that duration, it was decided to retain legal counsel and to seek an opinion as to whether or not there were grounds to appeal. The decision to appeal was only made on May 25, 2001 with counsel being retained to deal with the appeal on May 28, 2001.

After considering their legal options Enterprise submitted their \$100 filing fee and asked for an extension of time on May 30, 2001. Given the 180 day impound penalty faced by the company, and the fact that the extension request is of a relatively minor nature and there would likely exist no prejudice to the appeal tribunal that could not be compensated for by costs, the appellant submits that this would be an appropriate case for an extension of time to be granted, given the severe nature of the penalty that the appellant now faces. In addition the appellant submits that its appeal has merit and should be heard by the tribunal.

BACKGROUND FACTS

Enterprise Rent-A-Car Canada Limited, the owner of the 2000 Toyota Echo seized on May 11, 2001 disputes the seizing of its vehicle under the Impoundment Order for the following reasons:

1. The vehicle was subject to a rental agreement number D482389 entered into between Joyce Pittman and Enterprise Rent-A-Car Canada Limited. This contract provided that Ms. Pittman was the only authorized driver of this vehicle. When the vehicle was impounded it was alleged that it was being driven by Jeff Pittman who was not authorized to drive the car.
2. The rental agreement specifically states that the renter, Joyce Pittman, was the only authorized person allowed to drive the vehicle.
3. Ms. Pittman at all material times had a valid Ontario drivers license (bearing Ontario permit #P47224143495808)
4. Pursuant to the terms and conditions of the rental agreement, there were no other authorized drivers and that the renter, Ms. Pittman, was made aware that she was not to permit anyone else to drive the car.
5. Jeff Pittman is cited as the operator of the subject vehicle. He has reportedly been charged with driving with a suspended licence as well as other offenses.

OWNER'S POSITION AND LEGAL ARGUMENT

Due diligence appeal argument:

The legislation permits as one of the grounds of appeal, that *"the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's license was not suspended."*

Due diligence has been defined by the Ontario Court of Appeal to be the following:

*"[T]he defence of due diligence may take one of two forms: (1) holding a reasonable belief in a mistaken set of facts, and (2) taking all reasonable steps to avoid the offending event."*¹ (emphasis added)

In the context of regulatory offences the Court in *R. v. Bata Industries Ltd. (No. 2.)*(1992), 70 C.C.C.(3d)394(Ont.Prov.Div.) held that in order to establish the defence of "due diligence" in relation to a charge under an environmental protection statute [which the owner submits is analogous to the *Comprehensive Road Safety Act*] the accused must establish that he/she/it exercised all reasonable care by instituting a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of such a system.

By taking the steps outlined in the background facts, it is Enterprise's position that they in fact met the standard of due diligence for the following reasons:

- It entered into an agreement with a person who had a valid Ontario driver's license. Pursuant to the contract that was in place, no other drivers were permitted. This specific box was signed by Ms. Pittman indicating that this clause had been explained to her and that she understood that there was no other permitted drivers. At this point, Enterprise allowed its vehicle to be rented on the basis of the above conditions.
- When the vehicle was impounded, it was impounded because it was alleged to have been driven by Jeff Pittman. Jeff Pittman was not an authorized driver under the rental contract. At no time did Enterprise allow Jeff Pittman to gain access to the keys, nor at any time was Jeff Pittman an authorized driver.

Thus the owner submits that prior to the vehicle leaving its lot, it had ensured that the only person allowed to drive the vehicle had a valid driver's license. The contract specifically prohibited other drivers. By checking the licence in the manner in which they did and ensuring the rental agreement was understood, the owner submits that within the meaning of the legislation "it took all reasonable steps to avoid the happening of the event."

The Appellant has appealed two previous Orders of the Registrar impounding two Enterprise vehicles. This appeal has been to the Licence Suspension Appeal Board, and the Appellant has raised in each appeal the due diligence argument as discussed above.

This tribunal in the decisions of *Enterprise Rent A Car Limited v. Registrar of Motor Vehicles* dated March 14, 2000 and *Enterprise Rent A Car v. Registrar of Motor Vehicles* dated November 9, 2000 considered the due diligence argument and rejected it. The tribunal barely considered the argument and in dismissing the Appellant's argument stated (in *Enterprise Rent A Car Limited v. Registrar of Motor Vehicles* dated March 14, 2000) the following:

¹ See *R. v. London Excavators & Trucking Limited* (1998), 125 C.C.C.(3d) 83 (Ont. C.A.)

Did the owner exercise due diligence, respecting the driver's licence of the driver of the vehicle?

The Appellant's representative conceded that Mr. Gagnon's driver's licence was not inspected at the time of rental agreement being entered into. Indeed, there would have been no reason to have done so for it did not or could not have known that Mr. Gagnon would drive their vehicle. However, the legislation is clear and unambiguous. It is the driver's licence of the driver of the vehicle that must be looked into to attempt to determine that it was not under suspension. This Appellant failed to do so. The issue is not whether Appellant has shown due diligence in so far as Ms. Lucifera is concerned but whether due diligence was shown regarding Mr. Gagnon." (At p. 13 of the decision)

The Appellant submits that the above passage indicates that the board accepted the fact that Enterprise would have discharged its duty with respect to due diligence had the license of the renter been checked and found to be valid, but suspended between the time of renting and when the driver was stopped with a suspended license. The decision also seems to recognize that Enterprise Rent A Car could not have checked the licence of the suspended driver as they had no way of knowing he would drive the vehicle.

In effect the Appellant submits that the two decisions referred to above hold that the defence of due diligence is not available to Enterprise Rent A Car, or any other rental car company, if the vehicle is given by the renter to some other party who has a suspended licence. With all deference to the tribunal, this result could not have been the intention of the legislation amending the Highway Traffic Act which created the impoundment process for the following reasons discussed below.

Board has Discretion to Release Vehicle Given Consideration to the Entire Scheme

It is the Appellant's respectful submission that this board has the discretion to order the release of the Enterprise vehicle, if it is satisfied that Enterprise Rent A Car did all it could do to ensure that the vehicle which it rented would not be driven by a suspended driver. Indeed, the two decisions considering the due diligence argument give no guidance to Enterprise as what they could do in the future to avoid their cars being impounded in similar circumstances.

The Appellant submits that the discretion to release the Appellant's vehicles exists within the amended legislation, and becomes apparent upon reading all of provisions of the statute and not just section 50.2(3) of the Highway Traffic Act. It is also important to consider the purpose of the legislation which defines what the provisions are intended to accomplish.

In 1997 the Ontario government passed a Bill amending the Highway Traffic Act known as the *Comprehensive Road Safety Act*. The preamble to Bill stated as follows:

An Act to promote road safety by increasing periods of suspension for Criminal Code convictions, impounding vehicles of suspended drivers, requiring treatment for impaired drivers, raising fines for driving while suspended, impounding critically defective commercial vehicles, creating an absolute liability offence for wheel separations, raising fines for passing school stopped school buses, streamlining accident reporting requirements and amending other road safety programs.

It is critical in this Appellant's submission to examine the intent of the amendments to the legislation, which on their face were designed to "promote road safety". In addition the impounding of vehicles of suspended driver's was clearly intended to punish repeat drunk driving offenders who either continue to drive their own cars, or use other people's vehicles. Lastly, the legislature saw fit to specifically state that, with respect to wheel separations only, they would create "an absolute liability offence."

By inference the other offences and punishments created by the legislation, including impounding of vehicles, were not to be considered absolute liability offences, and were to be considered "strict liability offences" where the accused/Enterprise is afforded the right of establishing the defence of due diligence.

In this appellants' submission the above distinction between absolute and strict liability is critical in examining the role and power of the tribunal to exercise its discretion in considering the ground of appeal set out in section 50.2(3) of the Act.

The tribunal in the two decisions where they considered the owner's appeal regarding their exercise of due diligence, dismissed the appeal by finding in effect, that the owner could never exercise due diligence if a vehicle was driven by someone other than the renter. In effect by rejecting this argument they removed the only defence available to Enterprise and thus created an "absolute liability offence" which clearly was not the Act's intention.

It must be remembered that if Enterprise released their vehicle to a renter who has a valid driver's license and exercises due diligence in that regard, the vehicle will never be impounded unless the renter's licence is suspended between the time the vehicle was released to the renter and the renter in turn was stopped by the police. This would be very few cases, if ever, given the short-term nature of car rental contracts.

Instead, every time an Enterprise Rent A Car vehicle is impounded it is because either the vehicle was stolen, in which case their vehicle has been released, or the renter gave the vehicle to a suspended driver. Enterprise Rent A Car can never prevent the renter from physically giving control of the vehicle to another person once the vehicle leaves their lot. As such, all they can do is to establish that they checked the license of the renter, made the renter sign a contract that they were to give the vehicle to no one else and had the renter agree to the fact that they would never give the vehicle to anyone else to drive.

The Appellant submits that in the context of the provisions of the Act, Enterprise by doing these things has satisfied s. 50.2(1) of the Act. The Tribunal, contrary to its earlier decisions does in fact have discretion, which is conferred on it by the Act to release the vehicle in these circumstance where Enterprise has established that the renter had a valid licence.

Evidence of Boards Discretion

The Act in numerous points clearly establishes that the Registrar has wide discretion in the impounding and releasing of vehicles. The Act mandates when a vehicle could be impounded at s. 55.1(2) where it states as follows:

(2) Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving the motor vehicle on a highway while his or her driver's licence is under suspension under section 41, 42, or 43 even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues and order under subsection (3).

(3) Upon notification under subsection (2), the Registrar may (emphasis mine), without a hearing, issue an order to release the motor vehicle or (emphasis mine) issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

(1) For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded...

(4) **The order to impound issued under this section is intended to promote compliance with this Act and to thereby safeguard the public and does not constitute an alternative to any proceeding or penalty arising from the same circumstances or around the same time.** (emphasis mine).

(5) The registrar shall notify a police officer or officer appointed for carrying out the provisions of this Act of an order made under subsection (3) and shall send notice of the order to the owner of the motor vehicle at the most recent address for the owner appearing in the records of the Ministry.

(6) **Upon notification of the Registrar's order to release the motor vehicle**, a police officer or officer appointed for carrying out provisions of this Act shall forthwith release the motor vehicle....

The Appellant submits that it is clear from reading sections 55.1(2), 55.1(3), 55.1(4) and 55.1(6) that the Registrar upon being notified of the vehicle being impounded has discretion, without a hearing, to release the vehicle to the owner. There is no language in the Act that mandates that the Registrar must in all cases impound the vehicle, nor in a case where the vehicle has been detained by the police will an order impounding the vehicle always be made. The ability to release the vehicle without a hearing clearly indicates that the Act confers wide discretion on the Registrar and the Tribunal.

Further, a recent amendment to s. 55.1(14.1) provides that the Registrar:
"despite any order to impound issued under this section, the Registrar may, on application by a person belonging to a class of persons prescribed by regulation, release an impounded motor vehicle...prior to the end of impound period specified in the order on such conditions as he or she considers just."

This section clearly contemplates the exercise of discretion on the part of the Registrar to release the vehicle on "such conditions he or she considers just." Thus, the Act read as a whole clearly contemplates that the board should exercise wide discretion, and indeed as evidenced by this further amended section, they can release a vehicle on conditions that they consider just, which words clearly contemplate the exercise of discretion.

Finally, yet an additional example of discretion conferred onto the Tribunal is the "exceptional hardship" provision (at s. 50.2(3)(d)) and the fact that the board clearly has discretion in deciding what constitutes "exceptional hardship" and whether or not he appellant meets those guidelines. However, for reasons which will be discussed below, the Appellant cannot rely on this section either.

Impounding of Enterprise Rent A Car vehicle in No way Promotes the Act:

The appellant submits that the amendment to the Act clearly intended to promote "road safety" by punishing those persons who allow suspended drivers to drive their vehicles, thus stopping convicted drivers with suspended licences from continuing to drive. The appellant submits that having regard to the intent of the amendment, the seizing of an Enterprise Rent A Car vehicle for 180 days in no way promotes the goal of the Act.

The person to whom Enterprise Rent A Car rented the vehicle could the very same day that the vehicle is impounded, turn around and rent another vehicle from another car rental agency. That vehicle in turn could be given to the person whose licence was under suspension with no deprivation or cost to the suspended driver or renter. Enterprise and any other car rental agency, in order to recover their substantial costs (in this case well in excess of \$10,000) must then incur further legal expense and sue the renter who likely cannot re-imburse Enterprise for their money lost.

This draconian impact not only on Enterprise but on the car industry as whole, could not have been the intent of the legislature as the seizing of these vehicle in no way promotes public safety.

The whole purpose in taking away the "owner's vehicle" was to punish those people who allow, or don't care enough, to check the licences of persons to whom they gave their vehicle. In these circumstances a friend of the suspended driver facing the loss of their vehicle ranging from 45 days (on the first offence) to 180 days would likely not allow access to that vehicle by the suspended driver following the vehicle's release. Clearly, the punishment aspect of the legislation would work in that example. However, Enterprise and car rental companies as whole provide a necessary public service and

must continue to rent vehicles as part of their business. The only way that they could protect themselves from any monetary loss would be to demand a deposit of \$9000.00 per vehicle prior to it being rented. This of course is ludicrous as no car rental agency would survive demanding this level of deposit. As such, the car rental industry must continue to bear these horrendous costs until this Tribunal considers the circumstances that Enterprise faces in regards to this legislation, which the Appellant respectfully submits this board did not do in its previous interpretation of the appeal provisions.

Tribunal's Exercise of Discretion:

Noted authors' in the field of administrative law, Brown and Evans in their loose leaf text "*Administrative Law*" text have stated that boards and decision-makers in general when exercising their discretion:

"Must be prepared to entertain and consider representations that are designed to show not only that, properly interpreted, a rule or policy does not cover the facts of a particular matter, but also even if it does, an exception should be made in light of the facts of a particular case." At p. 12-36

If boards or Tribunals fail to do this, then their decision may be reviewed by a Court for failure to properly exercise their inherent jurisdiction. Brown and Evans in their text further point out instances where "decisions were set aside because the agency failed to make an independent judgment and instead merely applied a policy or guideline without considering the specific circumstances of the particular case." (At p 12-39)

Indeed, the Brown and Evans text, cites cases where evidence of failing to exercise proper discretion can be proven if an agency in its decision making process makes reference to it being bound by the policy, and that the guidelines it had to enforce were "definitive rather than tentative, and from the fact that non-compliance was treated by the agency and its staff as an occasion for the exercise of powers of enforcement." (At p.12-44)

The appellant respectfully submits that the tribunals two previous decisions with respect to the argument of due diligence, clearly establish that the Tribunal fettered its discretion. The tribunal did this, by not considering the legislation in conjunction with its purpose and the unique circumstances of, not just Enterprise but the car rental industry as a whole. The tribunal's reasons in rejecting Enterprise's argument regarding due diligence effectively created an absolute liability offence. This clearly the appellant submits was not the intent of the legislature.

The appellant further submits that by failing to take into account that Enterprise could never establish due diligence in the circumstances of these cases is clear evidence of the Tribunal's failure to exercise their discretion and interpret the provision fairly. It was and is open to Tribunal to decide that Enterprise as owner, met the test of due diligence if the renter had a valid licence and signed an agreement not allowing any other drivers. Failure to take into account this argument in the previous two hearings has deprived the Appellant of their right of establishing a defence of due diligence.

Further evidence that the legislation was not drafted to take into account the unique situation of rental car companies is s. 50.2(4) which states that the section dealing with exceptional hardship as a ground for releasing the vehicle can only be relied upon once, and that any subsequent order to impound cannot consider s. 50.2(3)(d) as a ground. The rationale for removing s. 50.2(3)(d) as a grounds for releasing the vehicle is obvious. Section 50.2(4) is intended to deal with a situation where someone on a prior occasion was able to get their vehicle released by relying on the provision of "exceptional hardship" to them by the impounding of their vehicle. If an owner's vehicle is stopped again, they are penalized more harshly on the second and subsequent offences as they should not have let a suspended driver operate their vehicle again.

As such on a second offence/impoundment regardless of whether or not "exceptional hardship" exists, the vehicle would remain impounded as a penalty to the owner. However, this provision clearly did not take into account rental vehicles and the fact that car rental companies own thousands of vehicles yet are treated as if they only own one vehicle. A grounds for appeal, quite separate and apart from the due diligence argument

Enterprise has made, would be the horrendous cost per vehicle it now faces. The costs associated for each impounded vehicle is in excess of \$10,000 because their vehicles will now be impounded for 180 days as they have had more than three vehicles impounded. This huge cost might in turn qualify them for the "exceptional hardship" provision. However, as they have had more than one vehicle impounded this argument is not open to them. The appellant submits that this fact is yet one more piece of objective evidence establishing that the legislation did not contemplate its effect on car rental agencies, and that the Tribunal should take into account the special circumstances involving rental vehicles.

Thus, the Appellant submits that the Tribunal in disposing of this appeal must consider the purpose of the Act and all its provisions. The Tribunal should further give effect to the intent of the Act by interpreting the provisions fairly keeping in mind the unique circumstances of the Appellant, while considering whether or not the Appellant has satisfied the Tribunal that they have "taken all reasonable steps to avoid the offending event" and thus have met the defence of due diligence.

Two persons gave evidence on behalf of the Applicant which evidence is summarized as follows:

Braden Edward McQueen testified that he is employed as Branch Manager at the Applicant's Orangeville location which position he has held since February 1, 2001. His duties are to attend to the branch's day-to-day operations.

He remembered that Joyce Pittman called at the Applicant's Orangeville branch on April 19, 2001 to rent a motor vehicle. He dealt with Ms. Pittman and prepared the rental agreement whereby the Applicant rented the vehicle to Ms. Pittman. He inspected her driver's licence and was satisfied as to its validity. In response to his question as to who would be the driver of the vehicle Ms. Pittman informed him she would be the sole driver. Ms. Pittman and he on behalf of the Applicant signed the rental agreement which stated that no other driver was permitted to drive the vehicle.

He had not previously had dealings with Ms. Pittman who came to the Applicant through her insurance company. The latter had arranged for a rental vehicle to be provided to her while her own vehicle was being repaired. The insurance company was responsible for and paid the rental charges for the vehicle.

The second witness for the Applicant was Craig Kazuo Hirota who has been employed by the Applicant as its Group Loss Manager since 1993. He testified that he was familiar with the vehicle impoundment provisions in the Act and knew it was of great importance to inspect the driver's licence of all motor vehicle renters prior to the vehicle being allowed off the Applicant's premises.

Mr. Hirota stated that during the vehicle's rental period it was impounded for a period of 180 days as this was the third time a rental vehicle of the Applicant had been impounded in terms of Section 50.2(3)(c) of the Act. He stated that the "down time" of one of the Applicant's motor vehicles - the period when that vehicle is not out on rental - is approximately \$30.00 per day and that translated to about \$5,400.00 over the 180 days during which the impoundment was in effect.

Additionally, there were impoundment storage charges and towing charges which would amount to about \$4,000.00. Further loss would be suffered due to deterioration of the impounded vehicle while in impoundment as its tires and battery would have to be replaced. In total, Mr. Hirota estimated that the impoundment of the vehicle would cost

the Applicant approximately \$10,800.00 apart from legal fees of between \$2,000.00 and \$5,000.00.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Jeffrey Pittman ;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 20, 2003.

No oral evidence was brought before the Tribunal by the Registrar.

FACTS FOUND PROVEN:

The Tribunal finds, on the evidence presented at this hearing, that the following facts to be found proven.

1. The Applicant is the owner of the vehicle.
2. Applicant rented the vehicle to Ms. Joyce Pittman and at the time of renting the vehicle to Ms. Joyce Pittman, the Applicant inspected her driver's licence.
3. Mr. Jeffrey Pittman was the driver of the vehicle at the time of its impoundment.
4. At the time of the vehicle's impoundment Mr. Jeffrey Pittman's driver's licence was under suspension due to his conviction under the Criminal Code of Canada of the offence of driving with more than 80 MGS Alcohol in his Blood.
5. The Applicant at no time attempted to determine that the driver's licence of Mr. Jeffrey Pittman at the time in respect of which the impoundment order was made was not then under suspension.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The onus of proof based on the balance of probabilities rests with the Applicant.

At the commencement of the hearing it was conceded by the Applicant's counsel that the driver of the impounded motor vehicle at the time of its impoundment was Jeffrey Pittman and that his licence was then under suspension and remains under suspension until April 20, 2003 due to his conviction under the Criminal Code of Canada of the offence of driving with more than 80 mgs alcohol in his blood. It was also conceded that the driver's licence of Jeffrey Pittman was at no time seen or inspected by the Applicant.

The only ground on which the Applicant has appealed is that ground set forth in section 50.2(3)(c) of the Act which states:

-
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
-

The above ground of appeal is the only ground on which the Tribunal in this matter may set aside the order to impound.

No evidence was placed before the Tribunal by the Applicant that it had attempted "to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension". (underlining is that of the Tribunal)

Section 50.2(3)(c) of the Act is clear and unambiguous. It is vehicle's owner's obligation (the Applicant) to attempt to determine that the driver's licence of the motor vehicle at the time in respect of which the order was made (Jeffrey Pittman) was not then under suspension. The Applicant did not attempt to determine the status of Jeffrey Pittman's driver's licence. Indeed, it could not have done so as he was unknown to the Applicant.

The Applicant's counsel in his submissions to the Tribunal advanced the argument that the Tribunal in its prior decision in the matter of *Enterprise Rent-A-Car Limited v. Registrar of Motor Vehicles* released by the Tribunal on March 14, 2000 had taken too narrow an interpretation of section 50.2(3)(c) because there is the possible interpretation that section 50.2(3)(c) applies where the owner has taken all steps to ensure that the vehicle does not end up in a suspended driver's hands. The Tribunal disagrees with this as a possible interpretation of section 50.2(3)(c). The provisions of the section are clear and unambiguous. The legislature clearly had in mind when drafting the section in question that it was the validity of the driver's licence of the driver of the vehicle at the time of the impoundment that was to be determined. There can be no other construction placed upon the words "the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension". Where there is no ambiguity in regard to a section of a statute, as is the case of section 50.2(3)(c), the rule is that the ordinary meaning is to be applied to the section. See: *Drieger On Construction of Statutes*.

Counsel for the Applicant also argued that the Tribunal may order the release of the vehicle from impoundment and that this discretion is conferred on the Tribunal by section 55.1(2) of the Act. The Tribunal does not agree with this submission for it is the Registrar only who has the discretion in terms of that section and not the Tribunal. The Tribunal's jurisdiction extends only to the hearing of an Applicant's appeal in terms of section 50.2(3) of the Act.

Applicant's counsel referred the Tribunal to section 55.1(14.1) of the Act which he contended gives the Registrar power in his discretion to release an impounded vehicle. The Tribunal notes that this section has not been proclaimed into law as yet and had it been proclaimed it only applies to a discretion in favour of the Registrar and not in favour of the Tribunal.

The Tribunal's jurisdiction in this matter is defined by section 50.2(5) of the Act which requires the Tribunal to confirm or set aside the Registrar's order to impound. In coming to a decision to either confirm or set aside the Registrar's order, the Tribunal is duty bound to follow section 50.2(3) of the Act which sets out that only the grounds specified in section 50.2(3) are those on which the Tribunal may set aside the order to impound. The Tribunal does not have the power to add to these grounds. The Tribunal, being a creature of statute, is restricted to the consideration of the four grounds of appeal as set forth in section 50.2(3)(a), (b), (c) and (d).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair
Presiding

Richard C. Delaney,
Member

RELEASED: June 25, 2001

GRAND PACIFIC TRANSPORT INC.

PREHEARING

GRAND PACIFIC TRANSPORT INC.

IN THE MATTER OF an application by Grand Pacific Transport Inc. dated May 15, 2001 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Deputy Registrar dated May 10, 2001;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator Registration CVOR # 124-455-422 issued to Grand Pacific Transport Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to Grand Pacific Transport Inc. issued on the 24th day of April 2001;

AND IN THE MATTER of the safety record of Grand Pacific Transport Inc.;

AND IN THE MATTER of unpaid fines;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
DALJIT S. KOONER, Agent for the Applicant

DATE OF

PRE-HEARING: June 19, 2001

By teleconference

ORDER

A Pre-hearing teleconference between the parties was held on June 19, 2001 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated June 8, 2001.

The Tribunal makes the following Orders respecting the hearing:

1. At this Pre-hearing Mr. Daljit Kooner informed the parties that he will be acting as Agent for Grand Pacific Transport Inc. at the hearing. He is the Manager of the company, and is the brother of the owner, Mr. Jagjit Kooner. Mr. Daljit Kooner undertook to confirm in writing by a letter from Jagjit Kooner to the Tribunal and Mr. Moore, authorizing him to act as the Agent on behalf of the Applicant at the hearing. Mr. Kooner will send this letter to the Tribunal and Mr. Moore, via a fax on or before June 20th, 2001.
2. The hearing date has been set for 9:30 a.m. on Wednesday, August 15, 2001, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

3. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before Tuesday, July 31, 2001.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

4. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Ms. Bunny McKenna. Ms. McKenna will evidence of all the Applicant's records and information, including the Applicant's CVOR, as well as a facility audit performed on the Applicant's premises in British Columbia.

The Applicant will present evidence and testimony from the owner of the Company, Mr. Jagjit Kooner, as well as the company manager Mr. Daljit Kooner. The Applicant will present evidence such as fuel sheets and driver records, to support their position that their actual proportion of mileage traveled in Ontario is 40% of the total mileage for the company, as opposed to the 23% claimed by the Respondent.

The Applicant could possibly call Mr. George Simpson, the company Safety Supervisor. Mr. Simpson will present evidence such as company safety courses, manuals and pre hiring tests for drivers, to show initiatives and improvement in driver safety at the company.

5. The time period that is expected to be covered by the evidence will be from 1999 to 2001, with some attention given to previous warnings that had occurred at earlier dates.
6. The Registrar has issued a 30 day Suspension and Seizure Order dated May 10, 2001 pursuant to section 50(1) of the *Highway Traffic Act*, as of May 21, 2001 for Grand Pacific Transport Inc.
7. Among the issues to be raised by the Respondent will be the safety record of the Applicant as the basis of the Registrar's May 10, 2001 Order, and possibly the outstanding fines owed by the Applicant.

Among the issues to be raised by the Applicant, will be the circumstances of the accidents involving its vehicles and drivers, as well as the relative mileages that the Applicant travels in Ontario as a function of the total mileage of the company.

The parties present at the pre hearing recorded that there was no resolution of the issues between the parties.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: June 26, 2001

PREHEARING

MROZEK AUTO SERVICE LTD. AND KENNETH E. BARBER

**APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES
91(3)(a) AND CLAUSE 92(4) OF THE *HIGHWAY TRAFFIC ACT*
R.S.O. 1990, CHAPTER H.8 AS AMENDED**

**To refuse Mrozek Auto Service Ltd.'s registration as a Motor
Vehicle Inspection Station and Kenneth E. Barber's
registration as a Motor Vehicle Inspection Mechanic**

TRIBUNAL: Stuart Cork, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards
JAROSLAW MROZEK, Agent for Applicant

DATE OF
PRE-HEARING: June 18, 2001 *By teleconference*

ORDER

Following attendances on June 18, 2001 at a pre-hearing by teleconference before this Tribunal of Jaroslaw Mrozek, Agent on behalf of Mrozek Auto Service Ltd. and Kenneth E. Barber (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Friday, July 27, 2001 at the Ramada Inn London, Churchill "A" Room, 817 Exeter Road, London, Ontario.

1. The Parties to the hearing are
 - (a) Mrozek Auto Service Ltd.;
 - (b) Kenneth E. Barber; and
 - (c) The Director of Vehicle Inspection Standards

2. Mr. Mrozek informed the Parties that he is withdrawing Kenneth Barber from his application as the Motor Vehicle Inspection Mechanic for Mrozek Auto Service Ltd. Mr. Mrozek further stated that he himself has achieved the required certification from the Ministry, and will be re applying as the Motor Vehicle Inspection Mechanic for Mrozek Auto Service Ltd. It was noted that Mr. Mrozek needs to give written notice to the Director as well as to this Tribunal if he wishes to amend his application.
3. Mr. Mrozek will be supplying an interpreter who will assist him with any translations he may need during the course of the hearing. The interpreter will be Mr. Mark Mager, who indicated he has experience as a provider of freelance professional interpretation services. Mr. Mager was informed that the Tribunal requires him to take an oath and be duly sworn before performing as an interpreter at the hearing before the Tribunal.
4. The Respondent will present testimony and evidence from four witnesses. Each witness will testify as experts to give information regarding mechanical details of vehicles certified by the Applicant. The witnesses will discuss information that led to various warnings and convictions of the Applicant.
5. The Applicant will call Mr. Barber, the mechanic at the station, to give evidence regarding the Safety Standards Certificates that were issued, and the findings of the Respondent.
6. The period of time that is expected to be covered by the evidence at this hearing will be from 1996 when the station began operations, until the Proposal from the Director. The years 1997 until 2001 will be in more detail than 1996.
7. Among the issues that will be raised by the Respondent will be the appropriateness of the decision to refuse a licence to the Applicant based upon the evidence. The Applicant's position is that it relied on a person who did the safety checks, is being dealt with too harshly, and has suffered much hardship and loss of revenue.

The parties present at the pre hearing recorded that there was no resolution of the issues between them.

8. It was confirmed at the Prehearing Conference that the Director has issued a Proposal to Refuse Mrozek Auto Service Ltd.'s registration as a Motor Vehicle Inspection Station and Kenneth E. Barber's registration as a Motor Vehicle Inspection Mechanic dated April 27, 2001, pursuant to section 91(3)(a) and section 92(4) of the *Highway Traffic Act*.

9. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before Tuesday, July 17, 2001.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: June 26, 2001

TERRY-EXHP

KATHLEEN G. TERRY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

KATHLEEN G. TERRY, Applicant
unrepresented

DATE OF HEARING: June 18, 2001

DECISION RELEASED: June 26, 2001 Owen Sound

REASONS FOR DECISION

A hearing was held on June 18, 2001, at Owen Sound, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Kathleen G. Terry (the "Applicant")
Motor Vehicle: 1999 Mercury Cougar, plant no. AAAY 826 (the "vehicle")
Date of Appeal: May 29, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on June 18, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am the owner of a 1999 Mercury Cougar described on reverse. The vehicle was left in the care of Dwayne J. Toth, R.R. # 2 Belwood to have repair work done. Plates were removed from the vehicle because I knew Mr. Toth had no licence, and he was not to remove the car from the property. I received a call @ 6AM Sunday May 20/01 from Dwayne Toth. He advised me that he had driven the car & was stopped & charged. My plated expire May 23/01 on both my vehicles. My present transportation is in poor condition & needs repairs. I did not intend to re-licence this vehicle @ this time. I cannot afford the needed repairs. I need the Cougar for transportation to work & various appointments for myself & children.

The Applicant testified that her vehicle, a 1999 Mercury Cougar, plate no. AAAY 826, slid into a ditch sometime in February 2001. She obtained estimates for the repairs to the automobile, but when she spoke to Mr. Toth he advised that he could “cut the cost of the repairs.”

Miss Terry advised that she removed the plates to her car before leaving it at Mr. Toth's place of residence because she knew that he did not have a valid driver's licence. The car was parked at Mr. Toth's home for several weeks, and the Applicant was quite surprised when she received a call on May 21, 2001, saying that Mr. Toth had been stopped while driving the vehicle, and that it had been impounded.

On that day he had been using plate no. 282 VAL, which Miss Terry testified was for a 1983 Buick Regal that she no longer possessed. She had previously lived with Mr. Toth, and had inadvertently left the plates at his home when she moved out.

Miss Terry further testified that she has been using a 1989 mustang pick-up since she had the accident in February. The automobile requires extensive repairs and she does not feel safe driving it. However, she did drive the vehicle from Mount Forrest to Owen Sound for the hearing.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Dwayne J. Toth;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Licence Suspended under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 11, 2002.

The Respondent asked Miss Terry where she worked. She replied, Specialized Pyrotechnics. She works from 7:00 a.m. to 4:00 p.m. and has been able to get lifts to and from work. She has only missed work three times since the day of the impoundment. She has not had any problems with her shopping because she only lives two blocks from town.

Her children have had no problems attending school, and have not had any medical emergencies.

In response to further questions Miss Terry, said that the only Taxi Company she could use had closed one month ago. She had not considered other taxis. She had not asked her neighbor for a lift. She could not rent a car because she did not have a credit card. In any event she did have use of a car. She was concerned that it was not safe, and that she did not want to continue using it.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The evidence established that Miss Terry's claim did not meet the criteria as set out under the Ontario Regulation 632/98 Amending Regulation 574 of R.R.O. 1990, and specifically Section 22.(1), and Sec 22.(4).

Section 22.(1) states that in determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle: or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

The evidence shows that there is an alternative available.

Section 22(4) states that in order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a) the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

Again, the evidence is that there is an alternative vehicle available. Because of this the Applicant did not find it necessary to make alternative arrangements.

The Applicant having an alternative to the impounded vehicle, the Applicant is unable to establish exceptional hardship as defined under section 50.2(3)(d) of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: June 26, 2001

ROSE M. ARMSTRONG

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

ROSE M. ARMSTRONG, Applicant
unrepresented

DATE OF HEARING: June 18, 2001

DECISION RELEASED: June 28, 2001 Belleville

REASONS FOR DECISION

A hearing was held on June 18, 2001, at Belleville, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Rose M. Armstrong (the "Applicant")
Motor Vehicle:	1997 Pontiac GAG, plate no. AJWJ 824 (the "vehicle")
Date of Appeal:	May 29, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on June 18, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I loan the car to my son on occasion as he is a licensed driver. He had permission to have the car on 21 May 01- because he has a few drinks he would not drive - a friend was driving who he thought had his drivers license it had been suspended sometime earlier - I was not aware of the fact that anyone other than my son would be driving the car and I would not have loaned it to him.

My position is one of need as I am a single mother with 4 children. 2 are in University in London. On and 2 are living at home - We have one car in the family - I need the car to drive to and from work each day. The cost of a cab in Trenton is \$5.00 a fare. This would amount to \$50.00 a week for work alone. I also drive my mother to her Dr. and medical appointments as she is being treated for multiple strokes and various medical ailments when I am needed.

I understand the reason the car was impounded but I has no idea anyone other than my son would be driving the car. It would be extremely hard on our family to be without the car for 45 days as I also visit my daughters in London on a regular basis and assist them while they work and attend University.

I would appreciate it if you would consider my case. It will not happen again.

Yours truly
Rose Armstrong

Page 2 of Notice of Appeal states "...loaned the car to son ...not aware ...that anyone other than ...son would be driving ...position is one of need ...Single mother with 4 children ...need the car ...to work ...drive mother to medical appointments..."

At the hearing the Applicant made a statement prior to testifying under oath.

The Applicant re-iterated her comments in the Notice of Appeal. She stated that the "...car is a necessity in a number of ways..." The Applicant confirmed that she has two children in University in Trenton and needs the car to visit them. The Applicant works for Human Resources in Trenton and taking cabs to and from work cost approximately \$60.00 to \$ 70.00 per week, sometimes more.

Further, the Applicant explained that her mother has suffered a number of strokes in recent years and that she needs to be taken to her medical appointments.

The Applicant claimed that it is "...hard to work and take care of family matters without a car..."

According to the Applicant she has no means to pay the required impoundment fee.

The Applicant understands that what happened is the law, but emphasized that she had no control over the situation.

Under oath, the Applicant testified that she has been able to get around by taking cabs and renting a car. As for losses, the Applicant claims the money spent on cabs and the car rental of \$125.00. As well, the Applicant has had to pay friends and family members for driving her around.

Under cross-examination, the Applicant confirmed that she has told her son on several occasions not to lend the car to any of his friends, nor to let them drive unless he has had too much to drink.

The Applicant clarified that her son and some of his friends had slept in the car, and one of his friends woke up and decided to drive home, while the Applicant's son was still asleep.

The Applicant established that she has not missed time off work due to the loss of the vehicle but has been late on occasion, due to the fact that the cabs may make several stops.

The Applicant is not the only person who is able to take her mother to her appointments but she affirmed that she is very close to her mother and that her mother has been asking for her.

In closing, the Applicant asked the Tribunal to reconsider the impoundment on the grounds that she will be more careful in future.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Jonathan Gauthier;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 24, 2001.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing, the Respondent asked the Tribunal to confirm the decision of the Registrar and uphold the suspension, on the grounds that "due diligence requires the Applicant to take action to prevent an occurrence..." The Respondent argued that the Applicant was unable to take action, as the situation was beyond her control.

As for hardship, the Respondent maintains that the Applicant has had the use of alternative vehicles and that the losses mentioned are neither significant nor likely to be long lasting.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5)

of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the due diligence or exceptional hardship ground of appeal as provided in subsection 50.2(3)(c) and 50.2(3)(b) and (d) of the Act, respectively.

Due Diligence:

The Tribunal has jurisdiction only on the four grounds of appeal set out in section 50.2(3) of the *Highway Traffic Act*. The due diligence ground of appeal set out in subsection 50.2(3)(c) is limited to due diligence with respect to the driver of the motor vehicle at the time of the impoundment. Subsection 50.2(3)(c) states:

(c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension (underlining added by the Tribunal)

The above ground of appeal is the only ground on which the Tribunal may set aside the order to impound on the basis of the owner's due diligence. In this case, the driver of the motor vehicle at the time in respect of which the order was made was Jonathan Gauthier. To succeed in this hearing on the basis of due diligence, therefore, the Applicant must establish that she exercised due diligence in attempting to determine that Jonathan Gauthier's driver's licence was not under suspension. Being unaware that Jonathan Gauthier would drive her vehicle, the Applicant took no steps to inquire about his driver's licence. Jonathan Gauthier's driving of her car was unknown to the Applicant. Accordingly, the Applicant cannot establish due diligence as defined in subsection 50.2(3)(c) of the *Highway Traffic Act*.

Exceptional Hardship:

With respect to exceptional hardship under subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that although getting around has been costly and inconvenient, she has found alternatives to the impounded vehicle. She has used cabs and rides with friends and family members. The Tribunal feels that these expenses are incidental and that the Applicant would have incurred comparable costs to drive her own vehicle. Thus, subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 would not be met with the Applicant.

Is the loss immediate, significant and lasting?

Also, the Applicant does not meet O. Reg. 632/98, subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows that loss will be immediate, significant and lasting.

The Applicant stated that there has been no loss of work, nor has the Applicant incurred any other significant expense, which can be considered long lasting and has not met O. Reg. 632/98, subsection 22(3)(b).

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship as defined under subsection 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: June 28, 2001

MED - 0598

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: June 15, 2001

By teleconference

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit 1 - Letter from Ministry of Transportation suspending driver's licence dated November 30, 2000.
- Exhibit 2 - Notice of Appeal filed by the Applicant received at the Tribunal May 16, 2001.
- Exhibit 3 - Tabulated documents (1-23), from the Ministry of Transportation received at the Tribunal June 12, 2001.
- Exhibit 4 - Applicant's driving record, dated May 23, 2001.

FACTS:

The Applicant, a 38 year old former school bus driver, had his "G" driver's licence suspended November 30, 2000, under section 47(1) of the *Highway Traffic Act*. This

action resulted after the Ministry received letters from Physician # 1 and two from the Windsor Police Services' Traffic unit questioning the Applicant's ability to drive.

Physician # 1's letter, dated January 21, 1999, stated that in his opinion the Applicant had physical symptoms that impaired his ability to operate a motor vehicle. The symptoms were double vision and severe pain in his right leg when driving. The Ministry took no action at that time.

The Traffic Unit's letters were from Police Officer # 1, dated June 21, 2000 and October 19, 2000 with accompanying Traffic Reports outlining details of two traffic accidents the Applicant had been involved in. Police Officer # 1 recommended in both letters that the Applicant be re-examined for his driving privileges. Summaries of the accidents follow.

(1) On the morning of June 15, 2000, the Applicant apparently drove past road closed signs off an unfinished portion of road, dropped 10" onto gravel, travelled 30', struck and moved a set of railway tracks. The estimated speed, by the police, was 100 km/hr. The police reported the Applicant appeared to be disorientated and confused, but no alcohol was detected on his breath. The Applicant advised the investigating officer that he was on medication.

(2) On September 30, 2000 the police investigated a report that a male person was unconscious in a jeep parked at an angle on a boulevard and over the sidewalk. When they arrived the individual had been taken to a hospital by the Ambulance Services for a suspected drug O.D. At the hospital, ambulance attendants advised the officers that the driver had been semi-conscious with a bottle of sleeping pills beside him. They related that the driver (the Applicant) admitted to taking the pills and smoking "weed".

The officers recorded the Applicant was placed under arrest for impaired care and control of a motor vehicle. He was advised of his rights and cautioned. They reported he was drifting in and out, but said he understood. He admitted, under caution, to one of the officers that he had been smoking marijuana and seeing double for the past two weeks.

The attending physician advised he was referring the Applicant to a psychiatrist for an assessment.

There were major conflicts regarding this evidence. The Applicant stated there were no "road closed" signs on the highway, only "construction" signs. He said that he had driven that road the day before without any problem. He denied driving 100 km/hr and said he was only travelling 50 km/hr.

He also denied telling the ambulance attendant and the police officer that he had been smoking marijuana. He could not remember seeing a psychiatrist, but if he did, it was simply someone who talked to him in the hospital, who did not introduce himself. He said his blood tests were negative for drugs, so the police did not arrest him for impaired driving.

The Applicant's GGT and ALT (SGPT) were reported as 167 and 54, respectively. Physician # 2, an addiction specialist, states in a medical report dated January 8, 2001 that the Applicant is not habituated or addicted to drugs or alcohol, in his opinion. He has been using analgesics, a narcotic combination and acetaminophen injudiciously and has experienced (a) sedation and (b) some reversible (probably) liver damage.

Physician # 2 did not feel the Applicant needed to take a drug rehabilitation program, but recommended pain management classes in order to be able to avoid medication completely.

The Applicant said the car he was driving had a defect allowing carbon monoxide to leak into the passenger compartment from the engine. This is what caused him to feel unwell and that is why he drove off the road and parked on the boulevard. He claimed a combination of carbon monoxide and his medication Cafergot, which constricted the flow of blood to his brain. He said he had not been advised of this side effect, but Cafergot actually only causes peripheral vasoconstriction in the extremities and does not effect the cerebral blood flow. Neither ambulance personnel nor police investigators apparently noted any evidence of carbon monoxide fumes in the car. The attending physician was not apparently aware of any Co involvement because a blood test was not ordered in the hospital.

The evidence before the Tribunal includes the following prior testing of the Applicant.

On December 27, 1997 Physician # 3 notified the Ministry of Transportation that the Applicant had suffered a "seizure? Withdrawal". As a result the Ministry suspended his driver's licence on February 9, 1998. The Applicant had experienced a light-headed feeling, which he called dizziness and collapsed striking his head on a dresser. He was examined in the hospital by a neurologist and told he had suffered a grand mal seizure. A previous diagnosis of vascular headaches, of migraine type had been made years ago. EEG's a CT brain scan, a Gluco brain scan and physical examination were all reported as normal. His medication was Zantaz, Cafergot and Oxazepam.

On April 6, 1998, the Ministry received a letter from Physician # 4, a neurologist outlining the results of a neurological assessment of the Applicant. It was his opinion the Applicant's dizzy spell and subsequent fall was a result of postural vasovagal syncope with a closed head injury and possible concussion associated with a tonic type of seizure activity.

The Applicant's "G" licence was re-instated on April 5, 1998.

The Ministry received a medical report from Physician # 4 on January 26, 1999 stating the Applicant had not experienced any episodes of light-headedness or syncope since December 28, 1997. This was a request to re-instate the Applicant's "B" licence.

On February 3, 1999 the Ministry received a second letter from Physician # 1 stating the Applicant seems improved with no more double vision or painful extremities and should be allowed to resume driving. This letter was two weeks after Physician # 1 had warned the Ministry of his concerns regarding the Applicant's ability to drive, but no action was taken.

On March 8, 1999 the Ministry re-instated the Applicant's class "B" licence.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) of the *Highway Traffic Act* empowers the Registrar to "...suspend or cancel" a driver's licence for "any ...sufficient reason...". The Registrar suspended the

Applicant's driver's licence on October 31, 2000 after receiving two unsolicited letters from the Traffic Branch of the Windsor Police Services requesting a re-examination of the Applicant's driving privileges. Police investigated two motor vehicle accidents in July and in September 2000, in which the Applicant appeared to have been impaired.

The Tribunal finds the Ministry acted properly in accordance with the Regulation, in suspending the Applicant's driver's licence, based on the information provided, initially.

In reviewing the evidence, however, there is nothing to substantiate the allegations. Blood tests were all reported as normal with the exception of the GGT and ALT results. These were elevated as a result of long term injudicious use of an acetaminophen and narcotic combination, which an addiction specialist stated he was not habituated or addicted to.

The conflicts in evidence between the Applicant and the police regarding the circumstances of the September investigation and the Applicant attending physician's evidence, regarding a psychiatric assessment, makes it very difficult to obtain a clear picture of what actually happened. The Tribunal is not certain whether the Applicant admitted to smoking marijuana or not, because there was no follow-up investigation. The Applicant's evidence of carbon monoxide in his truck could not be confirmed because there is no mention of it in the medical or police reports and a blood test was not ordered.

The police recommendation was for re-examination for the Applicant's driving privileges. The Tribunal could not find any evidence of a driver's re-examination, which would seem to be part of that evaluation.

In spite of an addiction specialist's (Physician # 2) medical report of January 8, 2001, stating there was no addictions and medical reports from Physician's #s 5, #3, and Physician # 1 indicating the Applicant was physically well, the Ministry is still demanding on March 13, 2001, a detailed assessment from a specialist in addiction medicine, completion of a treatment program, participation in relapse prevention and the results of urine drug screen toxicology. The Applicant gave evidence that he was not taking the analgesics and was willing to provide blood or urine specimens and take pain management classes, if required, to get his "G" driving privileges back.

The Applicant was apparently charged with careless driving after the July accident, but was acquitted because there was not a "road closed" sign at the site.

It is unclear whether the Applicant was charged with anything following the September incident. It states in the police report that he was arrested for impaired care and control of a motor vehicle by drugs, but there is no evidence that a charge was withdrawn or pursued.

Under section 47 of the *Highway Traffic Act*, the onus is on the Registrar to establish sufficient reason to suspend the Applicant's driver's licence. It was apparent that the Applicant's credibility could be questioned and he was guilty of bad judgement at times, but the Tribunal did not feel the Ministry was able to justify a continued suspension of his "G" licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 9, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D. Presiding Member

RELEASED: June 20, 2001

TAMMY FRIZZELL

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELIZABETH L. SPROULE,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

TAMMY FRIZZELL, Applicant
unrepresented

DATE OF HEARING: June 25, 2001

DECISION RELEASED: June 28, 2001

Kitchener

REASONS FOR DECISION

A hearing was held on June 25, 2001, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Tammy Frizzell (the "Applicant")
Motor Vehicle: 1995 Chrysler Intrepid, plate no. AJAN 980 (the "vehicle")
Date of Appeal: June 4, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on June 25, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am writing this letter to appeal the decision made to impound my vehicle as the loss of my car will cause exceptional undue hardship to my family. I would like to clarify the incident that led up to my car being impounded. On early Saturday night we had decided to drive to Algonquin Park just for the night. After driving myself the whole way to the park I began to fall asleep, so we thought that because we were extremely close to our camp ground that we would pull over and let Phillip drive. He had been driving for less than 2km when we decided to pull over and consult the map when a car pulled up behind us, That car being the OPP asked for our driver licenses, and when Phillip could not produce his; the police officer realized that his license had been suspended and my car was

impounded. This leaving us strand in that middle of Algonquin Park after the police officer had dropped us off at a campground. Being the long weekend and family and friends all were away, we were left to hitch hike out of the park to Huntsville, where we spent our last one hundred dollars in order to return home.

First let me start off by saying that I am extremely sorry for what has happened, and I realize that there is no valid excuse for this to have happened. We made an extremely poor decision and have suffered grave financial and emotional consequences as a result of our actions. I am appealing to you to modify your decision to impound my vehicle on grounds that it will cause undue hardship to my family, as I am 4 months pregnant, and having a lot of trouble with the pregnancy. Over the past year I have had three surgeries for Ovarian Cyst Disease, it was thought that after having an ectopic pregnancy that it would be very unlikely that I could have a child on my own. After a surgery -in February to remove several cysts from my ovaries I *found out* that, I was pregnant, but because of my medical history it was going to be a very extremely difficult pregnancy and that I have to attend a lot of doctor's appointments and have a lot of tests performed and try to place as little stress on myself as possible.

Even with my car it has been very difficult to juggle between my doctors appointments, tests and work. It is so very important that I have a car to get to work and appointments, due to the fact that I live in Guelph, and my work is located in the city of Kitchener. Since losing my car I have missed a great deal of work, as I have been unable to find a reliable mode of transport to get to and from my place of employment. My employer has stated to me that if I am to keep my job I must remedy this problem immediately I am so afraid that if I don't receive my car back soon that I will lose my job then in turn lose all my maternity benefits, which will be extremely tragic due to the fact that I am the sole supporter of our household. My fiancé has not been employed since January of 2001, and our money situation has been very tight. If I lose my job we will end up without a place to live and I am extremely worried that this potential stress may cause me to lose my baby.

I can only plead with you that despite the extreme lack of judgment we have shown in this matter, that you will see fit to return my vehicle so that I may try to continue on with my pregnancy, keep my job and insure that my baby will have a healthy environment to grow up in.

It is my intent to bring with me to the hearing a doctor's note verifying the above statements in regards to my pregnancy and my health.

I thank you for your time and consideration in this matter.

The Applicant submitted a written note from a Dr. Steven J. Traplin, M.D., Norfolk Medical Centre, Guelph, stating that Applicant suffers from "polycystic ovarian disease-resulting in frequent pelvic pains". This note was referred to in the Applicant's written statement although it was not filed within the prescribed time. The tribunal accepted it into evidence.

The Applicant's oral testimony was that she has been relying upon friends and family for transportation to and from work: that in fact the loss of her vehicle has been "more of an inconvenience" and has not jeopardised her employment or lead to economic hardship as anticipated and described in her written statement.

The Applicant testified that the loss of her car has made it difficult for her to attend various doctor appointments when they are scheduled on a workday as her employment is in Kitchener and her doctors are in Guelph. As a result she has had to miss 4 or 5 appointments. When asked what she has done when this has occurred the applicant stated that she either rescheduled the appointment or went to a walk-in-clinic. When asked whether public transit was available between the two cities the Applicant suggested that because of the varying times of bus departures it was difficult to arrange.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner or if different names registered as vehicle owner and as plate owner, then indicate which one the Applicant is;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Phillip Taylor;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 26, 2002.
5. Affidavit of PC Scott Macphie dated June 13, 2001.

The Registrar submitted no oral evidence.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant's basis for her appeal is that of "exceptional hardship" under section 55.2(3)(d). To succeed she must meet the very specific criteria set out in section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, set out above.

In her initial written submissions the Applicant argued that the impoundment will result in hardship as described in section 22(2) however it was made clear in her oral testimony that this in fact did not occur and therefore is not the basis of her appeal. Rather the basis of her appeal is that the impoundment will result in hardship as described in section 22(1).

Under section 22(1) the Tribunal is to consider whether an alternative to the impounded motor vehicle is available and if not whether this will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle. It was not clear to the Tribunal from the Applicant's testimony that an alternative to the impounded vehicle is not available for transporting the Applicant from her place of work to her doctor's in Guelph. In any event there was no evidence given to suggest that the lack of an alternative in these instances would result in a threat to the health or safety of the applicant or her unborn child.

Accordingly, after considering the criteria set out in section 22(1) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 6322/98, the Tribunal finds the Applicant has not established "exceptional hardship" as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elizabeth L. Sproule,
Presiding Member

RELEASED: June 28, 2001

SINGH

CHARAN SINGH

Appeal under section 50.(1) of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended (the *Act*) from the Suspension and Seizure Order of the Registrar pursuant to section 47(1) of the Act.

**TO APPEAL A SUSPENSION AND SEIZURE ORDER
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: BRIAN K. MAROTTA, PRESIDING VICE-CHAIR
ALAN HOLBROOK, MEMBER
CLARKE WALLACE, MEMBER

APPEARANCES: CHARAN SINGH,
Applicant unrepresented

PATRICK MOORE,
Counsel for the Respondent

DATE OF HEARING: June 12, 2001 Toronto

REASONS FOR DECISION

An oral hearing was held on June 12, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (HTA or the *Act*).

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Registrar pursuant to section 47(1) of the HTA.

PRELIMINARY MATTERS:

The Tribunal asked the parties if there were any preliminary matters which they wanted the Tribunal to deal with before commencing the hearing.

The person sitting with Mr. Singh identified himself as David Mirwal and requested that he be allowed to be the Interpreter for Mr. Singh. Counsel for the Registrar informed the Tribunal that Mr. Singh had appeared on his own behalf and represented himself in the English language, without any apparent problem, at the meeting with the Deputy Registrar on the 25th day of April 2001. It was the Tribunal's opinion that Mr. Singh had

a right to have an interpreter present to ensure that he entirely understood the proceedings. Mr. Mirwal was, therefore, sworn in as the Interpreter for Mr. Singh.

The second preliminary matter was a request for an adjournment by Mr. Singh. Mr. Singh advised the Tribunal that he did not receive notice of the hearing for June 12th until Friday, June 8th, 2001 and, therefore, he did not have time to prepare for the hearing.

The Tribunal noted that the Notice of Suspension & Seizure was dated the 11th day of April 2001 and that there was a meeting with the Deputy Registrar on the 25th day of April 2001.

Counsel for the Registrar pointed out that this series of events would have prompted anyone to obtain assistance and start preparing for the hearing. Mr. Singh had filed his appeal on May 2nd, 2001 so that he knew there would be a hearing on the matter. It was important that this matter be dealt with quickly in the interest of public safety.

The Tribunal noted that the Chief Administrative Officer and Registrar of this Tribunal sent a letter dated May 7, 2001 to Mr. Singh advising him that the Tribunal would schedule a pre-hearing conference on June 4th, 5th or 6th, 2001, or would proceed directly to the scheduling for this hearing on either one or all of the dates of June 11th, 12th, 13th, 14th and 15th, 2001. Mr. Singh was asked to advise the Tribunal of his preference in writing by May 14th, 2001. There was a letter in the Tribunal's file from Mr. Singh dated May 17th, 2001, when he specifically asked for the date of June 12th, 2001. It was also noted that this Tribunal had sent a notice of hearing to the Applicant by courier on May 29th, 2001. As Mr. Singh did not refute any of his information, the Tribunal declined his request for an adjournment.

Mr. Singh then made a second request for an adjournment based upon a different ground. He stated that he had retained the services of someone to assist him with this appeal and that he was fully prepared for the appeal on today's date until very recently when he lost trust with his advisor. He therefore requested an adjournment on that basis.

The Tribunal noted that the information conveyed by Mr. Singh in this second request for an adjournment was not in conformity with his first request for an adjournment which gave the Tribunal serious doubts as to the sincerity of Mr. Singh. The Tribunal also noted that the request of Mr. Singh was very vague in that he did not indicate that he had retained anyone else to assist him in the appeal, nor had he stated that he intended to retain anyone else. The Tribunal declined Mr. Singh's request for an adjournment and proceeded with the hearing.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the *Act*).

The Deputy Registrar of Motor Vehicles (the *Registrar*) made a decision to issue a suspension and seizure order under section 47(1) of the *Act*.

The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the ATribunal) together with supporting documentation and the required \$100.00 filing fee.

On April 25th, 2001, the Applicant met with Mr. John Miller from the Ministry of Transportation and with the Deputy Registrar to show cause why the suspension and seizure order should not be issued. At that meeting, the parties discussed the Deputy Registrar's dissatisfaction with the out of service records of the Applicant's vehicle and the record of accidents and convictions of the Applicant. The Applicant had an opportunity to point out any mistakes that he thought were in his records. Other than one windshield inspection which he did not recall, the Applicant did not dispute any of the records of the Deputy Registrar.

As a result of that meeting, the Deputy Registrar issued the following suspension and seizure order:

SUSPENSION AND SEIZURE ORDER

WHEREAS a Notice of Suspension & Seizure dated the 11th day of April, 2001 was issued proposing a 30 day suspension of the CVOR certificate issued to Singh, Charan and suspension and seizure of plate portion of permits and number plates;

AND WHEREAS provided in the notice, you had the opportunity to make submissions at a meeting with the Deputy Registrar on the 24th day of April 2001, to show cause why the suspension and seizure order should not be issued;

AND WHEREAS I have considered your submissions and your safety record including your record of convictions, accidents, vehicle detentions and vehicle out of service rates, I remain concerned for highway safety;

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of the 7th day of May 2001, CVOR certificate 126-368-205 and plate portion of permits for all commercial motor vehicles and trailers issued to Singh, Charan be suspended for 30 days and the plate portion of permits, or if issued, by a jurisdiction other than Ontario, the permits, and the number plates be seized.

ISSUES:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order for 30 days?

FACTS:

The Tribunal heard from Mr. John Miller, Carrier Safety Rating Administrator, with the Ministry of Transportation. It was his duty to monitor CVOR operators for safety and performance. Prior to that he was a CVOR Analyst who monitored the CVOR system and before that a National Safety Code Auditor and Transportation Enforcement Officer. He stated that the objective of the Ministry of Transportation is to monitor carriers to ensure that they comply with the provisions of the Act and Regulations. He explained how the CVOR rating system operated and the point system attributed to each infraction. He explained how this was all set out in the Ontario's Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline.

He produced the CVOR Abstract of the Applicant which set out all accidents, convictions and inspections. The Applicant became a CVOR holder on April 21st, 1998 under the CVOR certificate 126-368-205. The Applicant was the owner and operator of a dump truck and trailer with capacity of 53,900 kilograms, which is the upper end of the weigh scale. With the CVOR system, a threshold limit is established by comparing the record of the CVOR holder with operators of comparable fleet size. The threshold limit of the Applicant was therefore adjusted to compare with operations of a fleet size of one vehicle. When the CVOR holder reaches 35% of the threshold a warning letter is sent out. At 65% of the threshold, the holder is put in an audit stage, at 80% of threshold, the operator reaches an interview stage and at 100% of threshold the sanction stage is triggered.

In this case a warning letter was sent to the Applicant on April 17, 2000. On November 6, 2000, he was given a conditional safety rating, but the Applicant had so many accidents in such a short period of time, there was no opportunity to go through the rest of the stages. The Minister's actions are discretionary and can be taken at any stage where the safety of the public is of concern.

In April 2001, Mr. Miller did an analysis of the prior two years operation of the CVOR record of the Applicant. This was forwarded to the Applicant by courier on April 11, 2001 and enclosed the following:

1. Notice of Suspension and Seizure;
2. Commercial Vehicle Operator Record;
3. Rating and CVOR Registration System Public Guideline;
4. MTO's Facility Audit Guideline;
5. Accident Reports;
6. Analysis April/2001;
7. Safety net;

The analysis showed that the Applicant had been involved in five accidents, three convictions and two inspections with an overall threshold rate of 160.1%.

On cross-examination, the Applicant established that although the convictions were a result of driver impropriety, there was only property damage done with no injuries.

Although the Applicant was given the opportunity to take the stand himself or to produce any witnesses, he chose not to do so.

LAW:

- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections);

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the [Licence Appeal Tribunal].
- (2) The [Tribunal] may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.

3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.

3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.®

APPLICATION OF LAW TO FACTS:

From the evidence of Mr. Miller, it is accepted that the methods used by the Ministry and the Deputy Registrar to assess the Applicant, were applied clearly and uniformly. There is no evidence that the Deputy Registrar took into account information about the Applicant which would not be considered in assessing the safety of every other carrier in the Province.

The Applicant did not dispute the records of the Ministry, but instead asserted that the accident reports of the police were not accurate, and therefore the Ministry should not have based its rating system on the Police Reports. It is noted by the Tribunal that the Applicant did not contact any of the Police Officers who prepared the accident reports to request that they make any corrections in their reports even though he had previously been advised of his right to do so. It was also noted that the Applicant had not appeared and defended any of the charges in which convictions were entered. The Applicant chose not to call any evidence and his only submissions were that they would try to keep his truck in better repair and he would try to be a better driver. The Applicant offered no elaboration or plans on how he intended to achieve these goals.

In the case of *Brenner vs. The Registrar of Motor Vehicle Dealers and Salesmen*, 19 CRAT 59, a Decision issued by the Divisional Court on April 7, 1983, Southy, J. stated:

A...the effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty®.

The guidance provided by the Divisional Court in *Brenner* applies in appeal. Accordingly, it is only if the Tribunal finds that the Registrar was in error that the Tribunal will modify or set aside the Registrar's order. In the circumstances of this case, the Tribunal finds that the Registrar had sufficient and reasonable grounds to believe that the past conduct of the Applicant supported the belief that he would not operate a commercial vehicle safely or in accordance with the law. The Tribunal also finds no reason to interfere with the extent of the sanction imposed in the order issued by the Deputy Registrar.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of Registrar of Motor Vehicles to issue a suspension and seizure order for 30 days.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair,
Presiding

Alan Holbrook, Member

Clarke Wallace, Member

RELEASED: June 28, 2001

BART-POL EXPRESS INC.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

JOHN GRUEZIEN AND MRS. JOHN GRUEZIEN, Agents for
BART-POL EXPRESS INC., Applicant

DATE OF HEARING: June 21, 2001

DECISION RELEASED: June 29, 2001 Toronto

REASONS FOR DECISION

A hearing was held on June 21, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Bart-Pol Express Inc. (the "Applicant")
Motor Vehicle: 1998 Volvo Truck, plate no. 2140JB (the "vehicle")
Date of Appeal: May 31, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on June 21, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of documents bearing original certification seals which were entered into evidence as exhibit #3. These documents were submitted with the consent of all parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The driver has been employed by the Owner since December 1999.

Owner has a copy (enclosed) of driver licence valid till March 18, 2002.

Ower's insurance is renewed in January each year. Last January renewal did not indicate driver is suspended, when driver history was pulled.

Owner has financing costs in the amount of \$2,159.70 per month for the impounded truck as well as \$1,660.07 attached trailer costs, as well as \$1,000 per month insurance.

Owner is a very small operator (3 trucks) who is very dependent on income generated by these trucks. A 45 day penalty (through not our fault) would be disastrous to the well being of the company and the owner and his family individually.

We strogly beg the Board to immediate release of the truck. We had no knowledge whatsoever that driver had a suspended license, until now. We have done all that was required of the owner that driver had a valid licence. Driver has been employed by us for a year 1/2.

The Applicant's co-owner Mrs. John Gruezien testified that she was unaware that the driver's licence of their driver Edward Kalisz was under suspension. They had been advised by their insurance carrier that the driver had a valid licence in January of this year when a general review was made before renewal of their policy. No evidence was presented to confirm how the insurance company confirmed the status of Mr. Kalisz's driver's licence. No current abstract from Motor Vehicles was produced. There was some uncertainty that confirmation of Mr. Kalisz's driver's licence was a condition of employment for their drivers. Only the insurance check was required by the Applicant.

Mrs. Gruezien testified that the impoundment of their truck could cost them the failure of their business. However, to this point she had not inquired about the cost to rent another vehicle, and they had not attempted to recruit a new driver.

The Respondent's representative questioned Mrs. Gruezien in respect to documents to support her claim that the insurance company had cleared Kalisz to drive in their January 2001 review. These documents were not available for this hearing. The Respondent's representative provided the witness with a pamphlet on how to conduct a drivers licence search at a cost of just \$2.00.

Mrs. Gruezien testified that the gross income from a round trip to their normal California terminal is \$17,000. Costs for such a trip were not detailed by her. As no inquiry had been made in respect to the rental of a power unit, no assessment was offered as to the cost effect to the Applicant's profit.

John Gruezien, the co-owner of the Applicant Bart-Pol Express, also testified that they had been convinced by the insurance company that all was well with Kalisz's licence, but no documentation from the insurer was submitted. He too had not required his own abstract to validate Kalisz's licence even though he testified that he had known about the driver's suspension but had assumed it had been reinstated because of the insurance report. He advised that the production of an abstract is not a hiring requirement by the company but instead is left to the insurer.

The cost of any rental vehicle was dismissed as too costly by Mr. Gruezien even though he had not made any inquiry as to what that cost might. He had made no attempt to hire a new driver.

During his cross-examination by the Respondent's representative, John Gruezien admitted that he knew Kalisz's licence was in trouble, but considered the matter

resolved due to the insurance report. He made no special effort to satisfy himself in respect to Mr. Kalisz's drivers licence but simply felt the insurance carrier's annual review was adequate. When questioned about trip revenue, Mr. Gruezien confirmed that no inquiries had been made as to costs of rentals etc., and as a result no conclusions could be reached. At the suggestion of the Respondent's representative, Mr. Gruezien agreed that their personal satisfaction of the validity of their drivers' licences would be a future requirement in their business.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Edward Kalisz;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the Criminal Code of Canada pursuant to which the driver's licence of the driver was then under suspension until March 1, 2002

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the

particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional: Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(c) of the Act on the basis that the Applicant exercised due diligence to confirm the validity of Edward Kalisz's driver's licence, which was under suspension due to a conviction of the offence of Impaired Driving under the Criminal Code of Canada until March 1, 2002.

Statements made by both Mr. and Mrs. John Gruezien revealed that their only effort to verify the validity of their employee's licence was through their insurance company last January, 2001. No evidence was produced to confirm the insurance company's act of validation nor was any name offered of the insurer involved. Furthermore, John Gruezien knew Kalisz's licence was subject to a charge but failed to monitor closely any final conclusion of that charge. In addition, production of a driving abstract is not a condition of employment with the Applicant.

In conclusion, the Tribunal finds that the Applicant has failed to provide the Tribunal with any evidence that the Applicant has met the test of "due diligence" as required by Section 50.2 (3)(c) of the Act.

The Applicant has also appealed under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claim to be considered under section 22(b) and (c), the Applicant must have demonstrated that all of Section 22(3) has been met. Furthermore, section 22(4) of the Regulation requires demonstration that every reasonable option have been explored, including an alternative vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate any reasonable option to the impounded vehicle has been explored and inquired into as required under Section 22(4) of the Regulation. In fact the evidence offered indicates that no alternatives have been investigated by the Applicants.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford, Presiding Member

RELEASED: June 29, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1605004 OWNED BY: 1245246 Ontario Ltd. o/a Trees By Nature, 175 Toryork Drive, Unit 47, Toronto, Ontario M9L 2Y7 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: June 16, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

1245246 ONTARIO LTD. O/A TREES BY NATURE

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1245246 Ontario Ltd. o/a Trees By Nature, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: June 28, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

1245246 Ontario Ltd. O/A Trees By Nature

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #V1605004** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on June 16, 2001.
2. The applicant, **1245246 Ontario Ltd. O/A Trees By Nature**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating **that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received information from the police, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

1245246 Ontario Ltd. O/A Trees By Nature

Kim Grosskurth

(signature of Applicant)

(signature of Registrar)

(date)

(date)

ADLS - 0628

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF HEARING: June 22, 2001 Oshawa

DECISION

A hearing was held on June 22, 2001, at Oshawa, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: June 25, 2001

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

Applicant, unrepresented

DATE OF
HEARING: June 22, 2001

DECISION
RELEASED: June 25, 2001 Oshawa

REASONS FOR DECISION

A hearing was held on June 22, 2001, at Oshawa, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 25, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic*

Act was dated June 6, 2001, and was received by the Tribunal on June 7, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the hearing proceeded. With permission from both parties, the following submissions were entered into evidence.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal Form received June 7, 2001.

By the Respondent:

- a) Exhibit # 2 MTO submissions, 28 pages received June 19, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant was sworn and gave the following testimony. The Applicant testified that on May 20, 2001 he attended a bar arriving at approximately 9:30 p.m. and leaving at approximately 2:30 a.m. He stated that he had consumed only 3 beers during this period. When he left the bar at 2:30 a.m., he was pulled over by the police. He was asked by the officer if he had been drinking and how much he had consumed? He replied, “only 3 beers. At that point, the officer explained that he was going to call for a road side screening device. The Applicant was asked to enter the rear of the police vehicle which he did. The officer explained how to provide a sample into the device. The Applicant was given 8 to 9 opportunities to provide a proper breath sample. The

Applicant was advised of his rights as well as the consequences of not providing or failing to provide a proper breath sample. According to the testimony of the Applicant, he told the officer that he had pneumonia for the last year and that it was difficult to blow and that the officer should take him for a blood test. The Applicant stated that he knows he was not drunk and could drive properly. He stated that "I know how much alcohol it takes in my body to blow over and I know that I did not have that much in my system". The Respondent questioned how the Applicant knew how much alcohol it took him to blow over the legal limit and the Applicant responded "I know this information from commercials on the radio". The officer released the Applicant after he was charged with failing to provide and then drove the Applicant home. According to the Applicant he went into his house, listened to the radio for a while and then went to bed.

The Applicant attended Cobourg Clinic on May 22, 2001. The Applicant provided a note from Physician # 1 with a recommendation that he is awaiting an appointment with a lung specialist. Along with the note was one spirometry report.

On cross-examination by the Respondent, the Applicant stated that he went to the hospital to procure a letter for his appeal, which was at the suggestion of Police Officer # 1 and not to seek out medical attention.

Police Officer # 1 was then called to the stand and was sworn. Police Officer # 1 is employed by the Port Hope Police Department. Police Officer # 1 stated the he was on duty on May 20, 2001. At approximately 2:24 a.m., Police Officer # 1 pulled over the Applicant. The Applicant was known to the officer and has previous dealings with the Applicant on other police matters.

Police Officer # 1 stated that earlier that evening he had seen the Applicant in the tavern during a walk through. This walk through was part of the Port Hope Police Chiefs' initiative to have increased Police visibility in the local taverns. Knowing that the Applicant was in the tavern earlier, Police Officer # 1 requested that the Applicant provide him with a breath sample into an approved road side screening device. The Applicant accompanied Police Officer # 1 into the rear of his cruiser whereby the demand for breath was read as well as the Applicant's rights for which he responded that he understood. The Drager unit was demonstrated by Police Officer # 1. This particular unit indicates air movement within the machine. According to Police Officer # 1, no air was entering the unit. After 8 or 9 attempt Police Officer # 1 charged the Applicant's with failure to provide.

The Tribunal questioned Police Officer # 1 about the Applicant contention that he had indicated to the officer the he had breathing problems. Police Officer # 1 stated that he was not a physician, however he is a trained observer and is trained in first aid and would be able to see if the Applicant was in need of immediate medical attention. Police Officer # 1 testified that there was no indication of any breathing difficulties. The Applicant was not wheezing, gasping for air or short of breath. He believed that the reason the road side screening device was not registering was due to the Applicant's lack of effort.

Evidence was submitted by the Registrar which eluded to a report by Physician # 2, Director, Program in Respiratory Rehabilitation, Professor of Medicine, University of Toronto. Physician # 2 reviewed the spirometry tests provided by the Applicant. It was the opinion of Physician # 2 that the "tests themselves were woefully inadequate and would not be accepted in any lab that concerned itself with appropriate standards.

It is an example of a patient who coughed in the middle of the test and by all basic standards of care, the test should have been repeated.”

In conclusion, Physician # 2 states, “there is no evidence from the information supplied to me to suggest that the Applicant could not satisfactorily complete a roadside Alcotest. We have tested many patients with severe lung disease who require up to 14 seconds to complete exhalation. They have been able to complete Alcotest.”

The Tribunal accepts the evidence of Police Officer # 1 as well as the opinion of Physician # 2.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a medical condition which precluded him from providing a breath sample.

The Applicant has provided a medical report signed by Physician # 3 MD. Physician # 3 apparently is not his regular family physician. The Applicant's regular family physician is Physician # 4 who did not fill out the form. Physician # 3 lists the present condition as chronic bronchitis, emphysema, recurrent pneumonia. The only test performed with respect to pulmonary function tests was on May 22, 2001, along with a visit to Physician # 1. This visit was precipitated on the advice of Police Officer # 1 to the Applicant.

The report of Physician # 3, the Applicant's medical practitioner fails to meet the specific requirement of section 15(1) of Regulation 574 of the *Highway Traffic Act*. Physician # 3 does not provide a detailed history of the medical condition but only states what the present conditions are with a history of smoking 2 ½ packs of cigarettes per day since the age of 8. There is no detailing of visits for his breathing problems nor is there listed medications prescribed for his condition(s). There is no evidence presented that Applicant had been assessed for these conditions.

Attached to the report was a pulmonary function test which was performed on May 22, 2001 which indicated a reduced flow rate. The Tribunal accepts that this test is effort dependant and that the results obtained are not a true indication of the actual flow rate at the time this test was performed.

For the purposes of this appeal, the Tribunal can give very little weight to the medical report provided by the Applicant.

After reviewing the foregoing facts, the Tribunal finds that the Applicant has not established a medical condition as required by Regulation 574 and Section 50.1(2)(b) of the Act.

The evidence is clear that the Applicant attempted to provide a sample, however an adequate sample was not provided and the Applicant has not established that this was due to a medical reason.

The Tribunal can only conclude from the evidence presented, that the actions taken by the Applicant were actions taken by someone who was unwilling to provide an adequate sample.

The Applicant has not discharged the onus under Section 50.1 of the HTA to establish a valid medical reason for his failure or refusal to comply with a demand made under Section 254 of the Criminal Code (Canada) to provide a sample of breath.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated May 28, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: June 28, 2001

ADLS - 0630

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant unrepresented

DATE OF
HEARING: June 25, 2001

Toronto

DECISION

A hearing was held on June 25, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: June 26, 2001

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: LUBA NEWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant unrepresented

DATE OF
HEARING: June 25, 2001

DECISION
RELEASED: June 26, 2001

Toronto

REASONS FOR DECISION

A hearing was held on June 25, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 26, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic*

Act was dated June 7, 2001, and was received by the Tribunal on June 7, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

During Appearances the Applicant informed the Tribunal that he did have a lawyer but that his lawyer was on vacation. The Applicant also stated that he had witnesses who would be testifying at Court hearing, and were not present for today's hearing.

The Applicant confirmed, when questioned several times by the Tribunal, that he was ready to proceed.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1- Notice of Suspension Reminder dated May 15, 2001.
- b) Exhibit # 2- Notice of Appeal form received June 7, 2001.
- c) Exhibit # 3- Medical Report from Physician # 1, M.D., dated June 7, 2001.
- d) Exhibit # 4- Letter from the Applicant received June 18, 2001.

By the Respondent:

- a) Exhibit # 5- Ministry of Transportation Submissions received June 6, 2001.
- b) Exhibit # 6- Breathalyser Test from Police Station received June 21, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "May 13, 2001" as set out in the Applicant's Notice of Appeal (Exhibit # 1).

Page 2 of Notice of Appeal, which is to be filled in by the Applicant's physician, is blank.

In a letter dated "18th of June 2001 the Applicant establishes his position "...I refused to blow into the machine ...was scared he will lie against me... I refused..." (Exhibit # 2)

By letter dated June 7, 2001 Physician # 1, confirms that he has been the Applicant's physician since June 1999. After interviewing the Applicant Physician # 1 opines that the Applicant refused to provide a breath sample for two reasons: "...he felt intimidated by the police officer ...he believed that the medication he as taking for his skin condition (Atarax and Tretracycline ...would interfere with the test..." (Exhibit # 3).

At the hearing, after being sworn in the Applicant requested an adjournment on the grounds that his lawyer was on vacation. The Applicant explained that he noted in his Notice of Appeal that an agent or lawyer was "NOT APPLICABLE", as he had requested a written hearing.

The Respondent for the Ministry objected and advised the Tribunal that the Applicant had received notice on or about June 12, 2001 that a written hearing was refused, and an oral hearing had been scheduled.

The Applicant acknowledged receiving notice. Nonetheless, the Applicant contends that he failed to request an adjournment earlier as he was unaware of the procedures.

As the Applicant was unable to provide the Tribunal with a letter from his solicitor, the Tribunal notified the Applicant that the hearing would proceed. At the point the Applicant consented.

The Applicant testified as to the circumstances leading up to the suspension. Both in examination in chief and in cross examination the Applicant reiterated his position that he had refused to provide a breath sample for "...two reasons". The Applicant claimed that he was not certain how the medication he has been prescribed by his Dermatologist, for his skin condition would affect the results of the test, and further that he had felt intimidated by the treatment of the police officer.

The Applicant affirmed that he informed the officers that he was on medication, and that he was sick.

The Respondent called Police Officer # 1 as a witness.

Police Officer # 1 testified that he has been in the Police Services for 20 years and that he is a qualified breathalyzer technician.

After relating events of the incident that led to the suspension. Police Officer # 1 attested that at no time did he observe the Applicant being afflicted with a respiratory or

any other physical difficulty. Police Officer # 1 further indicated that the Applicant did not inform him of the fact that he was taking medication.

A videotape of the breathalyzer session was introduced as evidence. The Applicant ignored the Constable's demand to provide a breath sample.

In closing, the Applicant made several statements about his medical condition and the treatment he received from the Police Officer, as well as emphasized as to why he had wanted a lawyer to speak for him, not only on the night in question but also at the Hearing. The Respondent, in closing noted that the videotape indicates a clear refusal from the Applicant to provide a breath sample, and asked that the Tribunal confirm the decision of the Registrar.

APPLICATION OF THE LAW TO FACTS:

During the hearing the Applicant raised several issues not germane to this matter and the Tribunal. It was made perfectly clear to the Applicant, that the Tribunal has no jurisdiction to deal with the issue of police abuse or the use of force by the usage of gun in the carrying out an arrest.

Subsequently, the Respondent also attempted to introduce the matter of the use of the gun as evidence. The Tribunal ruled that any evidence concerning the use of the gun would be inadmissible. Although, the Tribunal considers an objection from the floor a procedural irregularity, the Tribunal must note the objection to the Tribunal's ruling, from an observing member from the Respondent's office. The point raised was that the issue of the use of gun should be addressed as it pertained to the credibility of the Applicant.

The applicable Section of the *Highway Traffic Act*, 50.1 (2) (b) reads:

"The only grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

b) that the person failed or refused to comply with a demand made under section 24 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason"

There is no doubt that the Applicant refused to provide a breath sample, for reasons other than a medical condition. By his own admission, the Applicant confirms as the grounds for Appeal, that he "...refused to blow into the machine ...was scared he will lie against me ...refused" (Exhibit # 2)

The videotape taken during the breathalyzer test session clearly demonstrates the Applicant's refusal. Thus, neither the circumstances leading up to the refusal, nor the credibility of the Applicant are at issue.

The Tribunal's original ruling stands and the Tribunal maintains any evidence relating to intimidation and the excess use of force is irrelevant and inadmissible.

At issue then is did the Applicant have a medical condition that could cause him to fail or not comply with the breath demand. If so, how does the medical condition of the Applicant relate to Section 50.1(2)(b) of the *Highway Traffic Act*. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

There is no indication that the Applicant has a medical condition that would prevent him from providing a breath sample. The Tribunal notes that, the Medical history in the Notice of Appeal is blank. (Exhibit # 2)

The Tribunal recognizes the possibility that being in a state of intimidation, may cause severe anxiety, which could impair the ability to provide a breath sample. However, it was evident from viewing the videotape that this was not the case.

According to Physician # 1, the Applicant's physician, the Applicant has a "...his skin condition..." for which he is taking medication. Physician # 1 proffers the estimation, that " he believed that the medication he as taking for his skin condition (Atarax and Tretracycline ...would interfere with the test... (Exhibit # 3)

The Applicant in his Notice of Appeal and at the Hearing adheres to this postulation. Although the Applicant claims to have mentioned this fear to Police Officer # 1, the Constable denies this assertion. On viewing the videotape of the request, it is evident that the Applicant offered no explanation for his refusal other than that he wanted to wait for his lawyer, who could not be reached until morning.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated May 13, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 4, 2001

ADLS - 0609

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF HEARING: June 27, 2001 Ottawa

DECISION

A hearing was held on June 27, 2001, at Ottawa, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: June 28, 2001

ADLS - 0609

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant

Counsel for Applicant

DATE OF
HEARING: June 27, 2001

DECISION
RELEASED: June 28, 2001

Ottawa

REASONS FOR DECISION

A hearing was held on June 27, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 28, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended,

chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated May 18, 2001, and was received by the Tribunal on May 24, 2001, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – received May 24, 2001.
- b) Exhibit # 2 Medical Report from Physician # 1 – received May 17, 2001.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received June 22, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant

to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "April 30/01" as set out in the Applicant's Notice of Appeal (Exhibit # 1).

Page 2 of the Notice of Appeal, signed on May 18, 2001 by the Applicant's Physician # 1, offers no comments regarding: "Details of Diagnosis: History of Diagnosis " or "Type of Measurements or recent test taken ".

Physician # 1 refers to "...ATTACHED letter of Physician # 1 – May 11/2001". Under his letterhead, Physician # 1, confirms that the Applicant "...has a respiratory disease called Chronic Obstructive Pulmonary Disease, also known as emphysema... On examination... on May 7, 2001 she had very reduced breath sounds bilaterally and has a barrel chest which denotes hyperinflation and correlates with the ability to develop only low expiratory flows and small volumes with each breath ...do not have formal pulmonary tests on record ...it is my professional opinion that the effort required to supply a breath sample that would allow a measured reading is more than any effort the Applicant would ever be able to supply given her C.O.P.D., and the restriction his places on her ability to blow out over any sustained period..."(Exhibit # 2).

An Affidavit from of Police Officer # 1 describes the attendance and subsequent volunteer breathalyzer testing of Physician # 1 at the Carlton Police Service. (Exhibit # 3).

In a letter dated June 14 2001 Physician # 2, MB,ChB,FRCP (UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respiratologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis... Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ... medical advisor to the pulmonary function laboratories for over 16 years... familiar with the Alcotest and the Intoxilyzer 5000C..."(Exhibit # 3).

Physician # 2 states that "... We have tested many patients with very severe chronic obstructive pulmonary disease. The vast majority are able to complete a breath test. It is my view that a decision regarding the Applicant's pulmonary function cannot be made until she has been referred a facility that can accurately measure some simple pulmonary function...."(Exhibit # 3).

At the hearing, the Applicant was represented by counsel, who introduced the Applicant's evidence by questioning the Applicant after allowing the Applicant to take the stand and give her answers under oath.

During the examination-in-chief, the Applicant testified as to her age, place of residence and place of employment.

The Applicant confirmed that Physician # 1 has been her personal physician for over one year, approximately since March, April or May of the year 2000. Prior to April 30, the Applicant had no dealings with Physician # 1 regarding respiratory concerns, and felt herself to be in good health. The Applicant's job requires her to maintain "...good health as the job is very physical".

The Applicant offered evidence regarding the circumstances leading up to the suspension. She explained the Constable approached her in pleasant manner and conformed to her request to move to a side street, in order to hide the situation from possible prying eyes on the main street.

As to the actual breathalyzer testing the Applicant affirmed that in total seven attempts had been made, and that "...I blew as hard as I could, but couldn't..." The Applicant testified that she told the Constable "I can blow longer but I can't get more air in the machine..."

When asked by her counsel whether each subsequent attempt to provide a breath sample got easier or more difficult, the Applicant replied that there was "...no difference..."

The Applicant stated that she was feeling "...excited..." at the time, but did want to be able to provide a breath sample as she was convinced the result would be negative.

Once the breathalyzer test session was finished, the Applicant stepped outside in order to have a cigarette, while the paperwork was completed, then was driven home by the Constable.

In cross-examination, in reply to questions posed by the Respondent the Applicant confirmed that she was not wheezing or out of breath and noted that she "...had more breath..." but the Constable gave her an indication to stop by saying "...whoa... whoa... whoa..."

The Applicant stated that she did not advise the Constable that she was experiencing any physical discomfort. In fact, she did have a cigarette during a break after the fourth attempt and was able to inhale and exhale without any problems.

The Applicant testified that she was not aware of Physician # 1's diagnosis until she saw his report. During the examination on May 7, 2001 Physician # 1 told the Applicant her "...lungs sounded clear...". Physician # 1 advised the Applicant to stop smoking and suggested "...following through would require a different examination..." (Exhibit # 2). To this date, no follow up appointments have been made, no medication was prescribed.

The Respondent called Police Officer # 2 as a witness. Police Officer # 2 testified that he has been in the Police Services since "...September 97 – 3 1/2 years..."

After relating events of the incident that led to the suspension, Police Officer # 2 confirmed that he had difficulty "...locating the plug..." but did find it "...behind the radio..." As the Applicant had expressed some concern, he then proceeded to test the machine to ensure the equipment was in proper working condition.

Police Officer # 2 attested that the machine registered an "error" message during each attempt made by the Applicant to provide a breath sample. The Applicant did not provide a reason as to her inability to provide a breath sample, other than to say "...she could not..." yet, the Constable noted air escaping from the mouthpiece and, not only explained but also demonstrated, the proper procedure for blowing into the machine.

At no time did he observe the Applicant being afflicted with a respiratory or any other physical difficulty, nor did the Applicant indicate to him that she was unwell or required medical assistance.

In closing, the solicitor for the Applicant, stressed that this matter was being appealed solely on the basis of Section 50.1 2(b). Counsel for Applicant remarked that the Constable's evidence had been comprehensive, based on memory supported by written notes and requested the Tribunal to accept the Constable's evidence in its totality. According to counsel for Applicant, the Applicant meets the criteria of Section 50.1 2(b) in that she willingly complied with the demand to provide a breath sample but was

unable to do so for medical reasons, which she was unaware existed, until she visited Physician # 1 on May 7, 2001.

Counsel for Applicant continued to argue that the letter from Physician # 1 should not be challenged and given more weight than Physician # 2's report, as Physician # 1 actually examined the Applicant. Further, Physician # 1 personally took upon himself to attend at the Police Service to voluntarily test the breathalyzer machine. Thus, his opinion of the Applicant's ability to comply with the demand to provide a breath sample is not conjectured but factual, based on personal experience and knowledge.

The Respondent, opened closing remarks by dismissing Physician # 1's report. The Respondent contends, that Physician # 1's report does not conform with the criteria set out in Sections 15(1) and (2) of Regulation 574 which provides "...that the medical practitioner that prepared the report was or is aware that the report may be used, in support of an appeal to the Tribunal...".

Further, the Respondent maintained, "...Physician # 1's letter fails to state the length of time that he has been the Applicant's physician, fails to state if he is a specialist; failed to detail the history and related tests..."

The Respondent emphasized that Physician # 1 proffered a diagnosis of emphysema, but prescribes no medication and does not recommend a follow up by a specialist.

The Respondent quoted a paragraph from Physician # 2's letter detailing the tests done on patients with lung disease and their ability to provide breath samples. In conclusion the Respondent pointed out that the Applicant was not coughing or wheezing nor demonstrating any of the symptoms generally associated with lung disease, and asked the Tribunal to uphold the suspension.

APPLICATION OF THE LAW TO FACTS:

Did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand? If so, how does the medical condition of the Applicant relate to Section 50.1(2)(b) of the *Highway Traffic Act*. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

Counsel for the Applicant requested the Tribunal rely implicitly on Police Officer # 2's evidence which indicates the Applicant was at all times cooperative and did not and at any time refuse to comply with the demand to provide a breath sample. Counsel for Applicant would have the Tribunal conclude that the reason the machine registered an "error" message was simply due to the Applicant's medical condition.

In reviewing the totality of Police Officer # 2's testimony, the Tribunal cannot ignore that the Constable also mentioned that he noted: "... air escaping from the side of the mouth piece..."; during a break, the Applicant stepped outside to have a cigarette; at no time was the Applicant perceived to be having any difficulty breathing.

The Applicant, by her own admission, did not note any physical symptoms other than that she was feeling "...excited...". The Applicant also confirmed that "...there was no

difference..." with each subsequent attempt made to provide a breath sample. This Tribunal's knowledge and previous experience in these matters, indicates that someone with emphysema would definitely find it progressively more difficult to continue blowing.

Thus, the Tribunal finds that Police Officer # 2's visual observation and the Applicant's own testimony do not support a finding that the Applicant was unable to provide a breath sample for medical reasons.

The Tribunal will now consider the two medical reports introduced in evidence by the Applicant and the Respondent, respectively, one from Physician # 1, the Applicant's physician, the other from an expert in the field, Physician # 2.

The Respondent contends that Physician # 1's report does not meet the criteria set out Sections 15(1) and (2) of Regulation 574. Section 15(1)(c) provides:

"that the medical practitioner that prepared the report was or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's license under section 50.1 of the Act."

The Tribunal disagrees with the Respondent's assumption that Physician # 1 was not aware of the purpose of this report. This premise is substantiated by the lengths that Physician # 1 went to, in arranging for his own participation in a breathalyzer test session. There can be doubt that Physician # 1 was aware of the function his report would serve.

The Tribunal recognizes that Physician #1's report does fail to meet the criteria of Section 15 (2) that further provides:

"The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests."

It is not disputed, that Physician # 1's report contains no medical history of the disease, nor mention of any follow up or medication prescribed. Yet, having deemed that Physician # 1 was fully cognisant of the reasons he was requested to write a report, the Tribunal will accept said report in evidence. The report's discrepancies are addressed hereinafter.

Physician # 1 asserts that the Applicant "...has a respiratory disease called Chronic Obstructive Pulmonary Disease, also known as emphysema..." (Exhibit # 2).

The word "chronic" implies long term. Taber's Cyclopedic Medical Dictionary provides the following description for C.O.P.D.: "Disease process which causes decreased ability of the lungs to perform their function of ventilation. Diagnostic criteria include history of persistent dyspnea on exertion, with or without chronic cough, and less than one half normal predicted maximum breathing capacity. Diseases which cause this are chronic bronchitis, pulmonary emphysema, chronic asthma, and chronic bronchiolitis". As previously stated, there is no evidence that the Applicant's condition existed prior to the incident on April 30. There is evidence, however, that the Applicant thought herself to be healthy. It appears that the Applicant's job is physically demanding; yet the Applicant encountered no problems before, nor since. Thus, it would appear that the

Applicant does not fit the established profile of someone with Chronic Obstructive Pulmonary Disease.

It could be argued, that since there is no history of the disease, prior to the medical consultation on May 7, the incident on April 30, was the first manifestation of the disease. The Tribunal dismisses this plausibility, due to the conflict created by the statements in Physician # 1's letter and the Applicant's viva voce evidence.

The Applicant testified, that she was not aware of the diagnosis until she read Physician # 1's letter. In fact, during the Applicant's visit to Physician #1's office, following a stethoscope examination, Physician # 1 told the Applicant her "...lungs sounded clear..."

The Tribunal's doubts are supported by the fact that, almost two months have elapsed, and Physician # 1 prescribed no medication, nor ordered a follow up with a specialist.

Counsel for Applicant suggests the Tribunal should "give more weight" to Physician # 1's report, as Physician #1 has tested the equipment himself and concluded that in his "...professional opinion that the effort required to supply a breath sample that would allow a measured reading is more than any effort the Applicant would ever be able to supply given her C.O.P.D., and the restriction this places on her ability to blow out over any sustained period..." (Exhibit # 2) The Respondent adopts the opposite position and requests that Physician # 2's report be given more credence, as Physician # 2 is a respiratory specialist.

The Tribunal concurs with the Respondent. With all due respect to Physician # 1, he is not a specialist in the field of pulmonary disorders, Physician # 2 is, and his credentials are impeccable: "...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years..."

Further, Physician # 2 is "...familiar with the Alcotest and the Intoxilyzer 5000C...". Physician #2 clarifies that he has "...tested many patients with very severe chronic obstructive pulmonary disease. The vast majority are able to complete a breath test."

With respect to the Applicant, Physician # 2 specifically states that her situation is not conclusive "...until she has been referred a facility that can accurately measure some simple pulmonary function..." Such a referral did not take place.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 30, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 4, 2001

1032506 ONTARIO LTD. O/A FORTE CONSTRUCTION CORP.

1032506 ONTARIO LTD. O/A FORTE CONSTRUCTION CORP.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel, representing the Applicant
CAROL STREET, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATES OF
HEARING:

May 28 and 29, 2001

Toronto

ORDER

WHEREAS a written Notice of Proposal dated August 9, 2000 to refuse to renew the registration of 1032506 Ontario Ltd. o/a Forte Construction Corp.(the Applicant) was issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal which appeal was to be heard in Toronto on May 28-31, 2001;

AND WHEREAS the hearing was adjourned on the first day of hearing on May 28, 2001 and both parties agreed to reconvene the next day on May 29, 2001;

AND WHEREAS in the course of the second day of hearing on May 29, 2001, the Tribunal was advised that the parties require an adjournment of the hearing to a further date;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the hearing is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Wednesday, June 27, 2001 and to continue on June 28, 2001, and to further continue on Monday, August 13 and 14, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair

Released: June 4, 2001

LUNNY

PREHEARING

JAMES AND CAROLE LUNNY

APPEAL FROM A DECISION OF THE
CORPORATION DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

JAMES LUNNY, representing himself and on behalf of Carole Lunny (the "Applicants")
FIL CECE, Appeals Clerk and DENIS FAUBERT, Regional Manager, representing the Ontario New Home Warranty Program (the "Respondent")

DATE OF

PREHEARING: May 31, 2001

By teleconference

ORDER

Following attendances *by teleconference* before the Licence Appeal Tribunal (the "Tribunal") on May 31, 2001, at a prehearing of James Lunny, representing himself and on behalf of Carole Lunny (the "Applicants"), and Fil Cece and Denis Faubert on behalf of the Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was no resolution of the issues in this matter at this time.
- 2) The parties agree that the three (3) issues to go before the Tribunal at the hearing are the roof shingles, the front step repair and the foundation problem.
- 3) The Applicants' shall provide to the Respondent and the Tribunal on or before June 15, 2001, by facsimile transmission and regular mail, any engineering or other expert reports which the Applicants wish to introduce at the hearing. The Tribunal's disclosure requirements set out in its Rules of Practice (particularly Rule 6.4 respecting the disclosure of the expert's name, qualifications, conclusions and so forth) shall be complied with.

- 4) The Respondent shall provide to the Applicants and the Tribunal on or before June 27, 2001, by facsimile transmission and regular mail, any responding expert reports that the Respondent wishes to introduce at the hearing.
- 5) The parties will exchange books of disclosure in accordance with the Rules of the Tribunal.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe,
Vice-Chair

Released: June 4, 2001

1280953 ONTARIO LIMITED O/A MORATO CARS AND RADOMIR MILJKOVIC

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RADOMIR MILJKOVIC, agent, representing himself and 1280953
Ontario Limited o/a Morato Cars
A. MICHAEL ROTHE, counsel, representing the Registrar,
Motor Vehicle Dealers Act,

DATE OF
HEARING: May 11, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar") pursuant to Section 7 of the *Motor Vehicle Dealers Act* (the "Act"). The Proposal, dated February 1, 2001, seeks to revoke the registrations of 1280953 Ontario Limited o/a Morato Cars (the "Dealer") as a motor vehicle dealers and of Radomir Miljkovic ("Miljkovic") as a motor vehicle salesperson.

The Proposal sets out the Registrar's reasons for the Registrar seeking an order for the revocation of both the above registrations. The reasons are stated as follows:

The Intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Registrants' conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

(Exhibit 3, Tab 1)

The particulars upon which the Registrar relies are stated in the Proposal as follows:

- 1) Radomir Miljkovic (hereinafter referred to as "Miljkovic") was registered as a motor vehicle salesperson on or about August 08, 1998.
- 2) Morato Cars (hereinafter referred to as the "Dealer") is an Ontario Corporation, which was registered as a motor vehicle dealer on or about August 06, 1998. At all material times, Miljkovic was the sole director of the corporation.

- 3) On or about November 8, 1999, the Dealer purchased a 1973 Mercedes 450 SLC VIN 10702412001322. The odometer reading on the vehicle at the time of purchase was unknown. On or about February 20, 2000, the Dealer sold the vehicle to Marcellous Cooper with an odometer reading of 30,609 kilometres thereby misrepresenting to the purchaser the true distance travelled.
- 4) On or about February 15, 2000 the Dealer purchased a 1993 GMC Jimmy, VIN 1GKDT13W8P2501560. The vehicle was branded as salvage and the odometer reading at the time of purchase was unknown. On or about March 7, 2000 the Dealer sold the vehicle to Dragan Marinovic, with an odometer reading of 148,000 kilometres thereby misrepresenting to the purchaser the true odometer reading on the vehicle. The Dealer also failed to disclose on the bill of sale that the vehicle was branded as salvage.
- 5) On or about March 28, 2000, the Dealer purchased a 1991 Volkswagon Jetta VIN WVWPA01G6MW597679. The vehicle was branded as salvage and the odometer reading at the time of purchase was 173,985 kilometres. On or about April 7, 2000, the Dealer sold the vehicle to Veselin Tadic with an odometer reading of 124,170 kilometres thereby misrepresenting to the purchaser the true distance travelled.
- 6) On or about May 9, 2000, the Dealer purchased a 1992 Volkswagon Golf VIN 3VWFA01G4NM023205. The odometer reading on the vehicle at the time of purchase was 200,620 kilometres. On or about June 9, 2000 the Dealer sold the vehicle to Zoran Milosevic with an odometer reading of 165,250 kilometres thereby misrepresenting to the purchaser the true odometer reading on the vehicle. The Dealer also failed to disclose on the bill of sale that the vehicle was branded as salvage.
- 7) On or about June 6, 2000, the Dealer purchased a 1992 Plymouth Grand Voyager, VIN 1P4GH44R9NX211411. The odometer reading on the vehicle at the time of purchase was 180,036 kilometres. On or about July 17, 2000 the Dealer sold the vehicle to Francisc Tarkanyi with an odometer reading of 131,300 kilometres thereby misrepresenting to the purchaser the true distance travelled.
- 8) On or about September 11, 2000, a representative of the Registrar attended the dealer's registered premises, located at 623 Keele Street, Toronto, Ontario, M6N 3E5, for the purposes of conducting an inspection under the Act. During the course of the inspection the dealer provided documents to be inspected which had been altered. In particular:
 - (a) The Dealer provided an Impact Auto computer generated Bill of Sale dated April 25, 2000, for a 1996 Volkswagon Jetta VIN 3VWRJ01H4TM031274, with the original odometer reading of 300,000 kilometres replaced with a hand written odometer reading of 5,960 kilometre;
 - (b) The Dealer provided an Impact Auto computer generated Bill of sale dated February 15, 2000, for a 1991 Volkswagon Gulf VIN 3VWFA01GOMM021790, with a hand written odometer reading;
 - (c) The Dealer provided an Impact Auto computer generated Bill of Sale dated February 29, 2000, for a 1996 Volkswagon Jetta GLS VIN 3VWSL81HXTM113228, with a hand written odometer reading; and
 - (d) The Dealer provided an Impact Auto a computer generated Bill of Sale dated March 14, 2000, for a 1991 Volkswagon Cabriolet VIN VWWCR0153MK017502, with a hand written odometer reading.
- 9) The Dealer has failed to disclose on the Bill of Sale, material information as to the true condition regarding the salvage status of the following vehicles;
 - (a) A 1991 Volkswagon Golf VIN 3VWFA01G0MM021790 sold on or about March 25, 2000, to Maja Miljkovic;

- (b) A 1996 Volkswagon Jetta GLS VIN 3VWSL81HXTM113228 sold on or about June 22, 2000, to Antonita Dordevic; and
- (c) A 1991 Volkswagon Cabriolet VIN WVWCR0153MK017502 sold on or about July 4, 2000, to Dragan Marinovic.

(Exhibit 3, Tab 1)

Subsequent to the Proposal the Registrar filed two Notices of Further and Other Particulars (the "further particulars") dated February 6, 2001 and April 12, 2001. The further particulars respectively stated as follows:

1. The Dealer has not been operating from his registered premise.
(Exhibit 3, Tab 2)

and

1. On or about December 4, 2000, Radomir Miljkovic was convicted for Operating as an Unregistered Dealer.
2. Radomir Miljkovic and 1280953 Ontario Ltd. o/a Morato Cars, has not complied with the provisions of the Motor Vehicle Dealers Act.
(Exhibit 3, Tab 3)

By written Notice the Dealer and Miljkovic informed the Tribunal, in terms of Section 7(2) of the Act, that they require a hearing regarding their appeal appeals to the Registrar's Proposal.

THE EVIDENCE:

The evidence prescribed to the Tribunal by the Registrar consisted of documentary evidence as well as the evidence of Jennifer Andrew ("Andrew") and Amanda Leedempsey ("Leedempsey").

Andrew's testimony was as follows:

She is an inspector with Ontario Motor Vehicle Industry Council ("OMVIC") and has been with OMVIC in that capacity for one and a half years.

On September 11, 2000 she attended at the Dealers premises at 623 Keele Street, Toronto in order to conduct an inspection. She spoke with Miljkovic at the Dealer's premises and inspected its books and records. She made written notes of her findings on that day and also completed a written "Inspection Findings" report. A copy of her "Inspection Findings" were handed to Miljkovic on September 11, 2000 and were signed for by him after she reviewed the findings with him. (Exhibit 3, Tab 7) The "Inspection Findings" state as follows:

Every vehicle that you purchase that is "salvage, or insurance write off" you must disclose that in writing on the bill of sale, accident repair is not acceptable in this case.

Andrew obtained from Miljkovic certain of the Dealer's documents and removed them to OMVIC's office for the purpose of making copies.

1973 MERCEDES 450 SLC

One of such documents was a bill of sale dated November 8, 1999 on the letterhead of Manheim's Oshawa Dealers Exchange ("Manheim"), an auction house. The bill of sale reflected that the Dealer had purchased a 1973 Mercedes 450 SLC (the "Mercedes") with the following declarations on the face of that bill of sale:

"TRUE KILOMETERS UNKNOWN"

and

"ODOMETER DISCLOSURE 30,608 KMS"

(Exhibit 3, Tab 8)

A second document obtained by Andrew at the inspection was a copy of a bill of sale dated February 20, 2000 from the Dealer to one Mr. Cooper in respect of the Mercedes motor vehicle. The VIN number that appeared on the bill of sale between Manheim and the Dealer was the same VIN number that appeared on the bill of sale between the Dealer and Cooper. There was no information given on the latter bill of sale as to the vehicle other than that it was sold "as is". There was no disclosure on the bill of sale from the Dealer to Cooper that the true kilometers were unknown.

1993 GMC JIMMY

A further document obtained by Andrew from the dealer and removed by her to OMVIC's offices was a bill of sale dated February 15, 2000 reflecting the sale by Impact Auto Auction's to the Dealer of a 1993 GMC Jimmy with the notation upon that bill of sale as follows:

"ODOMETER: T.M.U."

The bill of sale also noted that the vehicle was "Salvage".

Also obtained by Andrew at the time of her inspection was a copy of a bill of sale of a 1993 GMC Jimmy to Dragan Marincovic. The seller of this vehicle in terms of the bill of sale was the Dealer and the vehicle's VIN number corresponded to the VIN number of the 1993 GMC Jimmy the Dealer had bought from Impact Auto Auctions on February 15, 2000.

The "distance travelled" by this GMC Jimmy motor vehicle according to the bill of sale when the Dealer sold it to Marincovic was "148,000 kms". There was no information given on the latter bill of sale as to its condition and the statement made on the bill of sale was "as is".

Andrew stated she spoke with Impact Auto Auctions regarding the sale of this vehicle by them to the Dealer and pursuant to this discussion OMVIC received from them a copy of the schematic drawing of the vehicle's visible damage which they made at the time of receiving the vehicle for auction. This drawing indicated damage to the vehicle's left hand side and rear and the notation that it was delivered by "flatbed" to Impact Auto Auctions from which she concluded the vehicle was not in driveable condition. (Exhibit 3, Tab 9)

1991 VOLKSWAGON CABRIOLET

Andrew also stated that she received further documents from the Dealer and these documents related to a 1991 Volkswagon Cabriolet which the Dealer purchased under bill of sale dated March 14, 2000 from Impact Auto Auctions. This bill of sale reflected that the vehicle was a "salvage" vehicle. Also removed from the dealership was a copy of the bill of sale dated July 4, 2000 of this 1991 Volkswagon Cabriolet to Dragan Marincovic. This latter bill of sale, according to Andrew had no information regarding the condition of the vehicle including that it was "salvage" other than the following:

"AS IS MISSING PARTS"
(Exhibit 3, Tab 16)

1991 VOLKSWAGON JETTA

Among the documents Andrew removed from the dealer was a copy of an Impact Auto Auctions' bill of sale dated March 28, 2000 of a 1991 Volkswagon Jetta. The purchaser of this vehicle was the Dealer. The copy of the bill of sale removed by Andrew appeared to have been altered in ink in that the odometer reading of the vehicle was written in ink as "123,985 kms".

Andrew contacted Impact Auto Auctions and received from them a copy of the bill of sale retained by them and signed by Miljkovic on behalf of the Dealer when purchasing the vehicle. On this, Impact Auto Auctions printed bill of sale the odometer reading on it was "173,985" kms. Also obtained by Andrew from Impact Auto Auctions was a copy of the document they completed when they received the vehicle for auction. Amongst the information noted on this document is the odometer reading of the vehicle and it is noted as "173,985" kms. (Exhibit 3, Tab 10, page 1, 2 and 3)

Also removed from the Dealer at the time of inspection by Andrew was the bill of sale dated April 7, 2000 of this 1991 Volkswagon Jetta from the Dealer to Veselin Tadic. On this bill of sale the vehicle's "distance travelled" was recorded as "124,170 kms".

1992 VOLKSWAGON GOLF

When Andrew inspected the records of the Dealer, she removed certain documents relating to this vehicle. Among the documents removed was a copy of a bill of sale between Impact Auto Auctions and the Dealer dated May 9, 2000 when the Dealer purchased a 1992 Volkswagon Golf vehicle at auction. The copy of the bill of sale reflects an alteration in ink to the odometer reading as "165,000" kms. The bill of sale also reflects the vehicle as a "salvage" vehicle. Andrew obtained from Impact Auto Auctions a photocopy of their bill of sale to the Dealer which showed no alterations at all and indicated the vehicle's odometer reading being 200,620 kms. Also obtained from Impact Auto Auctions was a copy of the condition report on this vehicle when it was received for auction, and this document reflects the odometer reading of the vehicle to be "200,620" kms.

Andrew had also received from the Dealer the copy of the bill of sale regarding this vehicle when it was sold by the Dealer to Zoran Milosevic. The "distance travelled" by the vehicle according to this bill of sale was "165,250 kms", and it contained no

information regarding the vehicle other than it being sold by the Dealer to Milosevic "as is". (Exhibit 3, Tab 11)

1992 PLYMOUTH GRAND VOYAGER

Andrew stated she received from the Dealer at the time of her inspection the Dealer's copy of the bill of sale from Impact Auto Auctions when the Dealer bought the vehicle on auction. The copy of the bill of sale dated June 6, 2000 indicated an apparent alteration in ink to the odometer reading of the vehicle at the time of auction. What had been written in ink on this document appeared to be 130,008 kms. Andrew obtained a copy from Impact Auto Auctions of this bill of sale and a copy of the vehicle's condition report completed by Impact Auto Auctions when they received the vehicle for auction.

The bill of sale received from Impact Auto Auctions revealed no alterations to it and also indicated that the vehicle's odometer reading was 180,000 kms. The condition report regarding the vehicle showed it had an odometer reading of 180,036 kms when received by Impact Auto Auctions for auction.

Andrew testified further that she had removed the Dealer's copy of the bill of sale dated July 17, 2000 when it sold this vehicle to Franciso Tarkanyi. On this bill of sale the "distance travelled" was given as "131,300 kms". The bill of sale has the statement on it that the vehicle was sold "as is" and that it had an "electric problem". (Exhibit 3, Tab 12)

1996 VOLKSWAGON JETTA

When inspecting the records of the Dealer on September 11, 2000, Andrew removed for inspection a copy of a bill of sale between Impact Auto Auctions on behalf of their client Wawanesa Mutual Insurance Company and the Dealer dated April 25, 2000 when the Dealer purchased on auction the 1996 Volkswagon Jetta.

The bill of sale appeared to have been altered in that there had been written in ink, after the word "odometer", the figure "5,960". Andrew obtained from Impact a photocopy of the bill of sale in their records as well as the condition report of the vehicle when received for auction. Impact Auto Auctions' copy of the bill of sale of the vehicle to the Dealer reflected the odometer reading as "300,000" kms while the condition report mentioned nothing under the vehicle's odometer reading.

Andrew referred to the Department of Transportation's print out in relation to the various ownership registrations relating to this vehicle and noted that registration of title to this vehicle passed from Wawanesa Mutual Insurance Company to the Dealer on May 1, 2000 and from the Dealer to Impact Auto Auctions on July 19, 2000. (Exhibit 3, Tab 13)

1991 VOLKSWAGON GOLF

Andrew confirmed having obtained from the Dealer a copy of the bill of sale of February 15, 2000 when the Dealer purchased a 1991 Volkswagon Golf motor vehicle from Impact Auto Auctions. A perusal by Andrew of this bill of sale indicated that the odometer reading on the bill of sale appeared to have been altered in ink and now read "162,953 kms".

Andrew obtained from Impact Auto Auctions a copy of the bill of sale according to their records and on receipt of this copy bill of sale noted that Impact Auto Auctions' copy read "162,953" kms.

Andrew also testified that she obtained from the Dealer a copy of the bill of sale dated March 25, 2000 when the Dealer sold the above vehicle to a member of the public. The "distance travelled" by the vehicle on this bill of sale was "163,000 kms", but no mention was made on the bill of sale that it was a salvage vehicle and that it was sold "as is". (Exhibit 3, Tab 14)

1996 VOLKSWAGON JETTA GLS

Andrew testified that a 1996 Volkswagen Jetta GLS had been sold through Impact Auto Auctions to the Dealer under a bill of sale dated February 29, 2000 and that the copy of the bill of sale obtained from the Dealer showed the odometer reading had been written in ink at "128,667" kms. When compared by her to a copy of the bill of sale obtained by OMVIC from Impact Auto Auctions, there was no alteration on the computer generated bill of sale obtained from Impact which did show the odometer reading as "128,667" kms. (Exhibit 3, Tab 15)

Andrew also stated that the bill of sale, from Impact Auto Auctions to the Dealer, stated that the vehicle was "salvage" while the bill of sale from the Dealer to a member of the public makes no reference to the vehicle being "salvage".

1991 VOLKSWAGON CABRIOLET

Andrew stated that a 1991 Volkswagen Cabriolet motor vehicle was sold through Impact Auto Auctions to the Dealer under a bill of sale dated March 14, 2000 and that the copy of that bill of sale obtained by OMVIC from the Dealer's records indicated what appeared to be an alteration in ink on the Dealer's copy respecting the vehicle's odometer reading. The ink alteration indicated the odometer reading as "102,507" kms.

When Impact Auto Auctions' copy of the bill of sale was received from them there was no alteration to Impacts computer generated copy which reflected the vehicle's odometer reading as "102,507" kms.

The bill of sale dated July 4, 2000, when this vehicle was sold to a member of the public by the Dealer, did not disclose that the vehicle was "salvage" whereas the vehicle was sold to the Dealer by Impact Auto Auctions as "salvage" according to that bill of sale. (Exhibit 3, Tab 16)

Upon the completion of Andrew's testimony, Amanda Leedempsey testified for the Registrar and stated that she has been employed by OMVIC since 1997 and has held the position of Manager of Inspections since 1999.

She explained that OMVIC has, since January 1997, delegated authority and responsibility to administer the Act and its Regulations. She stated that she was familiar with the file pertaining to the Dealer and Miljkovic and the reasons for the Notice of Proposal to revoke their registrations. According to the computerized information obtained from the Companies Branch, the business name under which the Dealer operates is "Morato Cars" and that the Dealer is a Corporation with Miljkovic as its sole director. (Exhibit 3, Tab 5)

Leedempsey referred to four charges brought against Miljkovic under the Act, and particularly to two of such charges that related to Miljkovic carrying on business as a motor vehicle dealer and buying and selling motor vehicles when he was not registered to do so as required by Section 3(1)(a) of the *Motor Vehicle Dealer Act*. On December 1, 2000, Miljkovic plead guilty to the two counts of carrying on business as a motor vehicle dealer when he was not registered to do so. He was found guilty on the charges and fined \$250.00 on each charge.

Leedempsey testified of her concerns where a dealer does not disclose the true mileage of a motor vehicle that he sells. This is a material disclosure that should be made in all instances which affects the ability of a purchaser to make an informed decision as to what he considers is the vehicle's true worth. Furthermore, all purchasers are entitled to be informed when purchasing a motor vehicle as to its condition and whether it is a salvage vehicle, which can influence a purchaser in deciding whether or not to purchase the vehicle and what to pay.

At the conclusion of evidence for the Registrar, Miljkovic took the stand and testified.

As to the criminal conviction, Miljkovic stated that he made a mistake in pleading guilty to the two charges and did so on advice he should not have heeded.

Miljkovic also stated that in many cases when he purchased vehicles at auctions the vehicles had no batteries that were operational and hence the digital odometer did not give a reading when the vehicle was inspected prior to bidding on the vehicle. While the bill of sale could be inspected as to conditions relating to the state of the vehicle, this was not always possible as the auctions were rushed affairs with little or no time to adequately view the bill of sale.

Miljkovic testified that the Dealer purchased, the 1996 Volkswagon Jetta, through Impact Auto Auctions under bill of sale dated April 25, 2000 (Exhibit 3, Tab 13). After the vehicle was sold at the auction, Miljkovic started the vehicle and noticed the odometer reading was 5,960 kms. Immediately he went to speak with the owner of Impact Auto Auctions in view of the disclosure on the bill of sale that the vehicle had an odometer reading of 300,000 kms whereas the odometer read 5,960 kms. When the owner of Impact refused to return the purchase price paid by the Dealer, Miljkovic left the vehicle with Impact Auto Auctions with instructions for them to resell it. This they did, and the vehicle was not offered by the Dealer to the public.

FACTS FOUND PROVEN:

On the documentary and oral evidence, the following facts are found to have been proven.

1. Miljkovic is presently registered as a motor vehicle salesperson under the Act.
2. 1280953 Ontario Limited, operates as Morato Cars, and is presently registered as a motor vehicle dealer under the Act.
3. Miljkovic was at all relevant times the sole Director of the Dealer and represented the Dealer in all its purchases and sales transactions.

4. On September 11, 2000, OMVIC investigator handed Miljkovic a written copy of her inspection findings and explained OMVIC's requirements of the Dealer relative to the sale by it of all motor vehicles.
5. On November 8, 1999, the Dealer purchased a 1973 Mercedes 450 SLC motor vehicle through Mannheim Oshawa Dealers Exchange and Miljkovic represented the Dealer in concluding the sale. The bill of sale stated on its face that the Mercedes motor vehicle's true kilometers were unknown while the vehicle's odometer reading disclosed a figure of 30,608 kms. On February 20, 2000, the Dealer entered into a bill of sale in respect of the Mercedes motor vehicle with one M. Cooper, and represented on that bill of sale that the distance then travelled by the vehicle was 30,609 kms.
6. On February 15, 2000, the Dealer purchased a 1993 GMC Jimmy motor vehicle through Impact Auto Auctions, and Miljkovic represented the dealer in concluding that sale. The bill of sale stated on its face that the GMC Jimmy vehicle's true mileage was unknown and that the vehicle was branded as salvage. The Dealer subsequently sold the GMC Jimmy motor vehicle to one, Dragan Marinovic under a bill of sale which disclosed that the vehicle had travelled a distance of 148,000 kms at the date of the sale to Marinovic, and the bill of sale did not disclose that the vehicle was branded as salvage.
7. On March 28, 2000, the Dealer purchased a 1991 Volkswagon Jetta through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the 1991 Volkswagon Jetta was branded salvage, and its odometer registered 173,985 kms. On April 7, 2000, the Dealer entered into a bill of sale in respect of the above 1991 Volkswagon Jetta with one Veslin Tadic and represented on that bill of sale that the vehicle had travelled a distance of 124,170 kms.
8. On May 9, 2000, the Dealer purchased a 1992 Volkswagon Golf motor vehicle through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the vehicle 1992 Volkswagon Golf motor vehicle was branded salvage and its odometer registered 200,620 kms. Subsequently the Dealer entered into a bill of sale with Zoran Milosevic whereby it sold the vehicle to Milosevic. In the bill of sale to Milosevic, the dealer represented that the vehicle had travelled a distance of 165,250 kms and did not disclose that the vehicle was branded salvage.
9. On June 6, 2000 the Dealer purchased a 1992 Plymouth Grand Voyager through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the 1992 Plymouth Grand Voyager had at the time of the sale to the Dealer an odometer reading of 180,000 kms. On July 17, 2000, the Dealer entered into a bill of sale with Franciso Tarkanji in terms of which the Dealer sold the 1992 Plymouth Grand Voyager to Tarkanji. In that bill of sale the Dealer represented that the vehicle had travelled a distance of 131,300 kms.
10. On April 25, 2000, the Dealer purchased a 1996 Volkswagon Jetta through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the 1996 Volkswagon Golf had at the

time of its sale to the Dealer an odometer reading of 300,000 kms and was branded salvage. Immediately after completion of the bill of sale, the Dealer left the motor vehicle with Impact Auto Auctions and arranged for it to be resold by the latter for and on behalf of the Dealer. The vehicle was subsequently sold through Impact Auto Auctions for and on behalf of the Dealer.

11. On February 15, 2000, the Dealer purchased 1991 Volkswagon Golf through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the 1991 Volkswagon Golf had at the time of its sale to the Dealer an odometer reading of 162,953 kms and was branded as salvage. On March 25, 2000, the Dealer entered into a bill of sale in respect of the vehicle with a member of the public as purchaser. In that bill of sale the Dealer represented that the distance travelled by the vehicle was 163,000 kms but did not state that the vehicle was branded salvage.
12. On February 29, 2000, the Dealer purchased a 1996 Volkswagon Jetta GLS through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the vehicle had an odometer reading of 128,667 kms and was branded salvage. On June 22, 2000, the Dealer entered into a bill of sale in respect of the 1996 Volkswagon Jetta GLS with one Antonita Dordevic as purchaser. In the bill of sale, the Dealer represented that the motor vehicle referred to had travelled a distance of 128,705 kms and that "Left Bumper repaired".
13. On March 14, 2000, the Dealer purchased a 1991 Volkswagon Cabriolet through Impact Auto Auctions, and Miljkovic represented the Dealer in concluding that sale. The bill of sale stated on its face that the 1991 Volkswagon Cabriolet had at the time of its sale to the Dealer an odometer reading of 102,507 kms and was branded salvage. On July 4, 2000, the Dealer entered into a bill of sale in respect of the vehicle with one Dragan Marinovic as purchaser. In that bill of sale, the Dealer reflected that the distance travelled by the vehicle was 102,895 kms but did not disclose the vehicle was branded salvage.
14. On December 1, 2000 Miljkovic plead guilty to two counts contravening Section 3(1)(a) of the Act in carrying on business as a motor vehicle dealer when he was not registered to do so. Miljkovic was found guilty of those two counts and fined the sum of \$250.00 on each count.

THE LAW:

Section 3.(1)(a) of the *Motor Vehicle Dealers Act* states:

3.(1) No person shall,

- (a) carry on business as a motor vehicle dealer unless
the person is registered under this Act; or

.....

Section 5.(1)(b) of the *Motor Vehicle Dealers Act* states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

Section 6.(2) of the Act states:

.....

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

.....

Section 16.(2)(o) of Regulation 801 as amended states:

(2) Where a used motor vehicle is sold, the sales or purchase order shall show,

.....

- (o) the distance travelled by the vehicle at the time of sale; and

.....

Section 13.(4)(a) of Regulation 801 as amended states:

(4) It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,

- (a) operates from premises located in Ontario that are approved by the Registrar;

.....

APPLICATION OF LAW TO FACTS:

In these proceedings the Registrar proposes to revoke the registrations of the Dealer and Miljkovic on the basis of Section 5.(1)(b) and Section 6.(2) of the Act.

There are five issues for consideration by the Tribunal, namely

1. Did the Dealer misrepresent the odometer readings on various motor vehicles it sold to the public?
2. Did the Dealer fail to disclose material facts to various purchasers of motor vehicles at or prior to those purchasers purchasing the vehicles?

3. Did the Dealer, during the course of the Registrar's investigation into and inspection of the Dealer's books and records, alter the numbers in the books and records with the intention of misleading or obstructing the Registrar?
4. Did the Dealer operate the business of a motor vehicle dealer other than from its registered premises?
5. Has Miljkovic been convicted of contravening Section 3.(1)(a) of the Act in that he carried on the business of a motor vehicle dealer when not registered under the Act?

It is necessary to note that it is the Registrar's belief that is at issue in these proceedings, not that of the Tribunal. In the Commercial Registration Appeal Tribunal's decision, released on February 21, 2000, in the matter of *The Registrar of Motor Vehicle Dealers Act* and James Stone, the Tribunal repeated the Court's requirements respecting a proposal:

"The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself"

The proper function of the Tribunal is therefore to review the Registrar's decision in order to determine whether or not he was in error in coming to his decision to revoke both registrations. This, therefore, is a review of the Registrar's decision on the five issues pertinent to this matter.

ISSUE 1 - ODOMETER READINGS

When the Dealer, represented by Miljkovic, purchased the 1973 Mercedes 450 SLC motor vehicle at the Maniheim Oshawa Dealers Exchange, he received a bill of sale which clearly states that the true kilometers travelled by the vehicle were unknown. Despite this disclosure, as well as the written warning given by the inspector to Miljkovic when she visited the Dealer on September 11, 2000 and left her written inspection findings with the Dealer, the bill of sale when the Dealer sold the vehicle to Cooper did not mention that the "true kilometers were not known".

Each one of the motor vehicles that was the subject matter of this hearing had been purchased by the Dealer, represented by Miljkovic, at an auction. In each instance, Miljkovic received from the auctioneer at the time of purchase a bill of sale that stated

what the vehicles odometer reading was, or if not known to the auctioneer, that the true mileage was unknown.

When the Dealer, represented by Miljkovic, subsequently sold the vehicles noted below to members of the public, the Dealer did not disclose either the vehicles' true odometer readings or failed to disclose that the vehicles' true odometer readings were unknown.

- (a) With the 1973 Mercedes 450 SLC, despite Miljkovic knowing that the vehicle's true mileage was unknown, he chose not to disclose this fact to the purchaser of the vehicle.
- (b) With the 1993 GMC Jimmy, despite Miljkovic knowing that the vehicle's true mileage was unknown, he failed to disclose this fact on the Dealer's bill of sale when selling the vehicle to a member of the public and falsely stated that the vehicle had travelled a distance of 148,000 kms.
- (c) With the 1991 Volkswagon Jetta, despite Miljkovic knowing that the motor vehicle's odometer registered 173,985 kms, he falsely stated in the bill of sale, when the vehicle was sold by the Dealer to a member of the public, that it had travelled 124,170 kms.
- (d) With the 1992 Volkswagon Golf, despite Miljkovic knowing that the motor vehicle's odometer registered 299,620 kms, he falsely stated in the bill of sale when the vehicle was sold by the Dealer to a member of the public that it had travelled 165,250 kms.
- (e) With the 1992 Plymouth Grand Voyager, despite Miljkovic knowing that the motor vehicle's odometer registered 180,000 kms, he falsely stated in the bill of sale when the vehicle was sold by the Dealer to a member of the public, that it had travelled 131,300 kms.

The Tribunal finds that in the five instances above Miljkovic did not carry on business with integrity and honesty. There can be no doubt that when a member of the public purchases a second hand motor vehicle he wishes to make an informed decision before committing himself to a purchase. It is clearly material to any purchaser of a second hand motor vehicle that the vendor has disclosed to him all relevant and material information concerning the vehicle. It is both relevant and material to the contract that the purchaser knows the true mileage the vehicle has travelled which will help indicate if the price asked is fair and reasonable. The disclosures regarding odometer readings or distances travelled by the five vehicles enumerated above, were not only flagrantly false but flew in the face of the written warning given by investigator Andrew in her written notice to Miljkovic of September 11, 2000 which she handed to Miljkovic and explained to him.

The conduct of Miljkovic affords the Registrar reasonable grounds for belief that neither Miljkovic or the Dealer will carry on business in accordance with law and with integrity and honesty.

ISSUE 2 - NON DISCLOSURE OF MATERIAL FACTS TO PURCHASERS BY MILJKOVIC

In the following instances the Dealer, represented by Miljkovic, failed to disclose to purchasers of motor vehicles that such vehicles were branded salvage despite Miljkovic knowing that the vehicles, when purchased by the Dealer, had been branded salvage.

- (a) the 1993 GMC Jimmy motor vehicle.
- (b) the 1992 Volkswagon Golf motor vehicle.
- (c) the 1991 Volkswagon Golf motor vehicle.
- (d) the 1996 Volkswagon Jetta GLS motor vehicle.
- (e) the 1991 Volkswagon Cabriolet motor vehicle.

The branding of a motor vehicle as salvage indicates serious damage has occurred to the motor vehicle. When such a motor vehicle has, as is the case of each of the five above motor vehicles, been auctioned on behalf of an insurance company it indicates that the insurance company had decided that the vehicle had been damaged beyond economical repair and was being sold as salvage.

Motor vehicle dealers are well aware that at auctions, such as those conducted by Impact Auto Auctions, Dealers will likely buy salvage vehicles, and this fact is clearly stated on the auctioneer's bill of sale.

The Dealer having bought a motor vehicle branded salvage and then selling that vehicle to a member of the public without disclosing that the vehicle is salvage is unethical and clearly contrary to the explicit written instructions given to Miljkovic by Andrew on September 11, 2000 when she was at the Dealer's premises.

The failure of Miljkovic to disclose the fact that the motor vehicle's were branded salvage gives the Registrar further reasonable grounds for belief that neither Miljkovic or the Dealer will carry on business in accordance with law and with integrity and honesty.

ISSUE 3 - ALTERATION OF CERTAIN RECORDS BY THE DEALER

The Registrar contends that the Dealer not only altered its records but also did so with the intention of misleading the Registrar.

The Registrar identified the following bills of sale having been altered by Miljkovic after the Dealer was given the bill of sale by Impact Auto Auctions.

- (a) Impact Auto Auctions bill of sale respecting the letters "TMU" in regard to the 1993 GMC Jimmy.
- (b) Impact Auto Auctions bill of sale respecting the alteration of the odometer reading of the 1991 Volkswagon Jetta from 173,985 kms to 123,985 kms.

- (c) Impact Auto Auctions bill of sale respecting the alteration of the odometer reading of the 1992 Volkswagon Golf from 200,620 kms to 165,000 kms.
- (d) Impact Auto Auctions bill of sale respecting the alteration of the odometer reading of the 1996 Volkswagon Jetta from 300,000 kms to 5,960 kms.

As to the 1993 GMC Jimmy bill of sale referred to in (a) above, the Tribunal finds no alteration was made to the letters "TMU" on the copy of the computer generated bill of sale given to Miljkovic by Impact Auto Auctions. The inked in letters "TMU" are the same letters as appear in the computer generated copy given to Miljkovic. For the Registrar to infer this is an "alteration" is unreasonable and unfair to Miljkovic. The Tribunal finds that there was no change made to the computer generated bill of sale and there was no proof Miljkovic intended to mislead the Registrar by inking over what was already in the computer generated version of the bill of sale.

As to the 1991 Volkswagon Jetta bill of sale dealt with in (b) above, the Tribunal finds that this was an intentional alteration by Miljkovic with the intention to mislead the Registrar and to support the false "distance travelled" recorded by Miljkovic in the Dealers subsequent bill of sale with the purchase of the vehicle.

Similarly, as to the 1992 Volkswagon Golf bill of sale dealt with in (c) above, the Tribunal finds that this was an intentional alteration by Miljkovic with the intention to mislead the Registrar and to support the false "distance travelled" recorded by Miljkovic in the Dealers subsequent bill of sale with the purchaser of that vehicle.

Other "alterations" have not been shown by the Registrar to be other than what in fact appeared in the computer generated copy of the other bills of sale. The fact that Miljkovic wrote in ink in his handwriting on his copy what already appeared on Impact Auto Auctions bill of sale does not support the Registrar's allegation that the "alteration" was made with the intention of misleading or obstructing the Registrar in his investigations.

One bill of sale in respect of the 1996 Volkswagon Jetta requires comment by the Tribunal. The evidence of Miljkovic - undisputed by the Registrar - is that, immediately after the Dealer's purchase of the vehicle at the Impact Auto Auctions auction sale, Miljkovic complained about the digital odometer reading of the vehicle being completely at odds with the 300,000 kms recorded on the bill of sale. That vehicle was never sold to the public by the Dealer. It was left with the auctioneer to resell on behalf of the Dealer, which was done, and there is no allegation that this resale through Impact Auto Auctions disclosed an odometer reading other than 300,000 kms.

In regard to the 1991 Volkswagon Jetta and the 1992 Volkswagon Golf dealt with at (b) and (c) above, the conduct of Miljkovic in falsifying the odometer readings affords the Registrar with reasonable grounds for his belief that Miljkovic will not carry on business in accordance with law and with integrity and honesty.

ISSUE 4 - REGISTERED PREMISES

The Tribunal finds no evidence to support the Registrar's allegation that the Dealer failed to operate from its registered premises.

ISSUE 5 - CRIMINAL CONVICTION

Miljkovic plead guilty to two industry related charges of carrying on business as a motor vehicle dealer when not registered in contravention of Section 3.(1)(a) of the Act. Miljkovic was found guilty as charged and his statement in testimony that he was somehow coerced to plead guilty is not accepted by this Tribunal.

These convictions are recent in time and industry related. The convictions and the course of conduct displayed by Miljkovic in the other matters enumerated above leads the Tribunal to believe that he is an unsuitable person to be registered as a motor vehicle salesperson or to be the Director and controlling mind of a motor vehicle dealer. The Tribunal agrees with the Registrar that the registrations of Miljkovic as a motor vehicle salesperson and the Dealer as a motor vehicle dealer be revoked.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated February 1, 2001, to revoke the registration of Radomir Miljkovic as a motor vehicle salesperson under the Act and 1280953 Ontario Limited o/a Morato Cars as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: June 4, 2001

PREHEARING

1270991 ONTARIO INC. O/A AREIA FINISH CONCRETE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

No one appearing for the Applicant
No one appearing for the Registrar, Ontario New Home Warranty
Program

DATE OF

PRE HEARING: June 4, 2001

Toronto

ORDER

WHEREAS a written Notice of Proposal dated February 5, 2001 to refuse the registration of 1270991 Ontario Inc. o/a Areia Finish Concrete (the Applicant) was issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal;

AND WHEREAS the Tribunal in response to a motion by the Applicant directed the parties to participate in a prehearing conference before the Tribunal at 1:30 p.m. on Monday, June 4, 2001, at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS there was no appearance by the parties at the prehearing conference on June 4, 2001 at 1:30 p.m. at the Tribunal's aforesaid Chambers;

NOW THEREFORE the Tribunal orders that the prehearing conference be and is hereby dismissed.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

ERLAND

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MICHAEL ERLAND

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MICHAEL ERLAND

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

BROOKFIELD HOMES LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 14-18, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Monday, October 22, 2001, and to continue October 23-26, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 7, 2001

YONECI, MAHMOUD o/a A.R. AUTO WHOLESALE NETWORK

MAHMOUD YONECI O/A A.R. AUTO WHOLESALE NETWORK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: SHEENA MACKASKILL, Vice-Chair

APPEARANCES:

LEO ADLER, counsel, representing the Applicant
MARY JANE SOUTH, agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

June 1, 2001

Toronto

REASONS FOR RULING

BACKGROUND:

This is a motion brought by the Applicant for the determination of two preliminary issues:

- 1) Should the Registrar be prohibited from proceeding with the allegations set out in ground #2 of the Notice of Proposal to revoke the registration of the Applicant?
- 2) Has the Registrar provided for full disclosure pursuant to Rules 6.1, 6.2, 6.3 and 6.6 of the Rules of Practice of the Licence Appeal Tribunal?

The parties have agreed, on consent, to adjourn the hearing of this appeal to Friday, September 21, 2001.

FACTS:

The Applicant has been registered as a motor vehicle dealer since November 24, 1989. On July 23, 1993 the Applicant was convicted of aiding and abetting under the Immigration Act. On April 27, 1995 the Applicant was convicted on two counts of assault pursuant to the Criminal Code. According to the materials filed on the motion, the Applicant received a sentence of 30 days, probation for three years and prohibition from possessing firearms, ammunition or explosive substances for ten years. The Applicant did not disclose information about the Immigration Act conviction on his applications for registration under the *Motor Vehicle Dealers Act* (the "Act"). The Applicant did disclose information about the assault convictions on his application for renewal dated August 21, 1996.

By letter dated October 30, 2000 the Registrar received information from the Ontario Provincial Police regarding the following charges against the Applicant: assault with a weapon, use of a firearm to commit, possession of a firearm with altered serial number, possession of a firearm while prohibited, possession of a restricted firearm with ammunition and careless storage of a firearm. On the basis of this information, inter alia, the Registrar issued a Notice of Proposal to Revoke Registration dated December 28, 2000. On January 15, 2001 the Applicant filed a Notice of Appeal.

APPLICANT'S POSITION:

(i) pending charges

The Applicant advances three arguments in support of his motion to prohibit the pending criminal charges as a ground for revocation in the Notice of Proposal. First, counsel for the Applicant states that 'pending charges' are not evidence of past conduct as required under section 5(1)(b) of the Act. Section 5(1)(b) states:

An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty:

The Applicant argues that it would be unfair to allow the Registrar to proceed on the basis of unproven criminal charges. It is his contention that the Registrar is limited to relying on actual convictions as a basis for past conduct.

Second, the Applicant states that it would be highly prejudicial to permit the evidence of the investigating police officers because they were not witnesses to the alleged offences. Counsel states that these charges were made by the Applicant's ex spouse. She reported her complaints to the police officers whom the Registrar intends to call as witnesses. Counsel contends that most, if not all, of the evidence to be given by the two police officers will be hearsay. He submits that the complainant's allegation that she was threatened with a gun is denied by the Applicant. According to the Applicant, it is not disputed that the police found a gun. It is disputed that the Applicant used a gun to threaten the complainant.

Third, the Applicant argues that the "pending charges" and the circumstances relating thereto are irrelevant unless the charges relate to an industry specific offence such as odometer tampering or possession of stolen vehicles. The Applicant's position is that there is no link between the pending charges of assault and possession of a firearm and the Applicant's ability to carry on business with honesty and integrity as a motor vehicle salesperson and/or dealer.

(ii) disclosure

The Applicant seeks disclosure in the form of "will say" statements from the two police officers and the Registrar, Ms. South, pursuant to Rule 6 of the Licence Appeal Tribunal Rules of Practice. The Applicant also requests production of copies of all OPP checks to determine if the Applicant's conviction pursuant to the Immigration Act was considered by the OPP to be a criminal matter. The Applicant asserts that he did not

disclose this matter to the Registrar on his application forms because he did not think that an Immigration Act conviction formed part of a criminal record. It is argued that production of the OPP checks may support the Applicant's honest and mistaken belief. According to Exhibit 'A' to the affidavit of Yovanka McBean, sworn May 29, 2001, the Registrar does not have possession of copies of OPP checks which may have been done on previous applications.

REGISTRAR'S POSITION:

(i) pending charges

The Registrar agrees that the "pending charges" per se are not relevant to past conduct; however, the Registrar contends that the facts and circumstances underlying some of the charges are relevant. Specifically, statements made by the Applicant and the complainant to the investigating police officers subsequent to the commission of the alleged offences may provide reasonable grounds for belief with respect to the Applicant's past conduct. Further, the Registrar points out that hearsay evidence is admissible pursuant to the Statutory Powers Procedures Act. The investigating police officers will testify that they not only obtained evidence from the complainant and the Applicant but were directly involved in the recovery of the gun.

The Registrar cited several authorities for the proposition that it is not industry specific offences alone which may form the basis for a refusal to grant or renew registration under section 5 of the Act. In *Roadsport Automotive Inc.* (1998) O.C.R.A.T.D. No. 138, the Tribunal upheld the Registrar's decision to revoke registration because of the Applicant's history of cocaine trafficking and other drug related convictions. The Tribunal held at paragraph 12:

"There is no evidence before the Tribunal to facilitate a conclusion that questionable personal ethics, that reflect on one's integrity, honesty and propensity to obey the law, can be compartmentalized into either of one's personal or business domains, and not the other."

There is also authority for the proposition that the Tribunal is entitled to consider the facts underlying the pending charges as evidence of past conduct, see *Jacobs Sales & Service Inc.* (Re) (1998) O.C.R.A.T.D. No. 198, *Biunio* (June 27, 2000) David J. Hunt presiding and *Wiebe* (October 2, 1998) Dennis Shrewchuk presiding.

In reply, the Applicant argued that the foregoing cases are distinguishable from the case at hand because the facts underlying the pending charges related to industry specific offences. In *Jacobs*, allegations of odometer tampering formed part of the pending charges and also part of the documented misrepresentations investigated by OMVIC. In *Buinnio*, the police officer who was part of a surveillance team investigating the applicant was permitted to give evidence relating to past conduct. In *Wiebe*, the Tribunal allowed the testimony of the police officer who was involved in the investigation of the Applicant's role in an auto theft ring. The Applicant argues that in these cases, the police officer/witnesses who testified had direct knowledge of the illegal activities. In this case, the police officers will be giving hearsay evidence of what was reported to them by the complainant on matters unrelated to the Applicant's business.

(ii) disclosure

The Tribunal agrees with the Registrar's position that she is under no requirement to provide disclosure or will say statements. It is the Tribunal's view that the Registrar has complied fully with her obligations under Rule 6.

With respect to the request that the Registrar produce copies of the OPP checks for previous applications, the Tribunal is not convinced that these documents are relevant. Even if relevant to the issues in this appeal, the Tribunal accepts the affidavit evidence filed at the motion that the Registrar does not have copies of these documents in her possession.

ANALYSIS:

Section 5(1)(b) of the Act requires the Registrar to examine all past conduct that is relevant to whether the Applicant will carry on business in accordance with the law and with integrity and honesty. Further, the Registrar must look at the totality of that past conduct, considered in light of more current circumstances, *Faccenda* (1994) O.J. No. 954, Div. Ct.

The Tribunal is concerned that evidence of circumstances underlying pending charges may be highly prejudicial to an applicant if a) there are serious issues of credibility, and b) the evidence is introduced by way of hearsay only. In this case, it is undisputed that a gun was recovered by the investigating police officers. It is also undisputed that the Applicant was the subject of a firearm prohibition order at the time that the pending charges were laid. The Tribunal finds that direct evidence from the police officers on this issue is relevant to the issue of the Applicant's past conduct and the test to be met under section 5(1)(b).

ORDER:

For all of the above reasons, the Tribunal dismisses the motion brought by the Applicant for further disclosure. The Tribunal orders that the Registrar may proceed with the allegations set out in #2 of the particulars of the Notice of Proposal to Revoke the Registration of the Applicant insofar as those allegations relate to the use and possession of a firearm while prohibited.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: June 6, 2001

BOLEJSZO

TADEUSZ AND STANISLAWA BOLEJSZO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair
RICHARD C. DELANEY, Member

APPEARANCES:

No one appearing for the Applicants
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program,
No one appearing for the Added Party, 1136363 Ontario Ltd.

DATE OF
HEARING: June 4, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Tadeusz And Stanislawa Bolejszo (the "Applicants") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated October 4, 2000;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

WHEREAS, the hearing was to be heard on June 4 and 5, 2001 at the Tribunal;

AND WHEREAS, on June 4, 2001, no one appearing for the Applicants and no one appearing for the Added Party, although Karen Jones, counsel appearing on behalf of the Ontario New Home Warranty Program requested an adjournment of the hearing to a further date, on behalf of the other parties;

NOW THEREFORE this Tribunal orders, on the consent of the parties that this matter is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, October 15, 2001 and to continue October 16, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Richard C. Delaney,
Member

RELEASED: June 7, 2001

PREHEARING

REJEAN DENIS AND PATRICIA WARDEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

GEORGE S. GAGE, Counsel, representing Rejean Denis and Patricia Warden (the "Applicants")
NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program (the "Respondent")
MALCOLM McMASTER, Agent, representing 905155 Ontario Limited operating as McMaster Construction (the "Added Party")

DATE OF
PREHEARING: June 5, 2001

Toronto

ORDER

Following the attendances before the Licence Appeal Tribunal (the "Tribunal") on June 5, 2001 at a prehearing of George S. Gage, Counsel for the Applicants, Rejean Denis, one of the Applicants, Netanus Rutherford, Counsel for the Respondent, Richard Johnston on behalf of the Respondent, Malcolm McMaster and William Thomas for the 905155 Ontario Limited o/a McMaster Construction (the "Added Party");

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was a resolution of the issues in this matter and the parties have executed minutes of settlement.
- 2) The matter before the Tribunal is therefore concluded.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

Released: June 7, 2001

RAHIM, OMAR HASSAN and SHINE CAR SALES INC.

SHINE CAR SALES INC. AND OMAR HASSAN RAHIM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DAVID J. HUNT, VICE-CHAIR

APPEARANCES:

PHILIP I. ULRICH, Counsel, representing the Applicants
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF

HEARING: June 6, 2001

Toronto

ORDER

Following attendances on June 6, 2001 at a hearing before the Licence Appeal Tribunal of Philip I. Ulrich, Counsel for Shine Car Sales Inc. and Omar Hassan Rahim (the "Applicants") and A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

WHEREAS the Applicants requested a hearing before the Tribunal to appeal the proposal of the Registrar, *Motor Vehicle Dealers Act*, to revoke the registrations of Shine Cars Inc. and Omar Hassan Rahim, pursuant to section 7(4) of the Act;

AND WHEREAS the hearing was to be heard on June 6, 2001 at the Tribunal's Chambers;

AND WHEREAS after hearing the evidence on June 6, 2001, the matter not being completed, it is ordered that:

1. the proceedings in this matter be adjourned to Monday, June 25, 2001 at 9:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;
2. at the time of the parties attendance on June 25, 2001 before the Tribunal, final submissions will be heard unless counsel for the Applicants advise the Tribunal that an additional witness is to be called, in which case this matter shall be adjourned to Friday, July 27, 2001 at 9:30 a.m. for completion of the hearing in this matter.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair

Released: June 11, 2001

MERCIER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BERNARD SCOTT MERCIER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 2, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BERNARD SCOTT MERCIER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Bernard Scott Mercier, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 7, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Bernard Scott Mercier
275 Farah Ave., Box 30
New Liskeard, On P0J 1P0

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Bernard Scott Mercier (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
2. The Applicant agrees that his explanation of the circumstances surrounding the sale of a 1996 GMC Sierra to Michael Gibson, are substantially as set out in the disclosure provided to the Registrar.
3. The Applicant confirms that he has not in the past and will not in the future, forge a client's signature on any contract, financial agreement or other document. The Applicant further acknowledges that he will not sign as a witness to any contract, financial agreement or other document unless he has witnessed the client's signature on said document
4. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
5. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
6. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
7. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within 60 days of having his registration reinstated pursuant to this Order.
8. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
9. The Applicant shall not be an officer, director, owner or partner in a dealership.
10. The Applicant agrees to honour any outstanding judgements against the Applicant.

- Signed in the City of _____ this _____ day of March 2001.

Carl Compton
Registrar, Motor Vehicle Dealers Act

EVANIUK, OLEKSANDR o/a ALEX EVANIUK

OLEKSANDR EVANIUK o/a ALEX EVANIUK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS
ACT*

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

OLEKSANDR EVANIUK, Applicant
TIM SNELL, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
HEARING: April 24 and 25, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar, *Real Estate and Business Brokers Act*, by his Proposal dated November 6, 2000, refused to grant the application of Oleksandr Evaniuk, operating as Alex Evaniuk (the "Applicant"), to be registered as a salesperson under the *Real Estate and Business Brokers Act* (the "Act"). The Registrar based his refusal on two grounds under section 6 of the Act:

1. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business; and
2. The past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Applicant by his Notice of Appeal and attachments dated December 1, 2000 contested the Proposal of the Registrar and requested a hearing before the Tribunal. The Registrar had not objected to the late filing of the appeal by the Applicant.

A prehearing conference was held on March 9, 2001. In attendance at that time were Mr. Gary Wise, Counsel for the Applicant and Mr. Tim Snell, Counsel for the Registrar. There were no resolution of any of the issues. The date of the hearing was confirmed as April 24, 2001 and if necessary on April 25, 2001.

Previously the hearing had been scheduled for April 17 and 18, 2001. By consent of the parties and at the request of Counsel for the Registrar, there was an order dated

January 29, 2001 adjourning the hearing to April 24 and 25, 2001 peremptory as against the Respondent.

On April 24, 2001 the Applicant was not present at 9:30 a.m. The hearing was adjourned as is the practice of the Tribunal for thirty minutes to see if the Applicant would appear. The hearing commenced. The Applicant appeared shortly after the commencement.

PRELIMINARY MOTION:

When the Applicant appeared before the Tribunal, the Applicant made a preliminary motion to have the hearing adjourned as he was without Counsel. The Applicant stated that he had no longer retained counsel, Mr. Wise, as his counsel. There was a fax dated April 16, 2001 and received April 17, 2001 at the Tribunal from Mr. Wise stating that he was no longer retained. The Applicant wished an adjournment to retain counsel. Counsel for the Registrar objected to the adjournment.

Argument by Applicant: The Applicant stated that the breakdown of retainer was due to his inability to pay his Counsel. His Counsel had told him over a month ago about the money that would be required to have Counsel attend at the hearing. Mr. Evaniuk did not have the money at that time. He asked for assistance from his relatives but none was forthcoming. Then two days prior to the hearing date, a cousin of Mr. Evaniuk stated that he would give him the money to hire counsel. They met with another counsel the day prior to the hearing but no retainer had been signed pending the adjournment of the hearing.

Argument by Respondent: Counsel stated that the previous counsel, Mr. Wise, had prepared the Notice of Appeal and had appeared at the prehearing date of March 9, 2001. Indeed there had been consent of the Applicant to adjourn the matter from April 17 and 18 to April 24 and 25. The Registrar had also received a fax from Mr. Wise dated April 16 and received on April 17 saying he was not retained for the hearing. On April 23 Counsel for the Registrar received a telephone call from another lawyer saying he had been consulted by the Applicant that day, the appointment having been made on the Friday, but was not on the record for this matter. This lawyer asked what was the position of the Registrar to an adjournment of the hearing so the lawyer could review the file. Counsel stated that he told this lawyer that at this stage in the proceedings the lawyer would have to make that request to the Tribunal as the hearing was to commence the next day. Counsel stated that it was speculative that this lawyer would even be retained by the Applicant.

Decision: The Tribunal denied the request by the Applicant for an adjournment of the hearing. The Tribunal must consider all parties when deciding on such a request. The Tribunal must consider the public interest and whether or not it would be affected by an adjournment. The Tribunal must act with fairness and in granting or refusal the request of the adjournment, it must consider the prejudice to the parties. The Tribunal must take into account the Rules of Practice of the Tribunal, which had been distributed to all parties to this action.

The Tribunal takes seriously the wishes of the Applicant to be represented by counsel. In this case the Applicant had a lawyer up to April 16, 2001, one week before the hearing. The issue, as stated by the Applicant, was one of payment of the lawyer. Yet this matter had been discussed by the Applicant with his lawyer at least one month prior

to the hearing, and the Applicant knew that finances were an issue. The Applicant stated that just prior to the hearing, his cousin stated he would lend him the money to hire a lawyer. Counsel for the Registrar had stated that the Applicant made an appointment with another lawyer the Friday prior to the hearing and met with that lawyer the day before the hearing, yet that lawyer stated that he was not retained on this matter but wanted the adjournment so he could review the file. The Tribunal queried why the Applicant, if now he had the funds, would not have retained Mr. Wise, the lawyer who had acted for him up to and including the prehearing and who presumably had kept the dates free for attendance at the hearing until at least the date of his fax of April 16, 2001. Mr. Wise knew the issues and presumably would have been ready to proceed with the hearing. The Applicant gave no response to this inquiry by the Tribunal.

The Applicant knows the issues and has been in receipt of the documents of the Registrar for some time. On many occasions Applicants represent themselves before the Tribunal in these registration matters. The Tribunal is accommodating to such litigants and is tolerant of any lapses in procedure. The Tribunal did not find that the Applicant in these circumstances would be prejudiced by proceeding without a lawyer at the hearing. The Tribunal gave a short adjournment to see if the Applicant wished to consult with his cousin and/or Mr. Wise. The hearing would proceed at 11:15 a.m. Counsel for the Registrar provided the Applicant with an extra copy of the Registrar's documents which had been made exhibits in this hearing.

ISSUES:

Does the Registrar, *Real Estate and Business Brokers Act*, have reasonable grounds under section 6 of the Act to refuse the application of the Applicant for registration as a salesperson?

TESTIMONY:

Opening Statement of Counsel for the Registrar:

Counsel stated that the refusal of the Registrar to grant registration of the Applicant as a salesperson was based on the past conduct of the Applicant. It was submitted that the Registrar's decision is reasonable, based on:

1. the registration history of the Applicant, who had previously been registered as a salesperson under the Act from August, 1997 to August, 1999;
2. the civil judgments against the Applicant, including their background and circumstances by which they arose;
3. non disclosure on the Applicant's application form dated November 1, 1999;
4. the Applicant's trading in real estate prior to registration or while the registration had elapsed; and
5. the Applicant's ungovernability.

Testimony of Robert Andrew Rennie:

Mr. Rennie is a real estate broker. He has worked in the real estate business since 1974 and has been a broker since 1989. Currently he is the owner/broker of Remax Estates which has three branches and approximately eighty registered salespersons.

He knew Mr. Evaniuk through the real estate business. Mr. Evaniuk wanted to work for him as a salesperson. Mr. Rennie decided to hire him. He knew that Mr. Evaniuk had worked at the Sutton Group and had just completed the required three courses but was not licensed. Mr. Rennie affirmed that he had signed Mr. Evaniuk's application for registration which is dated November 1, 1999. After that time Mr. Evaniuk was given an office.

At some point after that time, the Real Estate Council of Ontario ("RECO") advised Mr. Rennie that there were problems with the registration of Mr. Evaniuk. At first, Mr. Rennie thought the problem was a cheque being returned "NSF". Mr. Rennie testified that he spoke to Mr. Evaniuk about that, and it was his understanding that Mr. Evaniuk had gone personally to RECO to deal with it. Mr. Evaniuk told him that the money had been paid and everything was fine.

Mr. Rennie testified that he then thought Mr. Evaniuk was registered as a salesperson, and orientation was provided to Mr. Evaniuk. Mr. Rennie stated that Mr. Evaniuk was never permitted to start working until his licence had arrived.

Mr. Rennie received a fax in late November, 1999 from Maria Paolercio, an employee of RECO, stating there were problems with Mr. Evaniuk's application. He then talked to Mr. Evaniuk. Mr. Rennie stated he was perturbed by these events and did not want to get into trouble with RECO. Mr. Evaniuk assured him that he was clearing up the problem, but Mr. Rennie wanted to see the licence. He followed this up with Mr. Evaniuk on two later occasions.

Mr. Rennie thought that Mr. Evaniuk was being hounded by a woman for money Mr. Evaniuk owed to her. Mr. Rennie felt it was like a vendetta because she would call Mr. Rennie and warn him about Mr. Evaniuk.

Mr. Evaniuk left Remax Estates, and Mr. Rennie understood that he went to Savoy Real Estate.

Mr. Rennie sent a letter to RECO dated January 13, 2000 stating that Mr. Evaniuk no longer worked for Remax Estates. Mr. Evaniuk had left Remax Estates some time prior to the date of that letter. Mr. Evaniuk had left some personal belongings at Remax Estates. They were not picked up until some six months later.

Mr. Rennie stated that he wrote RECO on February 23, 2000 when requested to do so by Ms. Paolercio. Mr. Rennie reiterated that he had assumed Mr. Evaniuk was reinstated as a real estate salesperson and that it was not until he was informed about the issues that he realized that was not the case. Indeed, Remax Estates had ordered business cards for Mr. Evaniuk when he first came to them. There was an outstanding invoice for \$217.29, which Mr. Rennie thought was for business cards and other office expenses.

Mr. Rennie stated that there was a listing for a property on Lansdowne dated December 7, 1999 which came to his attention at some time after that date. The owners wished to be released from the listing, and he did release them as of December 29, 1999. The listing broker was Remax Estates and Mr. Evaniuk was the salesperson.

Under cross-examination, Mr. Rennie stated that in hiring a salesperson he would want to know if the person was qualified. In this case, Mr. Rennie did not make telephone calls to Mr. Evaniuk's previous brokers.

Mr. Rennie stated that his member number would be known to the secretary who downloaded the listing. That person does not need permission to use his member number. Mr. Rennie stated that use of his member number was restricted to those who worked at Remax Estates.

Mr. Rennie testified that the listing was not in his handwriting and he did not know the seller. He stated that Mr. Evaniuk had not told him about this listing.

Mr. Rennie stated that the third party who was hounding Mr. Evaniuk was a Lena Preje. He knows that she has been paid.

Testimony of Lena Preje:

Ms. Preje is a real estate salesperson who has worked for a number of brokers. She has known Mr. Evaniuk for about four years. He was a friend. She testified that Mr. Evaniuk told her about buying his dream house at the Beaches on Kippendavie. Mr. Evaniuk called her in January, 1998 and asked for a loan as he was to get some real estate commissions but the closings had been delayed. Ms. Preje loaned him \$10,000.00US in January, 1998 and then a further \$10,000.00US some months later. There was a promissory note due May 14, 1998, but Mr. Evaniuk did not pay her then. Mr. Evaniuk gave her a cheque for \$15,000.00 which came back "NSF" due to the account having been closed some days previously.

Ms. Preje testified that she then called Mr. Evaniuk, spoke to Mr. Evaniuk's brother and then called the police.

Subsequently, Mr. Evaniuk's lawyer gave her a note saying that she would be paid from the sale proceeds of a house on Franklin Avenue which Mr. Evaniuk had renovated and was selling. Ms. Preje stated that she did not get the money from that sale.

After listening to promises from Mr. Evaniuk during May to July, 1998, Ms. Preje sued Mr. Evaniuk and obtained a judgment on August 28, 1998 for \$20,940.76US plus \$337.00C in costs. The statement of claim was dated July 22, 1998. A Writ of seizure was filed on September 1, 1998. There was a notice of garnishment of July 27, 1999 against Remax Professional where Mr. Evaniuk was working. She received some money from the garnishment and the balance when the property on Kippendavie was sold. Mr. Evaniuk paid about \$35,000.00C to satisfy the judgment.

Ms. Preje wrote a letter in July, 1999 to RECO making a complaint against Mr. Evaniuk.

Under cross-examination, Ms. Preje stated that Mr. Evaniuk had made some interest payments on the first loan of January 14, 1998. She stated that she did put a lien against 66 Franklin and a writ of seizure and sale against 71 Kippendavie.

Testimony of Maria Paolercio:

Ms. Paolercio works for RECO in its registration office. Prior to that, she had been a registration coordinator under the Ministry of Consumer and Commercial Relations. She reviews the applications for registration under the *Real Estate and Business Brokers Act* when there are problems.

Ms. Paolercio stated that due to the volume of registrations the office does random bankruptcy, sheriff and police checks. There are 45,000 registrants, and they must apply for registration every two years. Ms. Paolercio deals with between 50 and 100 registrations each month. After she has completed her work, she will review some of the applications with the assistant Registrar or the Registrar.

Ms. Paolercio stated that she reviewed the application for registration of Mr. Evaniuk. In the summer of 1999 she received a written complaint from Ms. Preje. At that time, Ms. Paolercio flagged his file as Mr. Evaniuk was not currently registered. He had been registered from August, 1997 to August, 1999. His original application in 1997 had been with Sutton Group partners with Bruce Murray as the broker signing the application. His transfer application to Remax Professions was dated July 6, 1999 as he left the Sutton Group on July 5, 1999.

Ms. Paolercio testified that there was a "NSF" cheque to RECO dated August 14, 1999 in the amount of \$175.00, which is the registration fee.

Ms. Paolercio stated that within the initial two years of registration a salesperson is supposed to complete three mandatory courses. As Mr. Evaniuk had not completed these courses, the transfer application was not processed as he was coming up for renewal in August, 1999. An application was received on November 2, 1999 for reinstatement with Remax Estates. Under question 8 of that application Mr. Evaniuk had answered "No" to having any unpaid judgments. There was a "NSF" cheque for this reinstatement application.

Ms. Paolercio stated that due to the complaint of Ms. Preje she was aware of an unpaid judgment so she ordered an execution search. That execution search showed two outstanding judgments as of November 23, 1999. One was for Lena Preje and the other was a judgment dated October 22, 1999 for Bruce Murray in the amount of \$112,552.66 plus \$1,500.00 costs. Ms. Paolercio stated that after receiving this information she wrote to Mr. Evaniuk at his stated address of 71 Kippendavie asking that he provide her with an execution search. That letter was returned from that address, and she faxed her letter to his business address at ReMax Estates on December 6, 1999. Ms. Paolercio recalled that Mr. Evaniuk had stated that he was having problems getting his mail at 71 Kippendavie.

Ms. Paolercio testified that Mr. Evaniuk sent her a letter dated January 6, 2000 in which he stated that he thought that if he was paying off a judgment, it was not outstanding, and he did not need to state it on his application form. He stated that the judgment by Bruce Murray came after he did the registration form. He stated that it will be paid as it is a registered mortgage against 71 Kippendavie Avenue.

Ms. Paolercio stated that she received a letter from Mr. Rennie stating that Mr. Evaniuk was not longer employed with his firm. Mr. Evaniuk found another broker, Savoy Realty.

Ms. Paolercio met on January 31, 2000 with the assistant Registrar and Mr. Evaniuk. They had a number of issues and wished to obtain answers from Mr. Evaniuk.

Savoy Realty terminated its relationship with Mr. Evaniuk by the letter of Elizabeth Donovan dated January 31, 2000. Home Life signed as the broker for Mr. Evaniuk on his application for reinstatement dated February 8, 2000. Mr. Evaniuk by his letter of February 10, 2000 further explained that he was paying off the judgment to Ms. Preje by garnishment of his wages.

Ms. Paolercio went through the legal documents in her file dealing with 71 Kippendavie and the Bruce Murray judgement. She stated that 71 Kippendavie was sold by Mr. Murray in April 17, 2000 for \$340,000.00.

After she had gathered the paperwork on these matters she passed over the file to the Registrar, Mr. Wright, who was to make the decision on the registration of Mr. Evaniuk.

Testimony of Tom Wright:

Mr. Wright has been the Registrar of the *Real Estate Business Brokers Act* since November, 1997. Prior to that, he was the Information and Privacy Commissioner from 1991 to 1997. He has also worked as the assistant Information and Privacy Commissioner, Director of Legal Services, and Senior Counsel for the Ministry of the Attorney General. He was in private practice prior to his government employment.

His duties as the administrator of the *Real Estate Business Brokers Act* are twofold: 1. To protect the consumer; 2. To regulate trading in real estate. Under section 6 of the Act, he considers the financial responsibilities of the registrants and applicants as well as their honesty, integrity and their ability to act in accordance with law. He considers the past conduct of the registrants and applicants in his assessment.

In this case, Mr. Wright testified that he made the decision to refuse the application for registration of Mr. Evaniuk. He based his decision on the issues of registration history, civil judgments against Mr. Evaniuk, non disclosure and trading while not registered under the Act.

Mr. Wright testified that as regards registration history, he took into consideration that Mr. Evaniuk did not complete the three mandatory courses within the required two years after his initial registration. Without the successful completion of these courses, the initial registration will expire. Mr. Wright did not factor into his consideration the fact that Mr. Evaniuk did complete these courses by November, 1999. Mr. Wright also considered the two "NSF" cheques given by Mr. Evaniuk for his applications. One was written in August, 1999 and the second was written, on a different bank account, in November, 1999. For a matter as important as your application to be a registered real estate salesperson, Mr. Wright felt that Mr. Evaniuk should have exercised more care concerning these application fees.

On the second issue of the civil judgments, Mr. Wright was concerned over their existence and that they were connected to the real estate business as they arose due to

the renovation of a home. He also considered the history of how Mr. Evaniuk dealt with these obligations. There was a series of unkept promises to Ms. Preje and an NSF cheque due to the closure of a bank account, which were all deliberate acts by Mr. Evaniuk. Ms. Preje had to exhaust all legal remedies in order to recover her monies, including garnishment and execution filed on the house of Mr. Evaniuk. Mr. Wright saw no positive action taken by Mr. Evaniuk to satisfy this obligation.

Regarding the Murray judgment, Mr. Wright stated that the creditor again had to go to extraordinary lengths to recover his money. Though there was a mortgage on the Evaniuk home, there was no payments made on it. A statement of claim had to be issued by Mr. Murray followed by Notice of Power of Sale and the transfer of the property to Mr. Murray. Despite these actions, there are still outstanding amounts due on this debt.

Mr. Wright testified that the change of mind of Mr. Murray who was now supportive of the reinstatement of Mr. Evaniuk as a real estate salesperson did not change Mr. Wright's position.

Although Mr. Evaniuk in his correspondence with the Registrar stated that he was selling property in order to pay off his obligations, that was not a correct statement. The sale of the property did not satisfy all of his obligations, and it was not Mr. Evaniuk who initiated the sale but his creditors. It might have been different if Mr. Evaniuk had been the person who actively sought to sell the property.

On the third issue of nondisclosure, Mr. Wright stated that there are over 40,000 registrants that renew every two years. It is essential that the Registrar be able to rely upon the honesty and integrity of the information on the renewal forms. Here, there was non disclosure of the judgments. By the date of the reinstatement application in November, 1999 the judgments had not been satisfied so there were issues of financial responsibility. In the case of Mr. Murray, the relevant date is the date of judgment which was October 22, 1999. It should have been listed on the reinstatement application even if the filing of execution was later on in November, 1999. But the dates were quite close and Mr. Evaniuk had filed a statement of defense in this matter, and Mr. Wright was prepared not to give as much weight to the non disclosure of the Murray judgment as he was to the non disclosure of the Preje judgment.

Regarding the fourth issue, Mr. Wright stated that Mr. Evaniuk knew of his obligation not to trade in real estate when not registered under the Act. Trade includes such actions as obtaining MLS listings from vendors. As Mr. Evaniuk knew prior to the December MLS listing that he was having problems with obtaining his registration, Mr. Wright found his behaviour to be more serious.

In conclusion, Mr. Wright felt that the past conduct of Mr. Evaniuk included promises not kept, creditors who had to go to extreme lengths to obtain their monies, the unwillingness of Mr. Evaniuk to comply with the law as shown by his NSF cheques and not completing his courses. In the opinion of Mr. Wright Mr. Evaniuk showed disrespect for obligations that were voluntarily undertaken.

In response to questions from the Tribunal, Mr. Wright stated that he felt the Proposal to deny the registration was the only reasonable course of action. He had considered the relationship of Mr. Evaniuk with Mr. Murray and Mr. Rennie and other real estate professionals. For there to be conditions, it would require a special relationship to exist

between Mr. Evaniuk and his broker. Due to the past conduct of Mr. Evaniuk, who had been indebted to other real estate professionals, Mr. Wright did not have confidence that terms and conditions with the broker supervising would be sufficient to control the behaviour of Mr. Evaniuk.

Testimony of Oleksandr Evaniuk:

Mr. Evaniuk testified that he became a real estate salesperson on August 15, 1997. He had been successful in real estate and once was the top agent of the month at the Sutton Group.

In 1997, Mr. Evaniuk stated he bought 71 Kippendavie in the Beaches area. He also had an arrangement with Mr. Ali Sabbah regarding 66 Franklin. Mr. Sabbah who was the vendor of this property was a civil engineer who wanted Mr. Evaniuk to be in charge of renovating this property. It was felt that the renovations would cost about \$28,000.00. The house had cost \$121,000.00 and ultimately it sold for \$181,000.00. Due to Mr. Evaniuk's debt to Ms. Preje, Mr. Sabbah had to hold back \$35,000.00 from the sale of this property. That money was tied up for over a year. Ms. Preje released the monies to Mr. Sabbah who did not pay Mr. Evaniuk for the renovations. Mr. Sabbah was upset that Mr. Evaniuk had not disclosed to him about his problems with Ms. Preje. As Mr. Sabbah has not paid him for the cost of renovations, Mr. Evaniuk is suing him. Despite the agreement with Mr. Sabbah being verbal, Mr. Evaniuk stated that he was confident he would win the law-suit as he could show that he had paid for the workers and the materials for the renovations of 66 Franklin.

Mr. Evaniuk stated that he had borrowed money, about \$10,000.00US from Ms. Preje in January, 1998. He also borrowed money from her after that time. He needed it for construction costs. The cost of borrowing was to be 3% monthly. Mr. Evaniuk stated that Ms. Preje's financial position changed when her mother who lived in Israel began to have poor health. Mr. Evaniuk did make some of the monthly payments. When Ms. Preje stated that she really needed the money and she was suicidal, Mr. Evaniuk gave her a cheque for \$15,300.00C but told her he did not yet have the money in his bank account. Then the bank closed that bank account without his knowledge. Mr. Evaniuk stated that Ms. Preje went to the police about this cheque, and the police investigated and found out that the bank had closed out his account without his knowledge.

Mr. Evaniuk stated that when Ms. Preje began to garnishee his wages while he worked at the Sutton Group, he was having 100% of his wages taken. Later, he got a lawyer who sent a letter to his employer to say that only 20% could be garnisheed.

Mr. Evaniuk stated that there were two "NSF" cheques to the Registrar but he did certify the last cheque to pay for his reinstatement application. He stated it was in error as he was under tremendous pressure from the constant harassment by Ms. Preje.

Mr. Evaniuk stated that he could not complete the courses on time as they each cost \$400.00, and he could not afford both the cost of the course plus the full time attendance at each course for about two weeks. He did complete the courses in October and November, 1999.

Mr. Evaniuk stated that Mr. Bruce Murray of Sutton Group was a good friend of his. Due to his financial problems, Mr. Murray did want him to change his place of employment so Mr. Evaniuk went to ReMax Professionals in Harbourfront. But the

owner of that office died and the office was sold to ReMax Condos. After that, Mr. Evaniuk went to ReMax Estates under the broker Mr. Rennie. This broker had three different offices, and he was having problems controlling his business. The manager was named Toni.

At this point Mr. Evaniuk interrupted his testimony to permit the testimony of Mr. Whelan.

Testimony of Christopher Gerald Whelan:

Mr. Whelan is the broker/manager of Homelife Realty. He is the sponsoring broker on the reinstatement application of Mr. Evaniuk. He had initially met Mr. Evaniuk in January or February, 2000. Mr. Whelan spoke to Mr. Evaniuk and then talked to his previous broker, Mr. Murray. As a result of those conversations, Mr. Whelan was satisfied with the conduct of Mr. Evaniuk and agreed to be his sponsoring broker. He was happy with the past income achieved by Mr. Evaniuk as a real estate salesperson.

Mr. Whelan testified that he does not know all the allegations being made against Mr. Evaniuk. He knows that Mr. Evaniuk had ticked off "No" on his application for no outstanding judgments and that had been an error. He stated that Mr. Evaniuk had discussed this problem with him and told him how he owed money to another agent.

Under cross-examination, Mr. Whelan stated that he has been a real estate salesperson since 1983 and has worked for a number of agencies as a broker prior to HomeLife Realty. He stated that during the time he has known Mr. Evaniuk, he knew that Mr. Evaniuk was studying a course on securities. He does not have any paid work at his agency and does no real estate business for them. He made the reference call to Mr. Murray in either February or March, 2000. Mr. Whelan was interested in the fact that Mr. Evaniuk had previously made in the six figures in real estate. He did not investigate that statement by Mr. Evaniuk but accepted it as fact.

Regarding the money owed by Mr. Evaniuk, Mr. Evaniuk told Mr. Whelan that it was now taken care of. Mr. Whelan did not characterize this matter as one of misleading customers or clients.

When it was put to Mr. Whelan that Mr. Evaniuk's past history included two "NSF" cheques to the Registrar, the non completion of mandatory courses, undertaking not fulfilled, writing a cheque on an account which was closed, non payment of a mortgage after one month and creditors having to take their legal remedies, Mr. Whelan replied that real estate agents often lack financial security and that garnishment can happen.

Mr. Whelan stated that he could review Mr. Evaniuk's files as he has to see every transaction in any event. He has 34 registered agents, a full time administrator and three part time administrators in his office.

Mr. Whelan felt that Mr. Evaniuk had been straightforward with him and that there had been no side deals regarding Mr. Evaniuk coming to his office. Mr. Whelan stated that he would chat with Mr. Evaniuk for maybe 5 or 10 minutes every couple of weeks.

Continuation of the Testimony of Mr. Evaniuk:

Mr. Evaniuk testified that when Alexandra Pascoe approached him he went to see Toni, the manager, and she told him to take the listing under the company's name. The writing on the listing agreement and the signature is that of Mr. Evaniuk. Mr. Evaniuk had hoped to have Ms. Pascoe come as a witness, but she did not respond to his telephone messages.

At this time, the testimony of Mr. Evaniuk was interrupted to permit the testimony of Mr. Bruce Murray.

Testimony of Bruce Murray:

Mr. Murray stated that he is the owner of Sutton Group partners as of June, 2000. Prior to that, he had been a partner in the agency since June, 1992. He has been a real estate agent since 1972 and a broker since 1976. Currently he has 53 registered salespersons working for him.

Mr. Murray testified that he has known Alex Evaniuk for about 5 years. He knew Alex when Alex worked as a trainer. He was impressed with his people skills and suggested to Alex that Alex consider a real estate career. Alex took him up on his suggestion, and Mr. Murray did help him out financially while he was taking his real estate courses.

Mr. Murray stated that during his first week of work, Mr. Evaniuk got his first deal which netted him about \$16,000.00 in commission. Although Alex was doing well as a real estate salesperson, he fell into the trap of being involved in renovating of houses. Mr. Murray had initially seen 71 Kippendavie, and Mr. Evaniuk ended up buying the house. The renovations on that house cost between \$150,000.00 and \$200,000.00. Mr. Evaniuk borrowed money from Mr. Murray. At this time, Mr. Murray did not know that Mr. Evaniuk had already borrowed money from another friend. This other person, Ms. Preje, began to telephone the Sutton Group office on a frequent basis, perhaps 25 to 40 calls per day. Finally Mr. Murray had to tell his receptionists to hang up the telephone if Ms. Preje called the office.

Mr. Murray recalls one incident when he was with Mr. Evaniuk and the cell telephone of Mr. Evaniuk began to ring. Mr. Evaniuk handed the telephone to Mr. Murray. Mr. Murray heard Ms. Preje say that this was her 28 telephone calls. This was at about 2 pm. Mr. Murray felt that this harassment put a lot of pressure on Mr. Evaniuk.

Mr. Murray knows about the situation at 66 Franklin. Mr. Evaniuk sold this property to Ali Sabbah and then got involved doing the renovations for him. Mr. Evaniuk had told Ms. Preje that she would get her money from the sale of the renovated home. But Ms. Preje locked up the funds from the sale and then only finally released all of the funds after a year. There was no written agreement between Mr. Sabbah and Mr. Evaniuk.

Mr. Murray testified that ultimately he had to do a power of sale on Mr. Evaniuk's home and then spend another \$48,000.00 to complete the renovations so he could sell it. Ms. Preje was paid by Mr. Murray from the sale of 71 Kippendavie.

Mr. Murray recalls that Ms. Preje had garnisheed Mr. Evaniuk's wages when Mr. Evaniuk still worked at the Sutton Group. Initially it was for 100% but after a lawyer got involved the percentage went down to 20%.

Ms. Preje telephoned him and wanted him to write a letter to Maria Paolencio at RECO. Mr. Murray stated that he did speak to Maria and then sent off a letter. Sometime after that, in June of 2000, Mr. Murray sent another letter to Ms. Paolencio stating that he felt that Mr. Evaniuk should be permitted to work again as a real estate salesperson as Mr. Evaniuk had shown serious remorse about his past conduct. He feels that Mr. Evaniuk has learned his lesson. Mr. Evaniuk loves real estate, and he would think long and hard before he would endanger that again.

Mr. Murray stated that Mr. Evaniuk still owes him about \$82,000.00. He is consulting with his accountant to see if any can be written off.

Under cross-examination, Mr. Murray stated that he probably lent Mr. Evaniuk about \$2,000.00 when Alex was taking the real estate courses as English is not Alex's first language and he had to concentrate on the courses and not spend so much time earning a living.

Mr. Murray agreed that the scenario of money lent, failed promises, bounced cheque, judgment and then execution procedures would lead one not to have confidence in that debtor.

Mr. Murray felt that the telephone calls and badgering by Ms. Preje towards Mr. Evaniuk went far beyond obnoxious behaviour. He agreed that she had not personally harassed him or his family. Mr. Murray did not consider his asking Mr. Evaniuk to find other employment as firing him. Mr. Evaniuk had resisted his attempts to put the property on the market. Once Mr. Evaniuk had left his office, Mr. Murray exercised his legal remedies and foreclosed on the mortgage.

Mr. Murray agreed that he had registered a mortgage in February and by March Mr. Evaniuk was in default on his mortgage payments. Mr. Murray sought a judgement on the mortgage by October.

Mr. Murray stated that in the past, besides helping Mr. Evaniuk when he was initially taking his real estate course, Mr. Murray had to assist him with arrears on a leased vehicle. Indeed, by the summer of 1998 Mr. Evaniuk owed him approximately \$50,000.00.

Regarding the statement of defence filed by Mr. Evaniuk, Mr. Murray stated that several paragraphs of it contained false information. He stated that contrary to paragraph 5, neither Mr. Evaniuk nor his wife had used 71 Kippendavie as their principal residence as it was generally unfit for habitation during the renovations. Mr. Murray stated that paragraph 11 was untrue as Mr. Evaniuk and his wife did receive independent legal advice and though Mr. Murray had recommended a lawyer to them, he had never met this lawyer nor did he have any influence over this lawyer. Regarding paragraphs 14 and 15, Mr. Murray stated they were false as he had advanced even more than the mortgage in order to finish off the renovations on the property.

Regarding the situation with Mr. Sabbah and the 66 Franklin property, Mr. Murray stated that he was not involved in any litigation against Mr. Sabbah. Mr. Murray stated that he has not garnisheed Mr. Evaniuk as he does not know where Mr. Evaniuk is now working.

Regarding his change in attitude towards Mr. Evaniuk, Mr. Murray testified that he had lunch with Mr. Evaniuk some months ago. At that time, Mr. Evaniuk told him about the hearing. Later, Mr. Evaniuk contacted him to come as a witness at the hearing. Mr. Murray felt that Mr. Evaniuk has changed due to this experience. Initially, he felt Mr. Evaniuk was too confident but now he found him to be subdued. The Registrar was trying to take away from Mr. Evaniuk something that Mr. Evaniuk loved. Mr. Murray stated "I am not saying Alec is a reformed man, just that he is not stupid".

Continuation of the testimony of Mr. Evaniuk:

Mr. Evaniuk stated that he had paid over \$8,000.00 to Ms. Preje prior to completing the application. He just misunderstood Question #8. He is willing to pay Mr. Murray.

Regarding the issue of trading while not licensed, Mr. Evaniuk testified that after New Year's, Mr. Rennie told him about his dealings with the Registrar, that he had no licence and that Mr. Rennie was going to terminate his employment at his brokerage. Mr. Evaniuk went to Savoy Realty, but Maria Paolercio told him that Savoy Realty had terminated him. Mr. Evaniuk then went to Homelife and talked to Gerry Whelan. He told Mr. Whelan about his problem with question 8 on the application form.

Mr. Evaniuk stated that he has been taking a Canadian securities course and has a certificate. He took courses in different areas of securities. Now he has sent resumes to different brokerages, but it is difficult to find a job with the stock market being on a down turn.

Mr. Evaniuk stated that he did not try to meet people to sell them real estate, but people would come into the office and he would talk to them. He loved real estate and would be prepared to work under the strict supervision of a real estate broker.

Under cross-examination, Mr. Evaniuk stated that he had not finished the required courses in the first two years. For the first year he was busy working as a real estate agent and making money. He had thought he would start the courses by December, 1998, but his financial position changed, and he could not afford to take the time off work. When he applied for his renewal of his licence in August, 1999 and could not get it without taking the courses, he borrowed the money and completed the courses.

Mr. Evaniuk stated that he had put considerable monies into renovations for the Franklin property and the Kippendavie property. He only had a verbal agreement with Mr. Sabbah for compensation for the renovations on the Franklin property. He had to take out a second mortgage when he bought the Kippendavie property as he had only 15% of the down payment.

Regarding the cheques that bounced for his renewal of registration, Mr. Evaniuk stated that he had a lot to think about and was not concentrating on the cheques. Regarding the cheque to Ms. Preje, he did not know the bank had closed that account. He agreed that when he wrote that cheque, he did not have that money in the account.

Regarding the listing at ReMax Estates, Mr. Evaniuk stated that he made a referral to ReMax Estates. He only signed as a witness. He agreed that there were two vendors for that property but only one signed the listing agreement.

Mr. Evaniuk stated that when he took the securities course, he was on social assistance and they paid for it. It has taken him a long time to find a job as he was taking courses, searching for work and doing volunteer work as well.

CLOSING STATEMENTS:

By Counsel for the Registrar:

Counsel for the Registrar, *Real Estate and Business Brokers Act*, referred to a number of cases in his verbal argument.

He cited Brenner v The Registrar of Motor Vehicle Dealers and Salesmen, (1983) 19 CRAT 58 (Ont. Div. Ct.) on page 61,

“The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

In the case of Ontario (Registrar of Real Estate and Business Brokers) v. Faccenda, (1994) O.J.No. 954 (Ont. Div. Ct.) he cited page 2,

“Given the test set out in s. 6(1) of the *Real Estate and Business Brokers Act*. R.S.O. 1990, C.R.4, all past conduct is potentially relevant, notwithstanding that it was the subject of a previous proposal. It is the totality of that past conduct, considered in the light of more current circumstances, which form the basis for the relief.”

In the case of RE Baldwin (1997) O.C.R.A.T. No. 19 Counsel cited the principle that the decision of the Tribunal must be made upon all of the evidence and arguments at the hearing.

In the case of Barroso v. The Registrar of Real Estate and Business Brokers, (1990) 20 C.R.A.T. 422 Counsel referred to the Gilford Garage Service and Ambury case cited at page 429, the Jakobs vs. Registrar of Real Estate and Business Brokers case cited at page 430 and the Giovanni Giannini case cited at page 430 as to the importance of there being complete and honest disclosure on the application form so there can be public confidence in the industry. Counsel stated that there is no prerequisite that there be a consumer complaint in order for there to be a breach of this public confidence.

Counsel stated that Mr. Evaniuk had not thought it a priority to take the required courses prior to the end of the two year term of his initial registration. Though there were witnesses that testified that Mr. Evaniuk was succeeding as a real estate agent, Mr. Evaniuk in his testimony states he could not afford to take the courses. Yet Mr. Evaniuk borrowed considerable amounts of money from several sources for other matters. Counsel submitted that Mr. Evaniuk could have found the funds to take the courses if he had wanted to do so.

Counsel cited the Innovative Ventures Corp. and Robert A. Brown v. The Registrar of Real Estate and Business Brokers, (1990) 20 CRAT 487 for the proposition that what is

considered as trading in real estate does not mean just the closing of a real estate transaction.

Regarding the issue of non disclosure, Mr. Evaniuk had stated that he had paid off some of his loan from Ms. Preje so he did not feel that he had to disclose this judgment on his renewal application. He gave a number of explanations for his non disclosure of the judgments, and in the opinion of Counsel such explanations have a negative impact upon the honesty and integrity of Mr. Evaniuk. Regarding the judgment by Mr. Murray, in the opinion of Counsel it was not credible that Mr. Evaniuk could claim lack of knowledge of it at the time he was applying for his renewal.

Regarding the judgments themselves, Counsel submitted that Mr. Evaniuk had stated that he wrote a cheque to Ms. Preje when he knew he did not have the funds in his account. He gave no credible explanation for this behaviour, in the opinion of Counsel. Mr. Evaniuk did nothing meaningful to pay back his creditors and both creditors had to take legal action and then enforce upon their judgments. In the opinion of Counsel this shows a pattern of behaviour by which Mr. Evaniuk does not fulfill his obligations until he is forced to do so.

Regarding working without a licence, Counsel submitted that the behaviour of Mr. Evaniuk of being at the office of ReMax Estates, having business cards ordered, and witnessing a listing all demonstrate that he was acting as an agent for that broker. Ms. Pascoe was a referral by Mr. Evaniuk to ReMax Estates. Counsel also stated that Mr. Evaniuk did not display good conduct by being a witness to a listing where only one of the two vendors had signed it.

In concluding, Counsel stated that at the present time Mr. Evaniuk still owes Mr. Murray approximately \$82,000.00 under that judgment.

By the Applicant:

Mr. Evaniuk stated that he has made mistakes and has learnt his lesson. He feels that he is honest and deserves to have a real estate licence. He has spent the past eighteen months thinking about his past conduct. He would be more cautious and careful in his future dealings.

LEGISLATION:

The relevant legislation is the *Real Estate and Business Brokers Act*,

Section 6

(1)An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;
.....

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 9

.....

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.
.....

Section 10

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Licence Appeal Tribunal Act, 1999

Section 6

(1) The Tribunal may make rules establishing procedures for hearings held by the Tribunal and the rights of parties to the hearings.....

Rules of Practice of the Licence Appeal Tribunal as amended March, 2001

2.12 Where a party's representative ceases to act for the party in proceedings before the Tribunal, the representative shall in writing promptly notify the Tribunal and all other parties to the proceedings.

15. Practice Directions:

15.1 Adjournments of scheduled hearings at the Licence Appeal Tribunal

(1) Adjournments of scheduled hearings

Once hearing dates have been fixed, the Tribunal will not normally grant an adjournment when:

The parties retain or change counsel a few days prior to the scheduled hearing and the new counsel is not available on the hearing date or has not been retained early enough to prepare for the hearing.

However, the Registrar, after consulting the Tribunal Chair, may consider granting an adjournment on limited grounds, such as when all the parties consent to an adjournment of the scheduled hearing, and the request is submitted to the Tribunal at least 10 days before the scheduled hearing date(s), along with alternative hearing dates, for the Registrar's approval.

(2) Request for an adjournment:

.....(b) for requests received less than 10 days before the hearing date where a party or the Tribunal does not consent to the adjournment, unless there are exceptional circumstances:

- (i) the parties will be asked to appear before the Tribunal panel on the scheduled hearing date(s) to deal with the request for an adjournment.
- (ii) the parties will be advised to present their arguments with respect to an adjournment at the onset of the hearing.
- (iii) all parties must be prepared to proceed with the hearing, should the Tribunal panel not grant the adjournment.

ANALYSIS OF LAW AND FACTS:

This case involved the Registrar, *Real Estate and Business Brokers Act*, issuing a proposal to refuse to permit the reinstatement of the Applicant, Oleksandr Evaniuk known as Alex Evaniuk, as a real estate salesperson. The grounds for refusal by the Registrar were as follows:

1. Having regard to the Applicant's financial position, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.
2. The past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honestly.

The Notice of Proposal issued by the Registrar contains detailed particulars on the four main issues raised by the Registrar under these grounds. These issues include the registration history of the Applicant; the civil judgments against the Applicant; non disclosure on the application form; and trading while unregistered. Any one of those items, if substantiated, could form the basis for the refusal to renew the registration of this Applicant. It is the opinion of this Tribunal that the Registrar has succeeded on three of the four issues and therefore that the Applicant should not be registered as a real estate salesperson. It is also the opinion of this Tribunal that this was not a case

whereby terms and conditions would have been appropriate. The Tribunal found the detailed particulars to be of significant assistance in assessing the reasonableness of the grounds submitted by the Registrar against this Applicant.

Since the Brenner *supra* it is a matter of considerable importance that the Tribunal carefully review the reasonableness of the grounds put forward by the Registrar. In so doing the Tribunal needs to look at the “past conduct” of the applicant as this is the wording set out in section 6 of the Act. Whether or not the Applicant is now “reformed” is not the issue. Under section 10 of the Act any applicant has the opportunity to reapply based on new or other evidence or where it is clear that material circumstances have changed since the initial refusal by the Registrar.

The Tribunal has a responsibility not only to those who wish to work within a regulated industry such as real estate but also to the general public to ensure that there is widespread confidence in the honesty and integrity of the real estate and business brokers industry. The Tribunal must balance the desire of an individual who has or wishes to work within this industry with the protection of the general public who wish to buy real estate. The purchase of residential or commercial real estate is often the most significant financial purchase by an individual in their lifetime. The purchasers of real estate need to be reassured that those working within this industry are honest people with integrity who work within the limits of the law. As well, it is important that those working within the real estate industry have sufficient financial resources so they will not be tempted to act outside the law or be foolhardy in their actions.

There is no doubt that Mr. Evaniuk is good at selling real estate. There is no doubt that he enjoys selling real estate. There is no doubt that he has some regret that in the past he acted in a foolhardy and unreasonable manner. But those statements do not hold much weight when compared to his past conduct in the matter of his registration history, the judgments against him and his failure to disclose those judgments on his renewal application. The pattern of his past behaviour shows that he is not willing to be honest, act with integrity or within the law unless he is compelled to do so. That is not good enough to permit him to be registered as a real estate salesperson. He has displayed a shocking disregard for his own personal obligations, and, accordingly, the Tribunal has grave concerns as to his professional judgement as a real estate salesperson.

On the issue of his registration history, Mr. Evaniuk failed to appreciate the purpose behind the requirement that all registrants must complete further courses prior to the expiry of their initial two year period of registration. His explanations showed his complete lack of understanding. He did not want to do the courses when he was making money. Then he did not want to do the courses when he had no money. Yet he could find the time and energy and when necessary money to get himself involved in expensive renovation schemes. The courses are mandatory so that those who have now some experience working in the real estate field will enhance their skills in areas of some complexity. This can only benefit the public. But Mr. Evaniuk only completed those courses when faced with the absolute refusal of the Registrar to entertain his renewal application without having successfully completed those courses.

Regarding the "NSF" cheques for the registration fees, they are not of the same significance as failure to complete the required courses, but they do show a lack of ability to perform one's obligations in a timely manner.

The failure of Mr. Evaniuk to provide a satisfactory address for mail to be forwarded to him and his inability to provide documentation when requested all demonstrate his inability to work within a regulated framework.

The civil judgments are of some importance in this case. If Mr. Evaniuk, through bad timing or even poor financial judgment, had found himself in some financial trouble but had demonstrated a willingness to accept this situation and to work with his creditors to honour his financial responsibilities, then the Tribunal would not have found these judgments to be so negative. But the behaviour of Mr. Evaniuk demonstrated his inability to act with integrity. He made promises that he did not keep. He provided a cheque knowing he did not have the funds in his account. He made little effort to maintain currency on his payment schedule. His behaviour was such that his creditors were forced to obtain court ordered judgments and then to go for such relief as garnishments and executions against property. The Tribunal finds Mr. Evaniuk to be cavalier in his treatment of his creditors. While Ms. Preje's constant telephone calls would be upsetting, it is evident that her anxiety sprang from Mr. Evaniuk's own behaviour towards this financial obligation. The Tribunal finds it incredulous that Mr. Evaniuk, working in the real estate business, would have put so much money into renovations for a home not owned by him and for which he has no written contract. His poor judgment in his own financial arrangements mirrored how he treated third parties to whom he owed substantial amounts of money. His past conduct demonstrated his lack of honesty, lack of integrity and inability to work within the law.

The Tribunal put little weight upon the recommendations of Mr. Murray and Mr. Whelan. It was obvious that Mr. Whelan had little knowledge of the past conduct of Mr. Evaniuk. What he did know was that given the right circumstances Mr. Evaniuk could make in the six figures which would translate into substantial commissions for his brokerage. Mr. Whelan did not appear enthused with taking on any additional responsibilities to strictly supervise Mr. Evaniuk in the case of the Tribunal permitting Mr. Evaniuk to be registered on terms and conditions. Mr. Whelan had done little to check on Mr. Evaniuk's background except for a brief conversation with Mr. Murray, a conversation that Mr. Murray had difficulty in remembering.

Regarding Mr. Murray, the Tribunal found his change in attitude towards Mr. Evaniuk to be somewhat puzzling. In the opinion of the Tribunal, Mr. Murray is a decent and honourable man of considerable experience as a real estate broker. He obviously cared for Mr. Evaniuk as demonstrated by his willingness to continually bail Mr. Evaniuk out of financial problems. Mr. Murray might be resigned to facing a considerable financial loss, but the Tribunal cannot place any reliance on his testimony that Mr. Evaniuk would be less willing to show such behaviour in the future. Indeed, Mr. Murray in his testimony stated, "I am not saying he is a reformed man, just not stupid." I am sure that Mr. Murray continues to have some residual fondness for Mr. Evaniuk, but that cannot be the basis for this Tribunal to permit Mr. Evaniuk to work in this industry. The past conduct of Mr. Evaniuk to Mr. Murray showed a blatant disregard for his obligations towards him. He failed to pay the mortgage within the first month that it was registered against the house yet he persisted in opposing Mr. Murray's plan to sell the property to pay off the debts, both of Mr. Murray and of Ms. Preje.

The Tribunal also puts considerable weight on the fact that these judgments deal with real estate and with creditors within the real estate business. There is no prerequisite that clients of Mr. Evaniuk need complain of his business practices. Here there was

evidence of a fellow colleague complaining of Mr. Evaniuk. That complaint is what alerted Ms. Paolercio to flag Mr. Evaniuk's application at RECO.

As well, both creditors had to go to extraordinary lengths to recover on their loans. Ms. Preje finally got her money and Mr. Murray is still owed the considerable sum of \$82,000.00. They both got judgments. They both had to use creditor remedies to collect on their judgments. Mr. Evaniuk's pattern of behaviour showed no concern for the extra time, effort and money required by Ms. Preje and Mr. Murray, both of whom had been his friends and who had trusted him.

On the issue of non disclosure, the Tribunal would have concurred with the Registrar's Notice of Proposal on this item alone. Mr. Evaniuk deliberately withheld information on the judgment obtained by Ms. Preje. The Tribunal discounts completely his explanation that as he had made some payments to Ms. Preje in the past (albeit distant past) therefore he did not have an outstanding judgment against him. Mr. Evaniuk took the real estate training. He was supposedly a professional within the real estate industry and yet he did not know the meaning of "outstanding judgment". The Tribunal finds this to be an incredulous statement. Mr. Evaniuk knew that Mr. Murray was going for judgment against him. Mr. Evaniuk filed a statement of defence dated August 27, 1999, of which there were numerous paragraphs that Mr. Murray in his testimony disputed as to their accuracy. Mr. Evaniuk ultimately did not contest the matter at court. He should have been aware of the likelihood that a judgment had been registered against him in this matter considering the amount of money owed by him to Mr. Murray and his failure to contest the hearing itself.

The Registrar cannot do background checks on each of the over 40,000 registrants that it deals with each year. The Registrar has to be able to rely upon the honesty and integrity of the applicants that they will fully disclose the relevant information. Mr. Evaniuk by his deliberate misleading of the Registrar as to his financial circumstances displayed a lack of honesty and integrity in his behaviour.

Regarding the fourth issue raised by the Registrar, the Tribunal is not completely convinced that there was proof that Mr. Evaniuk held himself out to be a licenced real estate salesperson with Ms. Pascoe. It would have been helpful to have had the testimony of Ms. Pascoe on this point. The evidence of Mr. Rennie, while damaging, was still vague enough that the Tribunal is prepared to give the benefit of the doubt to Mr. Evaniuk. The Tribunal is aware of the caselaw on this matter, but it feels that the evidence as presented was lacking in the necessary particulars to find Mr. Evaniuk had worked as an unlicensed salesperson.

The Registrar based his case mainly on the past conduct of the Applicant. There was no evidence presented except from the Applicant himself as to the current financial position of the Applicant. Mr. Evaniuk had testified that he had been on social assistance though the Tribunal does not know if he continues to receive Ontario Works. Mr. Evaniuk stated he could not afford to pay for a lawyer for the hearing. Mr. Murray stated he still is owed about \$82,000.00 by Mr. Evaniuk. Based on these statements it is doubtful that the Applicant has a good current financial position. But it is the past conduct of the Applicant in his financial affairs which is the basis upon which this Tribunal has upheld the Notice of Proposal of the Registrar.

Based on the evidence before it, the Tribunal did not find this to be a case whereby the Applicant could be permitted to be registered on terms and conditions. The Tribunal

was not satisfied with Mr. Whelan's knowledge of the Applicant and did not feel, given the diverse responsibilities of Mr. Whelan, that he would have the time to strictly supervise Mr. Evaniuk. In any event, the past conduct of Mr. Evaniuk was of such a severe nature that the Tribunal did not see that terms and conditions would be reasonable under these circumstances.

ORDER:

By virtue of the authority vested in it under section 9(4) of the *Real Estate and Business Brokers Act*, the Tribunal confirms the Notice of Proposal of the Registrar, *Real Estate and Business Brokers Act*, dated November 6, 2000 to refuse to grant registration to Oleksandr Evaniuk as a real estates salesperson.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

RELEASED: June 12, 2001

MARTINAKIS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990 Chapter M.42

IN THE MATTER of
ANGELO MARTINAKIS

AND IN THE MATTER of a decision of the
Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund

TO DISALLOW A CLAIM
- Decision dated: October 17, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

ANGELO MARTINAKIS

Applicant

- and -

BOARD OF TRUSTEES
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on June 11, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Friday, July 20, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 13, 2001

PREHEARING

ELISA KLEIN AND ELLIOT WEINSTEIN

APPEAL FROM A DECISION OF THE
CORPORATION DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

ALDEN DYCHTENBERG and PAMELA BLAIKIE, Counsel,
representing Elisa Klein and Elliot Weinstein (the "Applicants")
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program (the "Respondent")
BRIAN CAMPBELL, Counsel, representing Trailwood Homes
Limited (the "Added Party")

DATE OF

PREHEARING: June 11, 2001

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on June 11, 2001 at a prehearing of Alden Dychtenberg and Pamela Blaikie, Counsel for the Applicants, the Applicants, Netanus Rutherford, Counsel for the Respondent, Brian Campbell, Counsel for the Added Party and Michael Godfrey on behalf of the Added Party;

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was a resolution of the issues in this matter and the parties have executed minutes of settlement.
- 2) The matter before the Tribunal is therefore concluded.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

BLUE RIBBON CHILD CARE SOCIETY CARRYING ON BUSINESS AS
BLUE RIBBON DAY CARE CENTRE

**BLUE RIBBON CHILD CARE SOCIETY CARRYING ON BUSINESS AS
BLUE RIBBON DAY CARE CENTRE**

APPEAL FROM A NOTICE OF DIRECTION TO SUSPEND
THE LICENCE, AND FROM A NOTICE OF INTENTION NOT TO
RENEW THE LICENCE BY THE DIRECTOR UNDER THE
DAY NURSERIES ACT

TRIBUNAL: HUGH HANSON, Presiding Member
MALCOLM FEALING, Member
SIMON DANN, Member

APPEARANCES: GARY SHORTLIFFE, Counsel for the Applicant
KATHARINE RENISON, Counsel for the Director

DATES OF HEARING: March 29, 2001 and April 2, 3, 4, 5, 2001 and
April 6, 7, 8, 9, 10, 11, and 12, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing under the *Day Nurseries Act* arises from a Director's Notice of Direction to Suspend the Licence dated January 18, 2001 and a Director's Notice of Intention Not to Renew the Licence dated March 13, 2001 respecting the Blue Ribbon Child Care Centre operated by the Blue Ribbon Child Care Society at 544 Lansdowne Avenue in Toronto. The Notice of Intention was subsequently amended. It is unclear whether Blue Ribbon Child Card Society carrying on business as Blue Ribbon Day Care Centre (the "Applicant") or (the "Centre") ever formally appealed the amendment.

The Centre is located in a building owned by a Tamil co-operative and was intended to provide service to children and families in the co-operative and surrounding area. The Centre opened in 1989. In July 1999, the City of Toronto stopped purchasing service from the Centre, which quickly lost many of its clients and ran into financial difficulties.

Although the licence was held by the Blue Ribbon Child Care Society, it soon became clear in evidence that the centre was actually run by Siva Kandiah. She is sometimes referred to as "the manager" in these reasons.

The following witnesses were called by the Director:

Carol McNamara	Licensing Specialist
Darlene Chandon	Licensing Specialist
Sophie Abshez	Former Blue Ribbon employee
Mohama Yogarajah	Former Blue Ribbon employee
Kimberley Bolton	Employment Standards Branch
Sennathamby Sittampalam	Property Manager, 544 Lansdowne Avenue
Judy MacLeod	Manager, Compliance Review
Shirley Choon	Former Blue Ribbon employee
Xing Wei	Former Blue Ribbon employee
Brenda Patterson	Director, Contracted Services, Toronto
Sanaz Sharifi-Rad	Former Blue Ribbon employee
Caroline Soto	Former Blue Ribbon employee
Karen Meehan	Director for <i>Day Nurseries Act</i>
Gary McCann	Police Officer
John Long	Police Officer

The following witnesses were called by the Applicant:

Siva Kandiah Manager,	Blue Ribbon Child Care
Denise Pierre	parent
Manuel Gomez	Volunteer caretaker for Blue Ribbon
Regina Vitales	parent
Arijasingham Elaiyathamby	Former President, Blue Ribbon Society
Surinder Ghag	parent
Ledchumy Parameswaran	Founding member, Blue Ribbon Society
Sivathasan Prem Kumar	President, Blue Ribbon Society

A large number of documents were submitted as exhibits by the parties.

THE ISSUE:

The issue before the Tribunal is whether the Director under the *Day Nurseries Act* was justified in issuing the Notice of Direction and Notice of Intention and, if not, what action the Tribunal should order her to take.

PRELIMINARY ISSUES:

Postponement of hearing

As a preliminary issue, counsel for the Applicant moved that the hearing not proceed on the following Monday, since he had not been properly retained and was unprepared. He argued that it is in the interests of both Blue Ribbon and the Tribunal that there be proper representation. Counsel for the Respondent argued that there had been ample time for the Applicant to obtain counsel, that there was no certainty that counsel would be retained if more time were allowed, that the Respondent had witnesses under subpoena, that it would be prejudicial to the Respondent not to proceed with the hearing

dates that had previously been agreed upon, and that delay would disrupt the working of the Tribunal. The Tribunal agreed with the Respondent and ruled that the hearing would proceed as planned. Counsel for the Applicant informed the Tribunal that he would not be able to attend all the hearings, but would come whenever possible.

Joinder

The joinder of issues was raised and, to ensure expeditious disposal of the matters, the Tribunal ruled that the Notice of Direction and the Notice of Intention with its amendment would be heard jointly.

Order for restraint

Counsel for the Respondent asked the Tribunal to restrain the Applicant from having people contact Ministry officials about the case. The Tribunal ruled that it had no power to make such an order.

RECENT LICENSING HISTORY

Exhibit 3-1 shows the recent licensing history of Blue Ribbon, which the Tribunal finds instructive.

Licence	Issued	Expired
Provisional	October 10, 1998	February 28, 1999
Licence/renewal	February 23, 1999	February 23, 2000
Licence/renewal	March 1, 1999	August 23, 1999
Provisional	February 10, 2000	May 9, 2000
Licence/renewal	May 9, 2000	November 8, 2000
Provisional	December 15, 2000	February 13, 2001

It is important to note that provisional licences are given when inspectors identify serious non-compliances with the Act and Regulation. The Director expects the licensee to come into compliance within ten days. Recurring provisional licences are indicators that the operator has serious difficulties in compliance.

THE NOTICE OF DIRECTION

The Tribunal must determine whether the Director had reasonable grounds for ordering that the day nursery be closed and that the licence be suspended until her requirements are met.

THE LAW:

Section 15 of the *Day Nurseries Act* reads as follows:

15(1) Where, in the opinion of a Director, there is a threat to the health, safety or welfare of children cared for in a day nursery or in respect of a private-home day care from a private-home day care agency, as the case may be, the Director shall,

- (a) *give such direction or directions in writing as the Director considers necessary to the operator or to any person on the premises of the day nursery or premises where private-home day care is provided who appears to be in charge of the children being cared for, directing the operator or person in charge, as the case may be, immediately or within such period of time as the Director specifies to eliminate the threat to the health, safety, or welfare of the children or to protect the children from such threat,*

and may

- (b) *direct in writing that the day nursery shall not be used as a day nursery or that private-home day care not be provided on the premises that is the subject of the direction referred to in clause (a) until the Director's direction or directions are complied with.*

(2) Where the Director gives a direction under clause (1)(b), the Director may,

- (a) *notify the parents or guardians of the children enrolled in the day nursery or in receipt of private-home day care, as the case may be, of the direction; and*
- (b) *cause to be affixed to the premises of the day nursery or premises where private-home day care is provided, as the case may be, a notice in the prescribed form and no person except the Director or a program advisor designated under section 16 shall remove the notice unless authorized by the Director or a program advisor.*

(3) Despite section 13, where a direction is given by the Director under subsection (1), the licence of the day nursery or private-home day care agency, as the case may be, shall be deemed to be suspended without a hearing until the Director is satisfied that the direction has been complied with and upon suspension the provisions of section 13 apply as if the direction were a notice of a proposal to revoke the licence under subsection 13(1).

THE EVIDENCE:

Ms. Chandon and Ms. McNamara, Ministry of Community and Social Services licensing specialists, arrived at the Applicant's day nursery on January 17, 2001 in the late morning. Two children were present with a cleaner and the manager. There was no trained staff present. One of the children was six years old and was removed by the manager. (The licence allows only children 2.5 to 5 years old.) The manager testified that one of the inspectors ordered this removal. Shortly thereafter, Ms. Sharifi-Rad, the supervisor, arrived at the centre. She had been distributing flyers for the centre at the manager's instruction. Ms. Sharifi-Rad indicated that she was going to resign that afternoon and that there would be no qualified staff present the following day (two other staff had resigned two days previously).

Shortly after noon, the supervisor realized that a child who was supposed to be picked up from school at 11:30 had not been collected. The child was located in the school office and Ministry staff instructed the supervisor to file a Serious Occurrence Report.

Later that day, the manager took the six-year-old child who was being escorted from school to the day nursery. The evidence about exactly what happened is unclear. The manager testified that she took the child to her own apartment and found a baby-sitter for her. The inspectors testified that the manager would not say where the child was and also that the manager said she took the child home. They also testified that the child had been left alone in the manager's apartment for some hours. The inspectors required that a missing person report be filed as well as a Serious Occurrence Report. The police were called and found the child to be in the manager's apartment. The child's mother testified that the manager had no authorization to take the child anywhere but to school and to the day nursery.

What is to be drawn from this? Clearly the manager had allowed a child to attend the nursery who was over the age limit of the licence. This is a non-compliance, but not one that necessarily constitutes a danger to the health, safety or welfare of that child or the other children. Was the child left alone? We cannot know for certain, but the manager was not forthcoming in talking to the inspectors about it. The Tribunal finds the inspectors' testimony to have greater credibility than that of the manager in this regard, since they had no personal interest in the issue and would not have required a missing person report to be filed, involving the police, if they were not genuinely concerned.

In addition to these two serious occurrences on January 17, 2001, the inspectors recorded additional non-compliances at the day nursery that day (exhibit 3-55) several of which are disputed by the Applicant.

The prime issue in regard to the Notice of Direction is the anticipated lack of a Ministry-approved supervisor and adequate qualified staff. The manager had not given reasonable assurance that such staff would be in attendance on January 18, 2001. As the inspectors had been told that the supervisor would not be returning and there were, apparently, no other qualified staff, the Tribunal finds that the Director had reasonable grounds for issuing the Notice as she did. The appeal is dismissed.

THE NOTICE OF INTENTION

The Tribunal must determine whether the Director had good grounds for issuing this Notice of Intention not to renew the Blue Ribbon licence.

THE LAW:

Section 12 of the *Day Nurseries Act* (the "Act"), states as follows;

12(1) Subject to section 13, a Director may refuse to issue a licence where in the Director's opinion,

(a) the applicant or any employee of the applicant or, where the applicant is a corporation, its officers, directors or employees is or are not competent to establish, operate or maintain a day nursery or a private-home day care agency, as the case may be, in a responsible manner in accordance with this Act and the regulations;

(b) the past conduct of the applicant or any employee of the applicant or, where the applicant is a corporation, of its officers, directors or employees, affords reasonable grounds for belief that the day nursery or the private-home day care agency, as the case may be, will not be established, operated or maintained in accordance with this Act and the regulations; or

(c) the building or buildings or accommodation in which the applicant proposes to establish, operate or maintain the day nursery or provide private-home day care, as the case may be, does not comply with the requirements of this Act and the regulations.

(2) Subject to section 13, a Director may refuse to renew or may revoke a licence issued to a day nursery or a private-home day care agency, where in the Director's opinion,

(a) the licensee or any employee of the licensee, or where the licensee is a corporation, any officer, director or employee thereof, has contravened or has knowingly permitted any person under the control or direction of or associated with the licensee, officer, director or employee, as the case may be, to contravene,

(i) any provisions of this Act or the regulations or of any other Act or the regulations thereunder applying to the establishment, operation or maintenance of the day nursery or the provision of private-home day care, as the case may be, or

(ii) any term or condition of the licence;

(b) the building or buildings or accommodation in which the day nursery is established, operated or maintained or the private-home day care is provided, does not comply with the requirements of this Act and the regulations;

(c) the day nursery is established, operated or maintained or the private-home day care is provided in a manner that is prejudicial to the health, safety or welfare of the children cared for in the day nursery or in the place or places where private-home day care is provided;

(d) any person has made a false statement in the application for the licence or renewal thereof, or in any report, document or other information required to be furnished by this Act or the regulations or by any other Act or regulation that applies to the day nursery or private-home day care agency, as the case may be; or

(e) a change in the officers or directors of the applicant would, if the applicant were applying for the licence in the first instance, afford

grounds for refusing to issue a licence under clause 1(b). R.S.O. 1990, c.D.2,s. 12.

Section 13 of the DNA states as follows;

(1) Where a Director proposes under section 12 to refuse to issue a licence or to refuse to renew or to revoke a licence issued under that section, the Director shall cause notice to be served of the Director's proposal together with written reasons therefor, on the applicant or the licensee, as the case may be.

(2) A notice under subsection (1) shall inform the applicant or licensee, as the case may be, that the applicant or licensee is entitled to a hearing by the Tribunal if the applicant or licensee mails or delivers, within fifteen days, after the notice is served on the applicant or licensee, notice in writing to the Director and the Tribunal, requiring a hearing and the applicant or licensee, as the case may be, may so require such a hearing.

(3) Where an applicant or licensee does not require a hearing by the Tribunal in accordance with subsection (2), the Director may carry out the proposal stated in the Director's notice under the subsection (1) without a hearing.

(4) Where an applicant or licensee requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, at the hearing, may by order direct the Director to carry out the Director's proposal or refrain from carrying out the Director's proposal and to take such action as the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Director.

(5) Sections 199, 201 and 202 of Part IX of the Child and Family Services Act apply with necessary modifications to proceedings before the Tribunal, to the powers of the Tribunal under this Act and to appeals therefrom.

(6) Where, within the time prescribed therefor or, if no time is prescribed, before expiration of a licence, a licensee has applied for renewal of a licence and paid the prescribed fee, the licence shall be deemed to continue,

(a) until the renewal is granted; or

(b) where the licensee is served with notice that the Director proposes to refuse to grant the renewal, until the time for requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its decision. R.S.O. 1990, c. D.2, s. 13.

THE ALLEGATIONS:

This section deals with the allegations contained in the Director's Notice of Intention.

A. It is alleged that contrary to section 12(2)(a)(i) of the Day Nurseries Act you have contravened or have knowingly permitted persons under your control or direction or associated with you to contravene the provisions of the Day Nurseries Act and the Regulation thereunder applying to the establishment

1. You failed to designate a person to exercise the powers and duties of the operator in the absence of a person appointed to be responsible for the day-to-day operation and management of the day nursery contrary to section 3(3) of the Regulation including but not limited to:

(a) November 8, 2000

(i) it was unclear who was responsible for the day to day operations of the centre.

It is clear to the Tribunal, and it should be clear to the Ministry staff who had dealings with the centre over the years, that it was Mrs. Kandiah (the manager) who was responsible for the day-to-day operation of the nursery. It matters not that she described herself as a volunteer. The whole history of the centre shows that she was in charge. She hired and instructed staff and was a daily presence at the centre. That there was no written documentation of who was responsible is the real problem. The Tribunal finds that this is a non-compliance.

2. You failed to employ a supervisor who shall plan and direct the program of the day nursery, be in charge of the children and oversee the staff, contrary to section 3(5) of the Regulation to the Day Nurseries Act including but not limited to:

(a) November 8, 2000

(i) there was no qualified supervisor on the premises.

There is ample evidence that the manager made diligent attempts to hire qualified supervisors. Her problem was being able to pay them; hence the substantial turnover. There was credible testimony from former employees that there was not always a supervisor in attendance and that sometimes there was no supervisor employed at all. The Tribunal finds that this is a non-compliance.

3. You failed to ensure that the play equipment and furnishings were provided in numbers that are adequate to serve the licensed capacity of the day nursery and are of such a type and design so as to meet the needs of the children enrolled, contrary to section 14(1) of the Regulation to the Day Nurseries Act including but not limited to:

(a) *On January 3, 2001*

- (i) *there was no chalk or brush erasers for the chalkboard*
- (ii) *the games provided did not have any play pieces.*

(b) *On January 17, 2001*

- (i) *there was no evidence of any multicultural books although many of the children come from different cultural backgrounds.*

Testimony concerning this allegation is contradictory. Ms. Pierre and Mr. Gomez testified that the toys were fine. Ms. Soto said that some of the toys were broken and sometimes not clean. Ms. Sharifi-Rad said the toys were not bad and that there were sufficient books for the five children then enrolled, although not many of a multicultural nature. Ms. Wei said that the toys were not as clean as at home. Ms. Choon testified that some of the books had torn pages; small children can damage books. Ms. Yogarajah's testimony may have been influenced by her difficulties in getting paid. She testified that the books were not suitable for children and that she took the children to the library. She also said that there were not enough toys and that some of them were damaged. Ms. Abshez, who admitted having developed an animosity towards the manager, said that the toys and materials were very poor and that 12 of the 20 books were torn. On the balance of probabilities, the Tribunal finds that there is insufficient credible evidence to find that this is a non-compliance.

4. *You failed to ensure that equipment and furnishings used in the day nursery were maintained in a safe and clean condition and kept in a good state of repair contrary to section 16 of the Regulation to the Day Nurseries Act including but not limited to:*

(a) *on January 3, 2001*

- (i) *the dramatic area bench had screws missing, making it unstable*
- (ii) *the folding tri-mirror in the dramatic area was unstable and could fall on a child*
- (iii) *the hinges on the play stove were loose*
- (iv) *the handles were missing from the play fridge*
- (v) *the electronic keyboard was not working.*

(b) *on January 17, 2001*

- (i) *there were protruding screws on the hinges of the play stove*
- (ii) *the handles were missing from the play stove.*

There is sufficient credible testimony to persuade the Tribunal that some of the equipment posed a potential danger to the safety of the children and that this is a non-compliance.

5. This allegation, concerning insurance, was withdrawn by the Director.

6. *You failed to conduct a fire drill at least once a month and keep written records relating to fire protection contrary to section 27(1)(d),(e) of the Regulation to the Day Nurseries Act. This failure was specifically noted on:*

(a) *February 10, 2000*

(b) *January 3, 2001*

The Applicant's submissions state that a record of all fire drills conducted over the past 6 years can be found in Applicant's Book 5. In fact there is a record of only three drills: November and December of 2000, and January of an unknown year. There was testimony that the manager asked Ms. Abshez to conduct a drill and back-date it to October because they had failed to do one that month. Ms. Choon said that during her year at the centre fire drills were held sometimes but not every month. On the balance of probabilities, the Tribunal finds that this is a non-compliance.

7. *You failed to ensure that emergency information was readily accessible to each staff member contrary to section 29(1)(2)(3) of the Regulation to the Day Nurseries Act including but not limited to:*

(a) *February 10, 2000*

(i) *emergency cards were incomplete*

(b) *January 17, 2001*

(i) *there was no emergency card for one of the children*

(ii) *there was no parent information, no doctor's information, no health care or medical information for that child.*

There is ample credible testimony from the inspectors and former employees to substantiate this allegation. The Applicant claims that Book 10 contains the emergency cards. There is no medical information or doctor's information on these cards. Even if the required information was on record, it should have been readily available and the inspectors should have been able to see it. The Tribunal finds that this is a non-compliance.

8. *You failed to maintain a daily record of any incidents affecting the health and safety of children and staff contrary to section 30 of the Regulation to the Day Nurseries Act including but not limited to:*

(a) *February 10, 2000*

(i) *there was no daily record on the premises*

(b) *May 12, 2000*

(i) *entries were missing from the daily record.*

Although a number of non-compliances were noted by the inspectors in the visits of November 1 and 8, 2000 and January 3 and 17, 2001, there is no reference to this section of the Regulation. From this the Tribunal concludes that these daily records were being kept as required. The Tribunal questions the Director's judgement in pointing to omissions in the past that have not been substantiated in recent inspections. The Tribunal finds that this is not a non-compliance.

9. *You failed to maintain proper sanitary practices contrary to section 32 of the Regulation to the Day Nurseries Act including but not limited to:*

(a) *on January 3, 2001*

(i) *there was no evidence of soap or paper towels in the preschool washroom.*

There is credible testimony from the inspectors and former employees that soap and paper towels were sometimes missing. The Tribunal finds this to be a non-compliance.

10. You failed to ensure that before a child is admitted to care, and from time to time thereafter, the child is immunized as recommended by the medical officer of health contrary to section 33(1) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on January 3, 2001

(i) one child's file had no immunization record.

There is credible testimony by Ms. Sharifi-Rad that when immunization information is missing it can take a long time for the parents to provide it. The Applicant maintains that exhibit 12 shows these records to be complete. There is no evidence that the Applicant neglected to ask for this information or that it was never obtained for any specific child. The Tribunal concludes that this is not a non-compliance.

11. You failed to ensure that a drug or medication is administered to a child only where a parent of the child gives written authorization that includes when and the amount of the drug to be administered contrary to section 37(1)(d) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on November 8, 2000

(i) medication was administered to a child without any written authorization from the parent.

There is credible testimony from Ms. McNamara that this happened on the date noted. In Applicant's Book 5 there is a form dated 7 November 2000 giving the parent's consent and instructions regarding the administration of the drug. It is unfortunate that this document was not available for Ms. McNamara to see, raising the question of whether it might have been back-dated. However that may be, there is no evidence that this was a repeated or is a continuing problem. The Tribunal finds that this is not a non-compliance.

12. You failed to ensure that all food or drink is stored, prepared and served so as to retain maximum nutritive value and prevent contamination contrary to section 39)c) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on January 3, 2001

(i) catered food was delivered at a temperature of 100°, which was too cool

(ii) the food warmers were not heated prior to the delivery of the food

(b) on January 17, 2001

(i) food temperature was not recorded upon its arrival prior to 11:30 a.m. When the temperature was taken at 12:05 p.m., the temperature was 100° and the soup was contaminated

(ii) the food warmers were not heated prior to the arrival of the food.

There is no reason to doubt the testimony of the licensing specialist in this regard. There is corroborating testimony from former employees, some of it indicating that the manager wanted false temperatures to be recorded. The Tribunal does not need evidence that the food actually was contaminated to find, as it does, that this is a non-compliance.

13. You failed to ensure that each child one year of age or older is provided with a meal consisting of foods from the four food groups contrary to section 40(1)(a) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on February 10, 2000

(i) not enough meals were ordered for the children in attendance

(b) on November 8, 2000

(ii) two children do not eat meat for religious reasons but no vegetarian substitute was available.

That there were not enough meals ordered on February 10, 2000 may well have been a freak accident. There is no evidence that this is something that occurred with any frequency. The summary report of the November 8, 2000 inspection does not substantiate the allegation; it merely requires a letter from the caterer. Ms. Pierre testified that her child, who has a dietary restriction concerning milk and cheese, had no problems eating at the centre. The Tribunal finds that this allegation is not substantiated.

14. You failed to ensure that each child one year of age or older is provided with nutritious between meal snacks consisting of foods that will promote good dental health at times that will not interfere with a child's appetite for meal times contrary to section 40(1)(b) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on February 10, 2000

(i) no morning snack was served.

There is testimony from four former employees indicating that morning snacks were not provided to the children at the centre. This corroborates the allegation, and the Tribunal finds that this is a non-compliance.

15. You failed to ensure that there were menus posted for the current and following week in a conspicuous place and any substitutions posted contrary to section 41(1) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on November 1, 2000

(i) a substitution for the afternoon snack was required. The menu stated the snack was yogurt, however, there was none on the premises.

The Applicant admits that there sometimes were changes in the menu that were not reflected in the posting. While this may be a relatively trivial matter, the Tribunal nevertheless finds it to be a non-compliance.

16. You failed to carry out special dietary and feeding arrangements in accordance with written instructions of the parent contrary to section 43 of the Regulation to the Day Nurseries Act including but not limited to:

(a) on February 10, 2000

(i) a feeding arrangement letter was required for one child

(b) on January 3, 2001

- (i) two children were listed as having special dietary considerations (no red meat, no milk or sugar) on the allergy list but there was no evidence of these needs in the children's files*
one child does not participate in the lunch routine and is sometimes picked up at lunch time. Other times he stays during lunch and has parts of meals.

There is no reason to doubt that on February 10, 2000 a feeding arrangement letter was lacking for one child. There is no evidence to suggest that the child was not being fed in accordance with the parent's instructions, however. It may be that there should have been reference to dietary needs in the two children's files in January 2001, but note was made of these needs in the allergy list. The Applicant has provided evidence (Book 10) that the caterer was aware of these needs and was providing appropriate meals. The Tribunal finds that this allegation is not substantiated.

17. You failed to ensure that there are written policies and procedures with respect to discipline, punishment and any isolation measures to be used contrary to section 46(1) of the Regulation to the Day Nurseries Act. This failure was specifically noted on:

(a) February 10, 2000

- (i) employees had not signed the behaviour management policy as required.*

That employees had not signed the behaviour management policy does not prove that one did not exist. The Applicant has provided evidence that there was such a policy (Book 7). This allegation has not been substantiated.

18. You failed to ensure that the review of behaviour management policy is signed by the person who made the review contrary to section 47.2(2) of the Regulation to the Day Nurseries Act. This failure was specifically noted on:

(a) November 24, 1998

In the Tribunal's view, a noted non-compliance some 26 months prior to the issuance of the Notice of Intention, with no reporting of the deficiency in subsequent inspections, is insufficient to establish this as a non-compliance.

19. You failed to ensure that there is a written procedure for monitoring the behaviour management practices of employees contrary to section 47.3 of the Regulation to the Day Nurseries Act specifically noted on:

(a) February 10, 2000

The Director cites the inspection summary of February 10, 2000 to support this allegation. The note in that summary, and the oral testimony confirming it, refers to the recording of the monitoring of behaviour management. This is not evidence that the centre lacks a written procedure for monitoring behaviour management. Evidence of this deficiency is found in the summary of the May 12, 2000 inspection. On the basis of that report, and failing to find a relevant written policy in the documentation supplied by the Applicant, the Tribunal finds that this allegation is substantiated and that this is a non-compliance.

20. You failed to ensure that a record is kept of the monitoring of behaviour management practices for at least two years after the entry was made contrary to section 47.3(3) of the Regulation to the Day Nurseries Act specifically noted on:

- (a) November 24, 1998*
- (b) February 10, 2000*
- (c) June 22, 2000*

In Book 7 the Applicant includes certain performance appraisal forms that include the following items to be rated:

- (17) Uses appropriate disciplinary techniques, i.e. positive redirection
- (17A) Is firm and consistent when guiding behaviour
- (17C) Models attitudes and behaviour patterns as expected of children
- (17D) Encourages problem solving and decision making
- (17E) Establishes and maintains room control
- (37) _____ complies/does not comply with our behaviour management policy from _____ to _____

In the Tribunal's view, this constitutes a record that satisfies the Regulation. The examples in Book 7 are dated 1997, 1998 and 1999. The conclusion must be that the 1998 and 2000 inspections did not take these appraisals into account, failed to find them, or deemed them inadequate. The Tribunal has no evidence that more recent performance appraisals are missing or have not been done. Given this evidence, and despite testimony that behaviour management was not monitored, the Tribunal finds that this allegation is not substantiated.

21. You failed to ensure that there was a written procedure for monitoring behaviour management practices of employees and a record was kept of the monitoring done contrary to section 47.3(1)(3) of the Regulation to the Day Nurseries Act specifically noted on:

- (a) May 12, 2000*

This is a repetition of allegations dealt with above.

22. You failed to ensure that up-to-date records are available for inspection and are kept on the premises for each child enrolled contrary to section 48(1)(f)(g)(j) of the Regulation to the Day Nurseries Act including but not limited to:

- (a) on November 24, 1998*
 - (i) doctor's address was required on the application form*
- (b) on May 12, 2000*
 - (i) there was no health card number for two children*
 - (ii) there was no immunization record for four children*
- (c) on January 3, 2001*
 - (i) there was no health card number for one child.*

There is no evidence to dispute the inspectors' finding in this regard. The Tribunal finds that this is a non-compliance.

23. You failed to maintain a record of daily attendance for each child contrary to section 48(2) of the Regulation to the Day Nurseries Act, This deficiency was specifically noted on:

(a) January 17, 2001

(i) there was no daily attendance taken on this day

In testimony the manager said that attendance was not taken on that day because there were no children to record. Credible testimony indicates that there were children at the centre that day. The Tribunal finds this to be a non-compliance.

24. You failed to maintain a daily attendance record showing the arrival, departure and absence of children contrary to section 48(3) of the Regulation to the Day Nurseries Act. This deficiency was specifically noted on:

(a) February 10, 2000

(i) arrival and departure were not indicated on the daily attendance

(b) May 12, 2000

(i) arrival, departure and absence of each child was required

(c) June 22, 2000

(i) attendance was to be documented by time

(d) November 1, 2000

(i) daily attendance was required

(ii) arrival and departure were not indicated on the daily attendance.

There is no reason to doubt the testimony of Ministry officials regarding this allegation. The Applicant provided an attendance book showing arrival and departure times and absences for the period January 2000 to January 2001. There is credible testimony that the centre was closed (locked) by the property manager for lack of rental payment from December 12 to December 14, 2000. Nevertheless, the attendance book shows that four children were in attendance during those days. The Tribunal can put no weight on this document. The Tribunal finds this to be a non-compliance.

25. You failed to ensure that the program of activities is varied and flexible contrary to section 53(1)1.2.3 of the Regulation to the Day Nurseries Act including but not limited to:

(a) on January 3, 2000

(i) the creative shelf was inadequate. There was no evidence of collage materials, glue, variety of papers or scissors

(ii) planned activities were not in evidence.

There is strong evidence that the centre is in severe financial difficulties. This, no doubt, is the reason that adequate supplies were not available. Nevertheless, a certain minimum of materials is needed and the centre seems unable to provide them. The Tribunal finds this to be a non-compliance.

26. You failed to post a daily program plan contrary to section 53(2)(a) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on November 8, 2000

(i) the program plan that was posted was outdated as it was for the week of October 23, 2000 to October 27, 2000.

While it may be true, as submitted by the Applicant, that the centre does its best for the children, it is apparently not doing so in keeping with the Regulation, at least in regard to program plan. The Tribunal finds that this is a non-compliance.

27. You failed to ensure that a child unable to sleep during rest period is not kept in bed for longer than one hour and is permitted to engage in quiet activities contrary to section 53(5)(c) of the Regulation to the Day Nurseries Act as specifically noted on:

(a) November 24, 1998

(i) sleep time was chaotic

(ii) no bottles were provided at bedtime.

The observations do not support the allegation as worded. The inspection report cited was dated over two years ago. Subsequent inspections made no note of this problem. The Tribunal concludes that this is no longer an issue and finds that the allegation is unsubstantiated.

28. You failed to maintain proper staff to child ratio contrary to section 55(3) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on March 25, 1999

(i) trained staff was required from 4-6 p.m.

(b) on November 8, 2000

(i) there was no assistant staff on the premises.

This deficiency was also in evidence on January 17, 2000. The Tribunal finds this to be a non-compliance.

29. You failed to ensure that where fewer than five full-time employees as set out in schedule 3 or 4 are required to meet ratios, that the supervisor may be counted as a full-time employee contrary to section 55(7)(a)(b)(c) of the Regulation to the Day Nurseries Act including but not limited to:

(a) on May 12, 2000

(i) there was no supervisory coverage from 11:00 a.m. to 6:00 p.m.

(ii) the supervisor worked four hours daily.

When the Ministry staff arrived at the centre on 17 January 2001 the supervisor was out distributing flyers. The Tribunal finds this to be a continuing non-compliance.

30. *You failed to ensure that every child is supervised by an adult at all times contrary to section 57 of the Regulation to the Day Nurseries Act including but not limited to:*

(a) *on November 8, 2000*

(i) *in a span of three hours there were observed to be six incidents where the children were left unsupervised*

(b) *on January 3, 2001*

(i) *the children were left unattended in the room while ECE went to kitchen.*

There is credible testimony to support this allegation. As the Applicant submits, these deficiencies are directly related to the financial problems of the centre. The Tribunal, however, cannot overlook a clear non-compliance, which we find this to be.

31. *You failed to ensure that you employed at least one qualified person for each group of children who holds an ECE diploma or is approved by a Director contrary to section 59(1)(a)(b) of the Regulation to the Day Nurseries Act including but not limited to:*

(a) *on July 13, 1999*

(i) *there were 5 children with two untrained staff*

(ii) *trained staff and supervisor were not in attendance during the visit*

(b) *on May 12, 2000*

(i) *there was no trained staff from 11:00 a.m. to 6:00 p.m.*

(c) *on January 17, 200*

(i) *there was no program staff on the premises at 11:30 a.m.*

This allegation is fully corroborated by testimony, and the Tribunal finds that this is a non-compliance.

32. *You failed to post the operator's licence in a conspicuous place contrary to section 75(11) of the Regulation to the Day Nurseries Act as specifically noted on:*

(a) *January 3, 2001.*

Credible testimony corroborates this allegation, and the Tribunal finds it to be a non-compliance.

33. *You failed to keep financial records as required under s. 64(1) and 64(2) of O.Reg. 262.*

Ms. Patterson, the city's Director of Contracted Services, testified that it was the failure to keep appropriate financial records that caused the city to stop the subsidies that it had been providing. In May 1998 the centre's auditor resigned and his audit report for the year ended December 31, 1997 pointed out several serious deficiencies. The auditor of the accounts for the year ended December 31, 1998 refused to offer an opinion because the records were incomplete. The list of accounting deficiencies found in exhibit 3-84 is long and damning. The Tribunal finds this to be a non-compliance.

B. *It is alleged that contrary to section 12(2)(ii) of the Day Nurseries Act you have contravened or have knowingly permitted persons under your control or direction or associated with you to contravene a term or condition of your licence for the reasons set out in paragraph A hereof and additionally that:*

(a) On June 22, 2000 you contravened a term or condition of your licence dated May 9, 2000 by failing to ensure that:

- (i) the centre kept a record of the behaviour management practices of employees, volunteers or students for at least two years after the entry was made contrary to section 47.3(3) of the Regulation to the Day Nurseries Act.*
- (ii) the centre kept daily attendance records showing arrival, departure, or absence of each child contrary to section 48(3) of the Regulation to the Day Nurseries Act.*

(b) On January 3, 2001, you contravened a term of your licence dated December 15, 2000 by failing to ensure that:

- (i) a fire drill was conducted in December 2000 contrary to section 27(1)(e) of the Regulation to the Day Nurseries Act.*

These allegations are essentially a repetition of allegations dealt with above in these reasons.

C. *It is alleged that contrary to section 12(2)(c) of the Day Nurseries Act, the day nursery is operated and maintained in a manner prejudicial to the health, safety and welfare of the children cared for in the day nursery for the reasons already set out in this Notice and further it is alleged that:*

(a) on January 17, 2001 during a morning visit:

- (i) a child was not picked up from morning kindergarten at 11:30 a.m. as required. Mrs. Kandiah, who identified herself as a volunteer, nor the cleaning staff were observed making any efforts to make arrangements to pick-up the child.*
- (ii) Mrs. Kandiah removed one child, April, from the centre at approximately 11:40 a.m. and returned without the child, refusing to state her whereabouts. The supervisor was directed by the licensing specialists to make a Serious Occurrence Report to Toronto Children's Services. The child was later determined to have arrived at school for her afternoon program. The child told the supervisor that Mrs. Kandiah had taken her to her apartment, given cookies and milk, and no lunch and was told to watch television. She was left alone for an undetermined amount of time and reported feeling frightened.*
- (iii) At the end of the school day, the supervisor picked up April and Aries who were going to be picked up at the centre by a family member. The supervisor was met by Mrs. Kandiah on her way back who took April with her. The supervisor was directed to call the Serious Occurrence Line and call the police to report a missing child. Mrs. Kandiah called the centre to report that she had taken April home. There was no answer at April's home and police went to Mrs. Kandiah's home and found April in Mrs. Kandiah's apartment.*

(b) It is further alleged that

- 1. Proper fire drills were not being conducted.*
- 2. Proper emergency medical information was not readily accessible to staff.*
- 3. Equipment and furnishings were unsafe.*
- 4. Medications were being administered without parental authorization.*
- 5. Food was improperly stored, prepared or served.*
- 6. There was not adequate trained staff.*
- 7. The children were not supervised by an adult at all times.*

These allegations are restatements of issues dealt with above.

(c) There was a high turnover of staff and unstable environment for the children as a consequence of fiscal mismanagement including nonpayment of wages, employer obligations to Revenue Canada and provincial authorities and rent.

There had been a very high staff turnover caused, primarily, by the operator's inability to pay wages regularly. There is an abundance of credible evidence concerning this difficulty. The result was that children kept meeting different caregivers and were prevented from forming healthy and helpful bonds. This is clearly not in the best interests of the children.

D. *It is alleged that contrary to section 12(2)(a)(i) of the Day Nurseries Act you have contravened or have knowingly permitted persons under your control or direction or associated with you to contravene the provisions of the Day Nurseries Act and the Regulation thereunder applying to the establishment, operation and maintenance of the day nursery in that:*

- 1. You failed to employ a supervisor who shall plan and direct the program of the day nursery, be in charge of the children and oversee the staff, contrary to section 3(5) of the Regulation to the Day Nurseries Act including but not limited to:*

(a) On December 1, 2000 there was no qualified supervisor employed.

(b) From September 3 to November 3, 2000 there was no qualified supervisor on site or employed.

Although with different specifics, this allegation is a repetition of an issue dealt with above.

OTHER EVIDENCE:

Of particular concern to the Tribunal is the position taken by the board of directors of Blue Ribbon Child Care Society. The society is the operator of the centre, and it is to the society that licences have been issued.

There is credible evidence of a number of meetings between board members and Ministry officials at which the responsibilities of the board were carefully explained. Nevertheless, the board has taken the position that it will do nothing to bring the centre into compliance with the Act and Regulation. They will assume their responsibilities only when the centre has been issued a clean licence. This position is outlined in a letter

dated 19 January 2001 (exhibit 3-61) and in testimony by the president of the society, Mr. Prem Kumar.

ANALYSIS:

Some of the allegations in the Notice of Intention are of a relatively minor nature and would not justify the closing of the centre. Some allegations are found to be unsubstantiated. Nevertheless, the number of non-compliances that have been proven is too great to ignore. Given the financial condition of the society, the recent history of repeated non-compliances, and the position taken by the board of directors, on the balance of probabilities it is unlikely that the centre will be able to operate in accord with the Act and Regulation.

The Tribunal finds that the Director had good grounds for issuing the Notice of Intention. Since the centre is not operating at present, the Tribunal finds no reason to delay the implementation of its Order.

DECISION:

Pursuant to the authority vested in it by section 13(4) of the *Day Nurseries Act*, the Tribunal orders the Director to carry out her proposal not to renew the licence of Blue Ribbon Child Care Centre, such proposal to be effective immediately on the release of this order.

LICENCE APPEAL TRIBUNAL

Hugh R. Hanson,
Presiding Member

Malcolm Fealing,
Member

Simon Dann,
Member

RELEASED: June 14, 2001

MAIOLO

CATERINA MAIOLO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BEVERLEY J. READE, Vice-Chair

APPEARANCES:

PAUL J. OSIER, Counsel representing the Applicant
ANDREA YORK, Counsel representing the Ontario New
Home Warranty Program
BRENT T. HURST, Counsel representing the Added Party,
929763 Ontario Ltd.

DATES OF HEARING: January 25 and 26, 2001 and
April 25, 2001 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Licence Appeal Tribunal by Caterina Maiolo ("the Applicant") from a written decision dated August 28, 2000, issued by the Ontario New Home Warranty Program (the "Program") under the *Ontario New Home Warranties Plan Act* ("the Act").

FACTS:

The parties agreed at the commencement of the hearing that there remained three issues in contention, namely the width and quality of the hardwood flooring, the lack of a hearth on the fireplace, and the dimensions of the residence, particularly the kitchen.

The Tribunal heard evidence from the Applicant, Mr. Nelligan, a warranty representative of the Program, Mr. Mirra, a representative of the builder, and Mr. Hozjan, the real estate broker acted on behalf of the builder in effecting the sale.

The Tribunal also received various documents and letters of opinion from individuals who were not made available for cross-examination.

Based on the evidence before it, the Tribunal makes the following findings of fact:

1. In February 1997 the Applicant decided to purchase a new home. She dealt with Mr. Hozjan, who represented 929763 Ontario Ltd. ("the builder"). She viewed a "Bristol" model home, but was given several lots and home models from which to choose. She selected a lot and the model known as "The

Bristol” and signed an offer to purchase on February 23, 1997. The lot originally chosen had already been sold, unbeknownst to the realtor. She agreed to purchase a different lot, and an agreement of purchase and sale was entered into on February 24, 1997.

2. The purchase price agreed upon was \$152,000. This included many extras according to Schedule B of the Agreement of Purchase and Sale., including, “ALL BRICK, HARDWOOD FLOORS – (plank $\frac{3}{4}$ x 3 – dark stain, pre-finished), and Gas fireplace – oak surround – imitation marble surround – fan – thermostat”.
3. The Applicant was told that the selection of an all brick exterior would reduce the interior dimensions of the home. The agreement of Purchase and Sale gave the builder the right to deviate from the plans and specifications and provided that there were no collateral warranties or representations outside of the contract. During the course of construction, a selection sheet was completed by the Applicant, setting forth her choices of various materials. The selection sheet was not produced in evidence. No reasonable explanation was provided by any of the parties as to why it was not available.
4. The Applicant took possession of the home on August 29, 1997. The certificate of completion and possession noted, *inter alia* that there were holes in the hardwood floor and that the fireplace was not working.
5. On June 6, 1998, the Applicant filed a written complaint with the Program. She said that “The hardwood floors in my home are still splitting and was not satisfied with the first attempt of repair”. The letter noted that “The fireplace is not the correct one which I picked out and it matches the stairs which of course were stained the wrong finish.”
6. On August 28, 1998, a further list of defects was provided by the Applicant. The relevant complaints reiterated the June 6, 1998 letter, and added that “The last person in apparently has stained my carpet in front of the fireplace”, and “The square footage in this house is not even close to what it’s supposed to be.”
7. The Builder repaired the hardwood floor on several occasions. The grade of the hardwood was not specified in the agreement of purchase and sale. A letter from Royal Carpet and Interiors provided to the Builder indicated that,

Upon inspection of the wood, I feel the complaints from the homeowner are unfounded. Unfortunately, the homeowner does not know the difference between product grades and feels there is a problem with the wood, however the items which she is complaining about (i.e. poor end match and side splits) this is very normal for this grade of material. The material looks like Bruce CB924 tavern grade and this is within their levels of acceptance for a Bruce product. I found the installation was done very well and one could not do any better with this grade of product. The material in the house I found to be good quality for this Bruces’ tavern grade.

8. A letter provided to the Applicant’s counsel from Jonathon’s Floor Coverings reads, “The floor appears to be Bruce laurel strip – CB924 – gunstock brown.

The checks and grain differences we noted are consistent with the above mentioned grade. The floor also contains knots and pin worm holes which are typical of CB grade product. The installation was within acceptable industry standards and we saw no deficiencies.

9. Mr. Nelligan, the warranty representative who examined the floors found them to be acceptable. Photographs provided at the request of the Tribunal show the floor to have been repaired satisfactorily. The boards are not the same width as that called for in the purchase agreement. They are one of two standard sizes, neither of which is the size written by the realtor in the schedule to the agreement.
10. The builder's response to the complaint about the home's dimensions was that because the home was all brick, it lost 4" on exterior walls, compared to a similar house made of siding. He also noted that a ten inch bump-out in the dining room had to be eliminated because of the brick, and that the Applicant was made aware of this during construction. The Applicant admitted that she was aware that the brick would change the interior dimensions of the home. The over-all dimension change is within the tolerance allowed by the Program in Builders' Bulletin 22.
11. In order to accommodate the reduced dimensions on the interior of the home, the builder reduced the size of the kitchen. He did not discuss where the reductions in the interior should take place with the Applicant. Her kitchen is smaller than that of the model home she viewed before entering into the agreement of purchase and sale. She has less cupboard space and her table is too large for the kitchen.
12. On February 18, 2000, a lawyer for the Applicant wrote to Mr. Nelligan, complaining that the floors were un-repaired. He noted for the first time in any written complaint, that the contract called for $\frac{3}{4}$ " width floors, "an issue that has never been correctly dealt with by the Program. Obviously the solution here is to rip up the floor and replace it."
13. The letter also noted that the fireplace was not the one chosen, and noted for the first time that there was no hearth, only carpet.
14. The Ontario Building Code does not require a hearth for a gas, zero clearance fireplace. No hearth is mentioned in the agreement of purchase and sale.
15. The February 18, 2000 letter is the first complaint to specifically address the dimensions of the kitchen, rather than the overall dimensions of the house. It notes that there is a loss of two feet of cupboard space and suggests one appropriate remedy to be the removal of the kitchen wall.

ISSUE:

The issues in this matter are whether there has been a breach of warranty by the builder, and whether the Applicant registered her complaints within the time period required by the Act.

THE LAW:

Section 13(1) of the Act provides a warranty that the home is constructed in a workmanlike manner and that it is free from defects in material, and such other warranties as are provided by the regulations.

.....

Section 13(4) provides that this warranty applies only in respect of claims made within one year after the warranty takes effect, or such longer time under such conditions as are prescribed. Section 4 of Regulation 892 dictates that such notice must be in writing.

.....

Section 14(1)(b) provides that where an owner has a cause of action against a vendor for damages resulting from a breach of warranty, the owner is entitled to be paid out of the guarantee fund the amount of such damage, subject to the limits fixed by regulation.

.....

Section 19 of Regulation 892 permits a vendor to make substitution with respect to an item referred to in a purchase agreement, but provides a warranty to the purchaser that the item will be of equal or better quality. However, Section 20 limits the claim under such warranty to those claims made within one year after possession.

.....

The burden of proof in this matter rests with the Applicant.

APPLICATION OF LAW TO FACTS:

FLOORING

Following the Applicant's initial complaint regarding her flooring, several repairs were effected. The repairs may not have resulted in a perfect floor, but the Tribunal finds that they are satisfactory. The installation was performed in a workmanlike manner and the grade of the wood, while not the best, is commonly used in the construction industry.

There was no written complaint about the difference in the width of the boards until long after the one-year period required by the Act.

The Tribunal finds no breach of warranty with respect to the flooring.

HEARTH

The complaint about the hearth being replaced by carpet was not made within the one-year statutory time period and must be dismissed for that reason. In any event, the Tribunal is not persuaded that the purchase agreement provided for a hearth.

DIMENSIONS OF THE HOME AND KITCHEN

The Tribunal is satisfied that the Applicant was aware that her choice of a brick exterior instead of the standard siding would result in a reduction of the interior dimensions of her home. Unfortunately, this reduction was concentrated in the kitchen, an important room to the Applicant. Although it might have been appropriate for the builder to consult with his purchaser as to the best way in which to accommodate the interior changes, the agreement of purchase and sale allowed him to make such alterations in his discretion.

The Applicant has not satisfied the Tribunal on a balance of probabilities that there was a breach of warranty regarding the dimensions of the home and kitchen.

ORDER:

Accordingly, for the reasons stated above and pursuant to the authority vested in it by the Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade,
Vice-Chair

RELEASED: June 14, 2001

MARSHALL

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, Chapter 0.31

IN THE MATTER OF a CLAIM by
CHERYL ANN MARSHALL

AND IN THE MATTER OF the DECISION of the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 16(1) of the Act

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

CHERYL ANN MARSHALL

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Cheryl Ann Marshall (the "Applicant") initiated an appeal under section 16(2) of the *Ontario New Home Warranties Plan Act* from a Decision Letter issued by the Program dated April 26, 2000 in terms of which the Program denied the Applicant's claims;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period for this proceeding before the Tribunal, required pursuant to section 16(2) of the *Ontario New Home Warranties Plan Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedures Act*, as amended, this proceeding initiated by the Applicant's request for a hearing before this Tribunal is dismissed;
2. Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Ontario New Home Warranty Program to deny the Applicant's claims.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: June 15, 2001

STUART

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CHAD JOSHUA STUART

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 22, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CHAD JOSHUA STUART

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Chad Joshua Stuart, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 13, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Chad Joshua Stuart
9 Milton Street
Bracebridge, ON P1L 1G7

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Chad Joshua Stuart (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of June 2001.

Chad Joshua Stuart (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

PADAYACHEE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
THAVARAJ DAVE PADAYACHEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 17, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

THAVARAJ DAVE PADAYACHEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Thavaraj Dave Padayachee, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 13, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Thavaraj Dave Padayachee
2 Harts Lane
Guelph, ON N1L 1B1

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Thavaraj Dave Padayachee (hereinafter referred to as "the Applicant") hereby consents to the following terms and conditions to his registration as a motor vehicle salesperson.

In accordance with section 4.1 of the Statutory Power Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. The Applicant shall submit a new application for registration prior to any change in employers.
2. The Applicant shall not be an officer, director, owner, partner or manager in a dealership.
3. The Applicant will not apply for registration as a motor vehicle dealer.
4. The Applicant shall complete the OMVIC certification course and pass the exam within 60 days of the date of the order.
5. The Applicant will not be the final signatory on any bills of sale. The Applicant further agrees that any transaction he is involved in will be supervised and co-signed by Tony Canade. If Tony Canade is not able to supervise the transaction the applicant shall forthwith advise the Registrar, Motor Vehicle Dealers Act. Another manager employed by the dealer, and to whom the Registrar consents, shall be responsible to supervise and co-sign any of the Applicant's transactions.
6. The Applicant agrees to act with financial responsibility.
7. The Applicant agrees not to take any deposits or payments from purchasers, including but not limited to cash, cheque and credit card payments.
8. The Applicant shall not participate in any way, either directly or indirectly, in the provision of vehicles for export or in the sale of vehicles to anyone who the Applicant knows or ought to know is acquiring the vehicle for export either directly or indirectly.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity, which are not currently within the knowledge of the Registrar.
10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future which are not currently within the knowledge of the Registrar.

11. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal. The Registrar can only carry out the Proposal within 5 years from the date of the Order.
12. The Applicant will provide a copy of this order to his employer forthwith.
13. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto this day of May, 2001.

Thavaraj Dave Padayachee

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

ROSEDALE HOMES (1996) INC.

ROSEDALE HOMES (1996) INC.

MOTION BY THE APPLICANT FOR AN ADJOURNMENT
OF THE HEARING SCHEDULED FOR JUNE 5, 2001

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel representing Rosedale
Homes (1996) Inc., Applicant

MICHAEL W. BADER, Q.C., Counsel representing the
Ontario New Home Warranty Program, Respondent

DATE

OF HEARING: June 5, 2001

Windsor

REASONS FOR RULING AND ORDER

BACKGROUND:

This is a request by the Applicant for an adjournment of the hearing scheduled to be continued today, June 5, 2001, due mainly to its inability to continue its appeal at this time for financial reasons. As part of its case, Counsel for the Applicant stated it was necessary to place the Applicant in a more sound financial position not only to finance the expense of the continuing hearings before this Tribunal, but also to provide the Respondent and this Tribunal with current financial statements to support its case. As stated by Counsel, this is and was not possible due to the unexpected and recent withdrawal of services by the person responsible for keeping the financial records of the Applicant in circumstances which Counsel suggested may very well involve a misappropriation of funds. Counsel has thus found himself in a situation which prevents him from continuing the appeal on behalf of the Applicant and its defense to the Proposal of the Respondent at this time.

The Proposal of the Respondent, to which the Applicant has appealed, involves the refusal by the Respondent to renew the registration of the Applicant as of February 28, 1999, as contained in the Respondent's Notice of Proposal dated November 9, 1999 and supplemented by its further Notice of Proposal dated June 5, 2000. The Applicant appealed on November 23, 1999, to the Commercial Registration Appeal Tribunal for a hearing respecting the Respondent's Proposal and the matter comes before this Tribunal as successor to the Commercial Registration Appeal Tribunal.

Counsel for the Respondent opposed the request by the Applicant for an adjournment due mainly to the inordinate length of time it has already taken to bring the matter to this stage of the hearings before this Tribunal and the Respondent's quest for an orderly and timely determination of its Proposal as at February, 1999. Indeed, Counsel for the Respondent cited the many instances of delay on the part of the Applicant and its Counsel since the hearings on this matter began in August of 2000. Counsel reminded this Tribunal that the Applicant has continued since the date of the Respondent's Notice

in November, 1999, to build homes as a registrant despite the regulatory duties imposed upon the Respondent. It was stated by Counsel that many homes have been completed by the Applicant during this period of time and at the present time there are only three homes which constitute the work-in-process of the Applicant, one of which is the subject of an Agreement of Purchase and Sale, one of which is a completed model home awaiting a sale to a purchaser and one of which is in the course of being completed.

DECISION AND REASONS:

The decision of this Tribunal on the request for an adjournment by the Applicant must be fair and balanced between the parties since it is important to make an appropriate decision based upon the **main issues** of the Respondent's Proposal and the appeal by the Applicant. It would be inappropriate, therefore, to make a ruling the result of which would lay waste all the time, effort and expense spent by the parties to this date, or otherwise leave open the **main issues** to be determined at a later date through another process or another forum, thereby duplicating the expense. The current hearings on the issues to be determined by this Tribunal have to date involved some thirteen days of hearings not to mention the extra days of preparation and travel by Counsel, so that a ruling on the request for an adjournment of this case is peculiar to these specific circumstances and cannot be made lightly nor constitute a precedent.

The indication by both Counsel is that the case for the Respondent was concluded, or almost concluded, at the close of the previous day's hearing on May 3, 2001, and an estimate of the time necessary to take these hearings to an orderly conclusion is three or four further days of hearings. It would be unfortunate were the result of denying the Applicant's request to terminate effectively the hearings without presenting or understanding the Applicant's case due to the alleged temporary impecuniosity of the Applicant or its inability to present proper financial records and statements.

At the same time the ruling must move to an orderly conclusion of the **main issues** involved in the matter between the parties and not contribute in any way to an abuse of the process.

Accordingly, it is the decision of this Tribunal to place certain conditions upon acceding to the request of the Applicant which must be strictly complied with by the Applicant within the time parameters set, otherwise the hearings will go forward with or without the case for the Applicant being effectively placed before this Tribunal.

Furthermore, it goes without saying that this Tribunal reserves its jurisdiction to make a decision on the **main issues** of the matter between the parties based solely upon the evidence and argument placed formally before this Tribunal during the course of these hearings without regard to the ruling on this adjournment.

This Tribunal has already given an oral ruling upon the request for an adjournment by the Applicant at the conclusion of the hearing in Windsor on Tuesday, June 5, 2001. However, due to the importance of this ruling and the necessary precision required to state the conditions imposed in writing, this Tribunal indicated to Counsel that a written decision would be released which would govern and to which the oral decision would be subject.

ORDER:

Pursuant to the authority vested in it by the *Licence Appeal Tribunal Act*, 1999, the Tribunal orders that the hearings in this matter be adjourned to and continued at 9:30 am, on Tuesday, August 21, 2001, at such location in Windsor, or elsewhere, as the Registrar of the Tribunal shall by written notice to the parties prescribe, and continue at such location, if necessary, on August 22, 23 and 24, 2001, subject to the following conditions, namely:

1. The adjourned hearings shall be pre-emptory as against the Applicant, and no further adjournment requested by the Applicant shall be entertained or granted;
2. The Applicant shall deliver to the Respondent on or before the close of business on Friday, August 10, 2001, current audited financial statements of the Applicant and net-worth financial information as of a recent date respecting the guarantors, which said statements shall be entered in evidence by the Applicant at the commencement of the continuation of the hearings;
3. The Applicant shall cease carrying on business as at this date and shall suspend all business operations until the date of the commencement of the continuation of the hearings, save and except for the orderly completion or winding-up of work-in-process as hereinbefore stated, the completion of any and all business transactions involving the said work-in-process or contracts for the sale and disposal of completed homes, any and all warranty work required and the completion of the financial statements and net-worth financial information hereinbefore specified.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.
Vice-Chair, Presiding

RELEASED: June 15, 2001

627416 ONTARIO LIMITED O/A ROSEDALE HOMES

627416 ONTARIO LIMITED O/A ROSEDALE HOMES

MOTION BY THE APPLICANT FOR AN ADJOURNMENT
OF THE HEARING SCHEDULED FOR JUNE 5, 2001

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice- Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel representing 627416
Ontario Limited o/a Rosedale Homes, Applicant
MICHAEL W. BADER, Q.C., Counsel representing the
Ontario New Home Warranty Program, Respondent

DATE OF
HEARING: June 5, 2001 Windsor

REASONS FOR RULING AND ORDER

BACKGROUND:

This is a request by the Applicant for an adjournment of the hearing scheduled to be continued today, June 5, 2001, due mainly to its inability to continue its appeal at this time for financial reasons. As part of its case, Counsel for the Applicant stated it was necessary to place the Applicant in a more sound financial position not only to finance the expense of the continuing hearings before this Tribunal, but also to provide the Respondent and this Tribunal with current financial statements to support its case. As stated by Counsel, this is and was not possible due to the unexpected and recent withdrawal of services by the person responsible for keeping the financial records of the Applicant in circumstances which Counsel suggested may very well involve a misappropriation of funds. Counsel has thus found himself in a situation which prevents him from continuing the appeal on behalf of the Applicant and its defense to the Proposal of the Respondent at this time.

The Proposal of the Respondent, to which the Applicant has appealed, involves the refusal by the Respondent to renew the registration of the Applicant as of February 28, 1999, as contained in the Respondent's Notice of Proposal dated November 9, 1999 and supplemented by its further Notice of Proposal dated June 5, 2000. The Applicant appealed on November 23, 1999, to the Commercial Registration Appeal Tribunal for a hearing respecting the Respondent's Proposal and the matter comes before this Tribunal as successor to the Commercial Registration Appeal Tribunal.

Counsel for the Respondent opposed the request by the Applicant for an adjournment due mainly to the inordinate length of time it has already taken to bring the matter to this stage of the hearings before this Tribunal and the Respondent's quest for an orderly and timely determination of its Proposal as at February, 1999. Indeed, Counsel for the Respondent cited the many instances of delay on the part of the Applicant and its Counsel since the hearings on this matter began in August of 2000. Counsel reminded this Tribunal that the Applicant has continued since the date of the Respondent's Notice

in November, 1999, to build homes as a registrant despite the regulatory duties imposed upon the Respondent. It was stated by Counsel that many homes have been completed by the Applicant during this period of time and at the present time there are only three homes which constitute the work-in-process of the Applicant, one of which is the subject of an Agreement of Purchase and Sale, one of which is a completed model home awaiting a sale to a purchaser and one of which is in the course of being completed.

DECISION AND REASONS:

The decision of this Tribunal on the request for an adjournment by the Applicant must be fair and balanced between the parties since it is important to make an appropriate decision based upon the **main issues** of the Respondent's Proposal and the appeal by the Applicant. It would be inappropriate, therefore, to make a ruling the result of which would lay waste all the time, effort and expense spent by the parties to this date, or otherwise leave open the **main issues** to be determined at a later date through another process or another forum, thereby duplicating the expense. The current hearings on the issues to be determined by this Tribunal have to date involved some thirteen days of hearings not to mention the extra days of preparation and travel by Counsel, so that a ruling on the request for an adjournment of this case is peculiar to these specific circumstances and cannot be made lightly nor constitute a precedent.

The indication by both Counsel is that the case for the Respondent was concluded, or almost concluded, at the close of the previous day's hearing on May 3, 2001, and an estimate of the time necessary to take these hearings to an orderly conclusion is three or four further days of hearings. It would be unfortunate were the result of denying the Applicant's request to terminate effectively the hearings without presenting or understanding the Applicant's case due to the alleged temporary impecuniosity of the Applicant or its inability to present proper financial records and statements.

At the same time the ruling must move to an orderly conclusion of the **main issues** involved in the matter between the parties and not contribute in any way to an abuse of the process. Accordingly, it is the decision of this Tribunal to place certain conditions upon acceding to the request of the Applicant which must be strictly complied with by the Applicant within the time parameters set, otherwise the hearings will go forward with or without the case for the Applicant being effectively placed before this Tribunal.

Furthermore, it goes without saying that this Tribunal reserves its jurisdiction to make a decision on the **main issues** of the matter between the parties based solely upon the evidence and argument placed formally before this Tribunal during the course of these hearings without regard to the ruling on this adjournment.

This Tribunal has already given an oral ruling upon the request for an adjournment by the Applicant at the conclusion of the hearing in Windsor on Tuesday, June 5, 2001. However, due to the importance of this ruling and the necessary precision required to state the conditions imposed in writing, this Tribunal indicated to Counsel that a written decision would be released which would govern and to which the oral decision would be subject.

ORDER:

Pursuant to the authority vested in it by the Licence Appeal Tribunal Act, 1999, the Tribunal orders that the hearings in this matter be adjourned to and continued at 9:30 am, on Tuesday, August 21, 2001, at such location in Windsor, or elsewhere, as the Registrar of the Tribunal shall by written notice to the parties prescribe, and continue at such location, if necessary, on August 22, 23 and 24, 2001, subject to the following conditions, namely:

1. The adjourned hearings shall be pre-emptory as against the Applicant, and no further adjournment requested by the Applicant shall be entertained or granted;
2. The Applicant shall deliver to the Respondent on or before the close of business on Friday, August 10, 2001, current audited financial statements of the Applicant and net-worth financial information as of a recent date respecting the guarantors, which said statements shall be entered in evidence by the Applicant at the commencement of the continuation of the hearings;
3. The Applicant shall cease carrying on business as at this date and shall suspend all business operations until the date of the commencement of the continuation of the hearings, save and except for the orderly completion or winding-up of work-in-process as hereinbefore stated, the completion of any and all business transactions involving the said work-in-process or contracts for the sale and disposal of completed homes, any and all warranty work required and the completion of the financial statements and net-worth financial information hereinbefore specified.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.
Vice-Chair, Presiding

RELEASED: June 15, 2001

VORKAPIC, SASA o/a SGS AUTO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SASA VORKAPIC O/A SGS AUTO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 4, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SASA VORKAPIC O/A SGS AUTO

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Sasa Vorkapic o/a SGS Auto, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 13, 2001

TO: The Registrar
Motor Vehicle Applicant Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Sasa Vorkapic
o/a SGS Auto
51 Swayze Rd., Unit 10
Elftida, ON L0R 1P0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Sasa Vorkapic o/a SGS Auto (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicant acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicant.
2. The Applicant further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicant.
3. The Applicant agrees to maintain a sign at the Applicant's registered premise that will be visible to the public.
4. The Applicant agrees to operate exclusively from the location approved by the Registrar. The Applicant agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
5. The Applicant agrees not to invite the public to deal at a place other than his approved location.
6. The Applicant will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as an Applicant under the Motor Vehicle Dealers Act.
7. The Applicant will ensure that all advertisements placed by or on behalf of the Applicant will identify his registered name and the address of the location approved by the Registrar.
8. The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
9. The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.

10. The Applicant agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
12. The Applicant agrees to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or his authorized representatives.
13. The Applicant agrees that he is under a positive obligation to disclose all material facts in writing about the vehicles he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Applicant agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Applicant has sold, the Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
14. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice. The Applicant agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Applicant further agrees to provide free access to his books and records to any authorized representative of the Registrar.
15. The Applicant agrees that all books and records shall be kept at the Applicant's registered premise.
16. The Applicant agrees that all books and records relating to motor vehicles sold or leased by or on behalf of the Applicant before registration shall be kept at the Dealer's registered premise.
17. The Applicant will comply with all aspects of the Retail Sales Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
18. The Applicant understands that his registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Applicant's application.
19. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council's Automotive Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within 60 days of having his registration reinstated pursuant to this Order.
20. The Applicant agrees that he will not be involved with the buying and selling of motor vehicles without the benefit of registration.
21. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to his financial circumstances and his honesty and integrity.

22. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
23. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
24. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
25. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
26. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of June, 2001.

Sasa Vorkapic o/a SGS Auto (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

STANGE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
THOMAS HENRY STANGE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 28, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

THOMAS HENRY STANGE

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 17, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Superior Court of Justice, Courtroom # 2, 245 Windsor Avenue, Windsor, Ontario at 9:30 a.m., on Tuesday, July 31, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 18, 2001

VALIANT

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
EDWARD AND SUZANNE VALIANT

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

EDWARD AND SUZANNE VALIANT

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 29-31, 2001 and to continue June 1, 2001;

AND WHEREAS the matter was adjourned upon consent of the parties to June 26-29, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, October 9, 2001, and to continue October 10, 11, and 12, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 19, 2001

VELLONE, ANGELO and 373503 ONTARIO LIMITED o/a DURABLE CAR AND TRUCK SALES

373503 ONTARIO LIMITED O/A DURABLE CAR AND TRUCK SALES AND ANGELO VELLONE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DAVID J. HUNT, VICE-CHAIR

APPEARANCES:

ANGELO VELLONE, appearing on his own behalf
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

June 19, 2001

Toronto

ORDER

Following attendances on June 19, 2001 at a hearing before the Licence Appeal Tribunal of Angelo Vellone, appearing on his own behalf and on behalf of 373503 Ontario Limited o/a Durable Car and Truck Sales (the "Applicants") and A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"),

WHEREAS no application for an adjournment was made prior to the hearing date but at the commencement of the hearing on June 19, 2001, the Applicant, Angelo Vellone, applied for an adjournment on the basis that shortly after receipt of the Notice of Hearing, he had retained as his counsel, Patrick Di Monte, who could not attend this hearing due to a conflict in his schedule;

NOW THEREFORE this Tribunal Orders that:

1. this matter is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Friday, July 27, 2001.
2. the summons issued for Robert WalRaven (Field Investigator) Ministry of Finance is to continue on July 27, 2001;
3. the Applicant, Angelo Vellone is to provide proof at the hearing on July 27, 2001, that he has made his best efforts to make full or partial payment of the Applicants' debt to the Ministry of Finance;

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair

Released: June 20, 2001

OLIVIERI, PETER and LEONARDO, GIUSEPPE (JOE) o/a CHERRY WOOD PARK
DEVELOPMENT

PETER OLIVIERI AND (JOE) GIUSEPPE LEONARDO O/A
CHERRY WOOD PARK DEVELOPMENT

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: BRIAN M. CAMPBELL, Counsel, representing the Applicant
CAROL STREET, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING: June 18, 2001 Toronto

ORDER

WHEREAS a written Notice of Proposal dated May 1, 2000 and a Supplemental Notice of Proposal dated December 20, 2000, to refuse to renew the registration of Peter Olivieri and (Joe) Giuseppe Leonardo o/a Cherry Wood Park Development (the Applicant) were issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal which appeal was to be heard in Toronto on June 18-21, 2001;

AND WHEREAS prior to the hearing commencing on June 18, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with minutes of settlement agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair

Released: June 21, 2001

MacLELLAN, DAMIAN and PAPROSKI, PETER

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DAMIAN MacLELLAN AND PETER PAPROSKI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAMIAN MacLELLAN AND PETER PAPROSKI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

CLARIDGE HOMES (SOMERSET) INC.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on July 3, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Respondent* to commence at 1:30 p.m., on Thursday, July 5, 2001 by teleconference at the telephone numbers specified in the Notice of Prehearing.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 26, 2001

GALLO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
BARBARA AND ALFRED GALLO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

BARBAR AND ALFRED GALLO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

GREYSTONE COUNTRY PROPERTIES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 1-2, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, September 17, 2001, and to continue September 18, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 26, 2001

KOURNIOTIS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
STEVE KOURNIOTIS
as a motor vehicle salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

STEVE KOURNIOTIS

Applicant

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), Steve Kourniotis (the "Applicant") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, in terms of which the Registrar proposed to revoke registration of the Applicant as a motor vehicle salesperson;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal to revoke the registration of Steve Kourniotis.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: June 26, 2001

DYNASTY HOMES LTD.

DYNASTY HOMES LTD.

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES: RICHARD RUPP, Agent representing the Applicant
NETANUS RUTHERFORD, Counsel representing the
Registrar of the Ontario New Home Warranty Program

DATES OF
HEARING: May 30 and 31, 2001 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Ontario New Home Warranties Plan Act* (the "Registrar", and the "Act") respectively. The Notice of Proposal dated January 23, 2001 proposed to refuse to renew the registration of Dynasty Homes Ltd. ("Dynasty" and the "Registrant") under the Act.

BACKGROUND:

The Registrar under the Act proposed to refuse to renew the registration of the Registrant, Dynasty. The grounds relied upon by the Registrar for the Proposal are set out below:

1. Pursuant to the provisions of section 10(3) of Regulation 892 under the Act, the Registrant has failed to complete, execute and deliver to the Registrar such form or forms of application and other document as required by the Registrar by letter dated December 8, 2000 for the renewal of the registration TO WIT;
 - (a) The Registrant has failed to provide the Vendor and Builder Agreements in duplicate as requested; the Registrant has failed to provide a completed 1999 financial statement; and the Registrant has failed to provide personal net worth statements from the guarantors together with supporting documentation to substantiate the assets listed as requested by the Registrar.

- (b) Pursuant to Section 5.1 of the Vendor/Builder Agreement dated October 21, 1996 signed by the Registrant, the Registrant agreed to enter into such further agreements with the Ontario New Home Warranties Program as the Registrar may require for the purpose of modifying or supplementing any of the provisions of that Agreement or for the purpose of superseding that agreement. The Registrant has failed to enter into further agreements as required by the Registrar.
- (c) The Registrant has failed to carry out its obligations under Section 1.3 of Regulation 894 which obliged the Registrant as a condition of its registration to diligently perform or cause to be performed all obligations imposed under the Ontario New Warranties Plan and under any agreement made with the Ontario New Warranties Plan in respect of the 'Program'.
- (d) The Registrant has failed to carry out its obligations under Section 1.5 of regulation 894 by not furnishing the Registrar with documents relating to the Plan as the Registrar may reasonably require.
- (e) The Registrant has failed to meet its obligations pursuant to Section 1.6 of regulation 894 by failing to provide such information relating to its financial affairs and position as the Registrar may reasonably require.
- (f) The Registrant has thereby failed to comply with Section 10(3) of Regulation 892 which requires the Registrant on the renewal of a registration to complete, execute and deliver to the Registrar such forms of application and other documentation as the Registrar may provide.

THE LAW:

Section 7(1)(c)(i) of the *Ontario New Home Warranties Plan Act* (the "Act"), states as follows;

7(1) An applicant is entitled to registration by the Registrar except where,

.....

(c) the applicant is a corporation and,

- (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertaking will not be carried on in accordance with law and with integrity and honesty;

.....

Section 8(2) of the Act states as follows;

.....

- 8(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 9 of Regulation 892 to the Act states as follows;

- 9(1) Each applicant desiring registration under the Plan shall complete, execute, and deliver to the Registrar such form or forms of application as the Registrar may require from time to time.

.....

- 9(3) The applicant shall furnish to the Registrar;

.....

3. Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.

.....

5. Such additional documentation related to the application as the registrar may reasonably require.

.....

Section 10 of Regulation 892 to the Act states as follows:

.....

- 10(4) With each application for renewal of registration under the Plan, the applicant shall pay to the Corporation the prescribed renewal fee set forth in Schedule A.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Applicant who had a very serious criminal record which he had disclosed in his application but who had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated. The court found that the Tribunal had not

applied the proper test and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it thought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

The Court referred the matter back for re-hearing, stating:

"The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal".

V. Marques Construction Ltd. v Registrar of the Ontario New Home Warranty Program (Commercial Registration Appeal Tribunal) January 21, 1999

In this matter, the Registrar proposed to revoke the registration of the builder. The issues were whether the registrant could challenge a conciliation finding as part of the challenge of the reasonableness of the Registrar's Proposal; whether the Registrar had authority to require security at times other than the original registration or renewal, and if so whether it reasonable; whether the Registrar had authority to request financial statements from the registrant and the guarantor (the company president) of the registrant other than at the initial registration or subsequent renewal; and whether the Registrar is entitled to look at the entire history of the registrant when assessing the Registrant's standing.

The Tribunal adopted the reasoning of the decision in *Brenner* and found that the registrant did not have the right to request a hearing to review the decision of the conciliation. Registrants were found to be required under Regulation 894 section 3.3 to perform all obligations under any agreement with the Ontario New Home Warranty Program (the "ONHWP" and the "Program"), and under paragraph 4.4 (e) of the Vendors and Builders Agreement signed by the registrant, the registrant was required at the time of the initial registration or renewal to supply documentation including guarantees, surety bonds, letters of credit, statements of personal net worth, bank statements and any other documentation or records reasonably required by the Program. The provision stated that security could only be required at the time of initial registration or renewal, and the Program did not have authority to demand security in the circumstances of the case. There was evidence that the financial documents produced at the time of the last renewal showed that the registrant had "substantial equity", and it was therefore not reasonable for the Registrar to require updated financial statements from the guarantor. The Tribunal found that Regulation 894, section

5 gave the Program the power to request documents that were reasonably required by the Registrar, and section 6 of Regulation 894 gave the Registrar the authority to require financial information as reasonably required. This right to require financial information was not limited to the time of registration or renewal. The Registrar was found to have the right to examine the entire relevant history of the registrant. There was a failure by the registrant to indemnify the Ontario New Home Warranty Program, but that was not sufficient grounds for a Proposal, and the problems arose with one home and the amount of money involved was "fairly modest". The Tribunal found that there were not reasonable grounds for the Proposal, as there were no reasonable grounds to request security or financial statements on the basis of the financial information provided on the previous renewal. An Order was made requiring the registrant to indemnify the Program within 30 days, in default of which the registrant would be suspended until payment was made.

Ontario New Home Warranty Program V Lukenda (1991) 2 O.R. (3d) 675 (Ont. C.A.)

In this matter the Ontario New Home Warranty Program had required from an Applicant a third party guarantee. The court held that the Corporation for the purposes of the *Ontario New Home Warranties Plan Act* (the "Corporation") had the capacity of a legal person to require the guarantee as a term of the contract. The president of the applicant company had signed a Vendor/ Builder Agreement requiring documentation, guarantees, surety bonds, statements of personal net worth, bank statements, and other documentation reasonably required. The Program was found to have the capacity to require the guarantee and had the powers of a natural person unless specifically withdrawn. A broad and liberal interpretation of the enabling statute was found to be appropriate.

ISSUE:

The legal issue in this case is whether the Registrar was wrong in his decision to refuse to renew the registration of Dynasty on the basis that Dynasty had failed to provide the documentation requested by the Registrar.

WITNESSES FOR THE REGISTRAR

Mr. Gregory Baker testified that he is a Vice President Of Risk Management and also the Deputy Registrar of the Ontario New Home Warranties Program. He has been employed by the Program since 1997, and has held his present positions since 1998. Mr. Baker has a degree in finance and a law degree from United States as well as experience in industry.

Mr. Baker explained that the prior version of the Vendor/Builder Agreement was discontinued in April 2000. The earliest form of the agreement dates back to 1976 and the second version of the agreement came into use in 1987. Pursuant to paragraph 5.1 of the 1996 Vendor/Builder Agreement, the registrant agreed to enter any further agreements or superseding agreements as may be required by the Registrar.

On April 1, 2000, the Registrar began to use the new Builder Agreement and Vendor Agreement which replaced the earlier Vendor/Builder Agreement. Two separate agreements were developed to recognize that there are differences in the responsibilities for builders and vendors, and to try to simplify and modernize the

agreement. The two new documents are substantially the same with some minor differences. These agreements were developed in consultation with the industry, and as of May 29, 2001, four thousand seven hundred of the approximately five thousand registrants had signed the new agreements. Thirty registrants had refused, and the balance were still pending.

The Registrar's consultation process involved the Ontario Home Builders Association (O.H.B.A.) which is a provincial association of residential home builders formed in 1962 with approximately 3,500 members. Between 40% and 50% of these members are builders and vendors of residential homes. This consultation process began in 1995 when the Board of Directors of the Program formed a subcommittee which met four times per year, and made recommendations for changes in the Vendor/Builder Agreement. The committee included representatives from the O.H.B.A. who reported back to their members and brought the input of those members into the decision-making process. In November 1999, the liaison committee sent a communique to all registrants who had provided their fax numbers on their application forms, to get input on an individual basis from members who wished to bring their concerns to the attention of the committee. Mr. Baker did not think it was feasible to consult individually with each registrant and even though there was no obligation to get the input of the stakeholders, he chose to deal with a representative group and seek input from individual members at a later stage of the process.

Mr. Baker testified that the new Vendor Agreement, and Builder Agreement were much the same as the prior Vendor/Builder Agreement but they were clearer and codified many of the practices that were already in place.

Another purpose of the new agreements was to set out more of the important parts of the Regulations to make the process more understandable and make information available to builders who were unlikely to read the Regulations. Mr. Baker gave the example of the *Home Buyers Guide to After Sales Service* which had been published in some form since 1989, and was now being made available on the Internet. One of the changes in the new agreements was to codify an existing practice which allowed registrants an opportunity to correct information about them before publication of the guide. In his opinion, no new onerous obligations were imposed on the registrants, and some changes were required due to amendments in the Act.

Copies of the new agreements were sent to Dynasty for signature, but they were not signed and returned despite a request in a letter dated December 8, 2000 from Connie Vassallo the Manager of Licensing and Underwriting (Exhibit 3, Tab 14). In this letter, a request was made for the 1999 year end financial statements for Dynasty, up-to-date Personal Net Worth Statements from the guarantors with supporting documentation, signed copies of the new Vendor and Builder Agreements and a signed copy of the application form. Only the signed application form was returned.

In cross-examination, Mr. Baker agreed that only 30% to 50% of the registrants with the Program may be members of the O.H.B.A. and that probably over 50% of the members of the O.H.B.A. are actually builders. He testified that it was not reasonable to consult individually with all registrants, but even though the agreements could have been changed unilaterally, the Program decided to use a consultation process with a representative group of stakeholders.

Mr. Baker testified that although there was no specific provision in the prior Vendor/Builder Agreement for credit checks, it was a common practice, and was necessary to carry out the evaluation for the purposes of Section 7 of the Act which required the Registrar to assess the financial position of applicants for registration or renewal. Therefore, he did not see the new provisions in paragraph 1.4 of the Vendor Agreement (Exhibit 3, Tab 2) or paragraph 1.5 of the Builder Agreement (Exhibit 3, Tab 3) to be a change from the present practice.

Mr. Baker agreed that under the prior Agreement there was no specific power to copy documents as provided for in paragraph 3.1 of both the new Builder Agreement and Vendor Agreement, however in his opinion it did not change the existing practice. He agreed that there was no specific power in the regulations, as Regulation 894, section 1.2 simply allows access to books and records during normal business hours.

Mr. Baker agreed that paragraph 3.3 of the Vendor Agreement (Exhibit 3, Tab 2) which stated that the registrant could not sell and/or collect deposits on homes exceeding the number of homes permitted to be sold without the prior written consent of O.N.H.W.P was not in the prior Agreement or specifically in the Act or Regulations, but he testified that he had received opinions that this was the current practice and followed a legal interpretation of the Act. In his opinion, this was not a change but simply added clarity and specificity.

Mr. Baker agreed that under the prior Agreement there was no specific power for the Program to publish information concerning performance and compliance by builders. However, he stated that this was within the Program's powers as an independent non-profit corporation. The purpose of the existing practice was to protect the public from problem builders, and publishing this information was proper under the consumer protection mandate of the Program. Under the prior Agreement, there was no provision for the publication of the builders' names, addresses, fax numbers, and phone numbers. The witness testified that the information on the Web Site was in the prior publication and stated that the vendor/builder number is accessible on public documents such as building permit applications.

Mr. Baker agreed that paragraph 3.3 of the Builders Agreement (Exhibit 3, Tab 3) allowed the Program to limit the number of homes which could be constructed, and that under paragraph 3.1 of the prior Agreement (Exhibit 3, Tab 1) there was a similar power. He agreed that under Regulation 894, section 1.6(4), the Program is entitled to impose conditions for the construction of homes based on technical competence and financial ability, but he disagreed that this was an expansion of the Program's powers. He stated that the Program simply did not want to repeat the words of the Regulation verbatim and were trying to keep it short and understandable. The Program could already limit the number of homes based on the financial situation of the builder, so this paragraph did not change the existing practice. Under Section 7(2) of the Act, terms and conditions of registration could be imposed with the consent of the Applicant or by an order of the Tribunal, and the intent was to allow the builder to build wherever possible. If there were problems with the builder's finances, adequate guarantors would be required and limits could be put on the number of homes permitted to be built. In his opinion, paragraph 3.3 of the Builders Agreement would still be subject to the Act and Regulations, so the new Agreement did not change the existing practice.

Mr. Rupp, agent for the Applicant produced a copy of a Vendor Agreement (Exhibit 4b) and a Builder Agreement (Exhibit 4a) and pointed out that the publication date was

February 2000 and that the date of the agreements provided in the Program's materials (Exhibit 3) was April 2001. Mr. Baker agreed that the earlier agreements provided for deemed notice for the service of documents to be after three business days and that the newer agreements provided for a five day notice period which is consistent with section 20 of the Act. Mr. Baker explained that when the inconsistency between the original form of the new agreements and the Act was discovered, he ensured that it was changed in the later version and stated that anyone who signed the earlier form of the agreements with the three-day provision would be dealt with on the basis of a five day notice period rather than the three-day notice period in the agreements.

In redirect examination, Mr. Baker stated that credit checks were generally used with smaller builders who did not provide audited financial statements, or new builders who did not have a financial history. He explained that a credit check was only one factor in the evaluation, and that size, tenure, and financial statements were also considered. He stated that the Act is a consumer protection statute and that the largest risk to the consumer is from the financial failure of builders, since the consumer is limited to a claim of \$20,000 if the deposit is lost. Even though the Program had the power to do credit checks before, this was made specific.

Mr. Adil Darr testified that he is a Senior Underwriting Analyst for the Program and has held that position since 1999. He has a degree in commerce from the University of Toronto, and is a chartered accountant.

Mr. Darr makes risk assessments of the financial viability of builders to determine if they meet the standards for registration and whether any terms should be imposed. The assessment involves four factors which include the size of the builder (the number of homes), the tenure (the number of years of registration), the business and technical rating for after sales service, and the financial rating.

For the financial rating, Mr. Darr examines the equity position of the registrant and determines if guarantors are needed. Policy information on this is provided to builders in Builder Bulletin # 28. Each time there is an initial registration or a yearly renewal, this process is followed. He found that Dynasty was first registered on December 1996, and standard personal guarantees dated October 21, 1996 were provided by Richard Rupp and Marco Pereira. The Vendor/Builder Agreement was signed in 1996 by Richard Rupp on behalf of Dynasty. There were renewals of the registration in 1997 and 1998, and on November 1, 1998 a guarantee was signed by Phoebe Rupp and submitted with the application for renewal. Personal net worth statements would have been provided by Phoebe Rupp for her to be approved as a guarantor. Mr. Pereira had left the company, and the Registrar required a new guarantor even though the fact of leaving the company did not remove Pereira as a guarantor.

The 1999 renewal application was not granted as the financial statement provided was a combined financial statement for three companies. Mr. Darr did not consider this statement to be sufficient, and testified that it was not an up-to-date statement which permitted him to properly assess the financial viability of the Registrant. No personal net worth statements or supporting documentation were provided by the guarantors as requested. On February 7, 2000 a letter (Exhibit 3, Tab 8) was sent to Dynasty requiring the finalized 1999 year end financial statements for Dynasty together with up-to-date net worth statements and supporting documentation from the guarantors Richard Rupp and Phoebe Rupp. This information was not sent, and on February 24, 2000 another request was sent by the Program as the final notice.

On March 1, 2000 Mr. Rupp advised the Program by letter (Exhibit 3, Tab 10) that the 1999 year end had not been completed, and that the net worth statements for Phoebe Rupp and him were unchanged from 1998. Mr. Darr explained that he could not rely on verbal assurances on financial matters, and required the material requested to make a proper evaluation. On March 12, 2000 the Manager of the Licensing and Underwriting section, Connie Vassallo, sent a letter (Exhibit 3, Tab 12) to Dynasty advising that they wished to resolve the matter without a Notice of Proposal and explained that it was not possible to carry out the financial evaluation without the required information. On July 5, 2000, Mr. Rupp responded by letter (Exhibit 3, Tab 13) and stated that the 1999 financial statements were not completed, and that there were no fundamental changes since the 1998 statements which the Program already had.

On December 2, 2000, another Application for Renewal form was filed by Dynasty and no further supporting documentation was provided. With the 1999 and 2000 renewal applications still pending, a further letter was sent by Ms. Vassallo (Exhibit 3, Tab 14) again requesting a completed 1999 year and financial statement from an accountant, up-to-date personal net worth statements for the guarantors together with supporting documentation, signed copies of the Vendor Agreement and Builder Agreement, and a signed copy of the registration renewal. When the Renewal Application form was received, there was no supporting documentation but simply a notation that the 1999 financial statements were not yet available, there were no changes since 1998, the net worth of the guarantors was the same as on file, and there had been no building in 1999 -- 2000. In the opinion of Mr. Darr, this was still insufficient for him to make the required financial assessment.

In cross-examination, Mr. Darr agreed that if the registrant owns the shares of other corporations, they would be assets and taken into account, but he stated that a combined statement was not adequate for accounting reasons to assess the financial position of the one company individually. He agreed that personal net worth statements were provided in 1996 and 1997 and that the corporate financial statement was provided in 1997. Mr. Darr was also aware that the last home enrolled by Dynasty was in 1998 and that in the December 2, 2000 Renewal Application form, Dynasty did not propose to construct any homes. In the renewal application form, Mr. Darr agreed that paragraph 6(c) (Exhibit 3, Tab 15) required current financial statements "if available" or "interim statements". He also agreed that Dynasty had provided security deposits on the initial registration, and they were returned. To the question of whether there might be no change in financial position of a builder whose sole business is building and selling homes when no homes are built, Mr. Darr explained that it could be possible, but he would only be guessing and could not be certain. In his opinion, even though a signed application for renewal and a cheque were received, the application was not complete without the financial statements and up-to-date net worth statements.

In re-examination, Mr. Darr explained that even if the application for renewal shows that no homes are planned, it does not prevent the builder from building homes, and a financial assessment is required. Financial statements would still be required to show if the company had received money or paid debts as the construction of homes need not be the only business carried on by the company.

WITNESS FOR THE APPLICANT

Mr. Richard Rupp testified that he and his original partner supplied personal net worth statements when they applied in October 1996. They both signed guarantees, and he signed the Vendor/Builder Agreement. During their first year of business, Dynasty enrolled and built several homes, and provided security deposits as required. At the end of 1997, they received the renewal package with the application form, the blank personal net worth form and the request for financial statements. The required fee was paid, and the documentation was found acceptable and the removal was granted. From December 1997 to December 1998, Dynasty again built and enrolled homes, but after the closing of the last transaction in May 1998, Mr. Rupp bought out his partner's interest in the business. In 1998 he sent the renewal Application together with the financial statements as provided by the accountant, and his personal net worth statement as guarantor.

Mr. Rupp was notified by the Program that a further guarantor was needed as the partner had left the business, and they would probably not renew the registration with only one guarantor. Mr. Rupp had his mother act as a guarantor and provided the necessary personal net worth form. His understanding was that the issue of her guarantee could be revisited in the 1999 renewal, depending on the requirement for guarantors at that time.

After May 1998, no homes were enrolled or built, and another renewal package was received at the end of 1999. He sent in the renewal form together with the fee and a copy of his 1998 financial statement. The Program advised him that a 1999 financial statement was required, and he notified them that his 1999 financial statement was not yet prepared, that there had been no building activities, and that there was no structural changes in the company. In a letter dated June 14, 2000 (Exhibit 5), he advised the Program that the associated companies were owned by Dynasty Homes Ltd. and that their value should be added to the financial consideration. He requested another renewal package, and was advised that the 1998 and 1999 renewal applications was still on Ms. Vassallo's desk and the 2000 package had not been sent. He then contacted Ms. Julia Cook of the Home Builders Advocacy Association. On November 28, 2000, Mr. Rupp sent a registered letter (Exhibit 7) to Ms. Connie Vassallo enclosing his cheque for \$321.00 together with a letter from the Home Builder's Advocacy Association of Ontario and his inquiry why he had not been sent his 2000 registration renewal form.

The Program received Mr. Rupp's cheque on December 13, 2000 and within a few days Mr. Rupp received his renewal application form. Originally, he sent the form in unsigned, but later sent a signed copy. He did not send financial statements, the guarantees, or the Vendor and Builder Agreements. He simply noted on the form that the 1999 financial statements were not completed, that there were no changes since 1998, and that the net worth remained in the same as stated their file.

Mr. Rupp testified that despite the evidence from Mr. Baker that there was consultation with the Ontario Home Builders Association, he was never aware of the new Vendor Agreement and Builder Agreement proposed until he received the communique sent in 1999. By that time, he felt it was too late to have input, as it appeared to be already finalized. Had he known that this consultation process was in place, he would have joined the Ontario Home Builders Association in order to have input even if it was only one vote. In his opinion, the Ontario Home Builders Association was more of a social

organization for people to network and made up of not only builders but subcontractors, bankers, advertisers, and people in the legal community.

On the issue of the new Vendor Agreement and Builder Agreement, he stated that he had specific concerns. The agreements provided to him in the renewal package were different from the ones in Exhibit 3 and had different publication dates. Mr. Rupp said that there were differences between the agreements, and explained his objections to individual paragraphs.

His first objection was to paragraph 1.5 of the Builder Agreement (1.4 of the Vendor Agreement) in which the Registrant authorized the Program to obtain credit information without limiting the sources. He was concerned that inquiries would be made from sources that would be a problem for the builder.

The second objection was to paragraph 1.4 of the Builder Agreement (1.3 of the Vendor Agreement) which required the Registrant to provide information including any driver's license and birth certificate upon request to the Program. Mr. Rupp was concerned that this was beyond the scope of the Act or the Regulations, and was therefore unauthorized as it went beyond "piercing the corporate veil". He stated that he did not have a problem with the request for the statement of personal net worth.

The third objection was to paragraph in 1.8 of the Builder Agreement (1.7 of the Vendor Agreement) by which clauses in the Agreement remain in force and bind the Registrant despite any amendments or alterations or modifications to the Act or the Regulations until such time as the Registrant's obligations are fulfilled or any warranty and limitation periods have expired. He had concerns that the builder or vendor could be subject to terms in the Agreement even after changes in the Act or Regulations which meant that they were no longer legally required.

The fourth objection was to paragraph 3.1 in each Agreement which allowed the Registrar access during normal business hours to inspect books and records as in the earlier Agreement but added a power to make copies of all relevant portions of documents or records. Mr. Rupp testified that in his opinion this was beyond the power given in the Act or Regulations and onerous.

The fifth objection was that paragraph 3.3 of the Vendor Agreement prevented the Registrant from selling or collecting deposits on homes exceeding the maximum number (if any) permitted to be sold by the Program without obtaining prior written consent of the Program.

The sixth objection was to paragraph 3.5 in the Builder Agreement and the Vendor Agreement which required the Registrant to apply annually and to pay the required fee notwithstanding the delivery or nondelivery to the Registrant of the renewal form. In his opinion, this did not comply with Regulation 892, section (10)(3) which stated:

"Every Applicant for renewal of registration shall complete, execute and deliver to the Registrar such form or forms of application and such other documentation as the Registrar may provide from time to time."

The seventh objection was to paragraph 4.2 in the Vendor Agreement and Builder Agreement originally sent to him in which the notice period was three days and not the five days as provided for in section 20 of the Act. He did agree that in the more recent

version of the agreements as provided in the materials filed by the Program, the notice period had been changed to five days.

The eighth objection was to paragraph 4.3 in the new Vendor Agreement and Builder Agreement which authorizes the Program to report the Registrant's performance or compliance in a printed or electronic form available to the public. Mr. Rupp objected that this was beyond the terms of the Act or Regulations and oppressive.

The ninth objection was that paragraph 4.6 of both the Builder Agreement and Vendor Agreement would authorize the Registrar to publish the registrant's name, business address, telephone number and fax number. The Applicant was concerned that there could be security problems with the publication of the "builder number" on the Internet, and that the fax number could lead to the receipt of "junk faxes" as the information would be more widely available than it was with the publication of a booklet.

The tenth objection was that under paragraph 4.12, the Registrant requests that the Agreement and all related documents and instruments be written in English. He had concerns that if he was joined by a French speaking partner, this could cause a problem.

In cross-examination, Mr. Rupp testified that he was not sure if he read the Vendor/Builder Agreement that he signed in 1996 before he signed it, and was also not sure that he read the guarantee in 1996 before he signed it. He stated that Dynasty Homes is the name used by Dynasty Homes Limited and Dynasty Developments Ltd. and that the combined financial statement supplied to the Program included in the statement of Dynasty Homes Ltd. and two other wholly owned corporations.

On February 7, 2000 his accountants commenced preparation of the financial statement for Dynasty Homes Ltd. even though the fiscal year-end was in August. When he received the letter from the Program on February 7, 2000 (Exhibit 3, Tab 8) requesting the 1999 financial statement for Dynasty Homes Ltd., he said that his accountants had been working on it for one or two months. When he received the May 4, 2000 letter from the Program (Exhibit 3, Tab 11), they have left it "on the back burner" as they were busy. Despite this delay, he did not ask the accountants to speed up their work, or try to ensure that they were working diligently. He simply advised the Program that there were no structural changes.

Mr. Rupp stated that after the receipt of the further letter of December 8, 2000 (Exhibit 3, Tab 14) from the Program, he again did not ask his accountants to expedite the preparation of the statement.

Mr. Rupp was asked if he considered the combined statement sufficient after he received the letter of May 4, 2000 (Exhibit 3, Tab 11), and he stated that he did not. He testified that he did form the opinion that the Program should accept his statement that there were no changes in the financial situation. Mr. Rupp stated that he thought that it was unclear to the Program that the equity of the related companies should be taken into account for Dynasty Homes Ltd. He conceded that he was also unsure if he had actually read the 1998 combined financial statement, and agreed that nothing had been submitted since.

When Mr. Rupp was shown the Dynasty Homes statement of May 23, 1998, he was not sure that it was the statement submitted, and testified that he was not sure what was

combined in terms of the companies, assets, and liabilities. On June 14, 2000, he sent a letter (Exhibit 5) to Connie Vassallo at the Program stating that neither of the other two companies were building or selling homes in Ontario, and that their individual values had been added to the financial statements of Dynasty Homes Ltd. Mr Rupp agreed that at the time he sent this letter, he had not actually read the financial statement. When he was again asked if he had at that time formed the opinion that the combined statement was sufficient, he did not answer the question and stated that his accountants could not understand why it was not sufficient. He avoided answering the question when asked if he was prepared to give the Registrar the financial statement for Dynasty Homes Ltd. and instead replied that he had tried to clarify the situation with the Program.

Mr. Rupp testified that he had conversations with Connie Vassallo concerning the guarantee of his mother Phoebe Rupp and was told that the issue would be revisited on the renewal. There was no promise made that the guarantor would be released, as that decision would depend on the financial circumstances at the time of the renewal.

REPLY EVIDENCE:

In reply, Connie Vassallo testified that she is the Manager of Licensing and Underwriting at the Ontario New Home Warranties Program. She stated that she probably did have discussions with Mr. Rupp about an extra guarantor because Dynasty Homes would otherwise be placed under high security, and the extra guarantor could reduce the amount required. Ms. Vassallo stated that she would have explained that an assessment would be done each time there was a renewal, and there would be no automatic release of the guarantor. She testified that the letters received from Mr. Rupp did not change her mind on the requirement for the 1999 financial statement from Dynasty Homes Ltd. and up-to-date financial information from the guarantors.

FACTS FOUND PROVEN:

The Tribunal finds that the Registrant executed a Vendor / Builder Agreement on October 21, 1996 together with the required guarantees. On November 1, 1998 the further guarantee was provided by Ms. Phoebe Rupp together with adequate supporting financial information. A combined financial statement prepared on June 18, 1998 was submitted for 1999, and found not to be sufficient for the financial assessment carried out by the Program. Mr. Rupp wrote on the renewal forms for 1999 and 2000 that there were no changes in the financial situation for the Registrant or the guarantors, but these assurances were found to be inadequate by the Program and no supporting documentation was received despite repeated requests by the Program. No further financial statements for the Registrant or financial information for the guarantors has been submitted by the Registrant. Copies of the year 2000 versions of the new Vendor Agreement and Builder Agreement were sent to the Registrant for signature. They were not signed and returned as requested by the Program. When the Registrant filed the renewal applications in 1999 and 2000, the application fee was paid.

The Tribunal finds that Mr. Rupp had decided that the financial statements for Dynasty Homes Ltd. as a separate corporation would not be provided to the Program as requested. Even if there was initial confusion in his mind as to the sufficiency of the combined financial statement, it is clear that after letters were exchanged, he knew that an individual statement was required, and he took no real steps to obtain it despite

repeated requests. Even if his accountants were slow, as he said, his own evidence is that he did not ask them to produce the statements in a timely fashion. He refused to answer the questions when again asked if he thought the Registrar should accept the combined statement. It is clear from his actions that he had decided that his statement to the Program that there were no structural changes to the company should be sufficient. He did not provide interim statements or a further combined statement or direct his accountants to discuss the matter with the Program. Given the length of the delay, and the fact that no individual statements have been produced to date despite repeated requests, there can be no other conclusion than that his intention was to try to make the Program accept the combined statement from 1998 together with an assurance that nothing had changed in 1999 for the company or the guarantors. In his evidence, he carefully avoided saying that he would not produce the statements, but he has made his intent clear through his actions. While giving evidence at this hearing, he never offered to provide the required statements from the company or information from the guarantors.

The Tribunal finds that the Dynasty has also failed to sign the new Vendor Agreement and Builder Agreement as required by the Program under the terms of paragraph 5.1 of the original Vendor/Builder Agreement signed in 1996.

APPLICATION OF LAW TO FACTS:

The Act and the Regulations give Registrar registration authority under the Act but do not exhaustively set out every rule and procedure to be followed. A legislative framework has been established. The Registrar is entitled to take the necessary actions to carry out the goals of the legislation.

The new home building industry in Ontario is a regulated industry and vendors and builders of new homes are entitled to registration or renewal if they meet the requirements set out in the Act and Regulations. To carry out its duties under the Act, Registrar must be able to evaluate whether a builder or vendor will be a risk to the consumer and has established a method of assessing registrants. This includes financial assessments, technical assessments and the consideration of the prior behavior of the officers of the company. To do the necessary financial assessments, the Registrar requires up-to-date financial statements on registration or renewal to comply with the requirements of section 7(1)(a) and 7(c)(i) of the Act. Under these sections, the Registrar must make a determination of whether a registrant can be reasonably expected to be financial responsible in the conduct of its undertakings.

The Registrar has determined that up-to-date financial information is required for his analysis and will not simply accept the verbal assurances that things are fine or that nothing has changed since the last statements were filed. This Tribunal finds that the requirement for up-to-date financial statements for the registrant is reasonable and necessary to carry out the intention of the Act. Where the registrant does not individually meet the financial requirements set by the Registrar, this Tribunal finds that the requirement for guarantees is a common business practice, and is a reasonable method for the Registrar to carry out his obligations to protect consumers as required by the Act.

To require a guarantee without supporting documentation would give little or no assurance that it would be effective, and the Tribunal therefore finds it reasonable to

require supporting information. To request financial information from the company and supporting information for the guarantors on the renewal of registration is reasonable as financial situations may not remain constant, but may change dramatically from year to year.

The agreements give the Registrar access to books and which the Registrar requires registrants to sign records for inspections to provide confirmation of the financial integrity of a registrant. The new agreements also authorize the Registrar to publish information about the registrant's performance and compliance, and provides a mechanism for the registrant to challenge information prior to its release to the public. The original agreement signed by this registrant obliged the registrant to sign any new agreement as required so long as it is reasonable.

The new agreements were sent to the registrant for signature and were refused. If the new agreement is unreasonable, the registrant is not obliged to sign it to comply with the obligations under the initial agreement. The Tribunal must determine if the paragraphs complained of by the Applicant are reasonable in order to find whether the Registrant has complied with the obligations under the initial Agreement signed in 1996.

THE NEW AGREEMENTS

The Tribunal finds that paragraph 1.4 of the Agreements which permits the Program to obtain credit information from anyone is a clarification of an existing practice and is a normal industry practice for a corporation making a financial assessment, and is reasonable.

The Tribunal finds that paragraph 1.3 of the Agreements which requires in the registrant to provide such information as a driver's licence and birth certificate codifies an existing practice and is reasonable and necessary to properly carry out a bankruptcy search or a criminal records search for registration and renewal assessments.

The Tribunal finds that under paragraph 1.7 of the new Agreements the registrant agrees that all obligations will remain in effect notwithstanding the revocation of registration under the Act or any amendments, alterations, or modifications of the Act or Regulations until such time as the obligations of the registrant have been fulfilled or the warranty periods have expired. This is found to be a reasonable term in the agreements, as it ensures that the consumer will maintain the same level of protection from the time of the home being enrolled until the expiration of any warranty periods. This paragraph does not significantly change the obligations of the registrant from those under paragraph 5.1 of the 1996 Agreement.

The Tribunal finds that the power to make copies under paragraph 3.1 of the Vendor Agreement and Builder Agreement simply states an accepted practice that has developed under the inspection powers in the 1996 Agreement and which in any event would be reasonable to carry out the purposes under the Act and Regulations.

The Tribunal finds that paragraph 3.3 of the Vendor Agreement which restricts the Registrant from selling or collecting deposits on homes in excess of the maximum number of homes (if any) permitted to be sold by the Registrant without obtaining prior written consent of the Program, is reasonable and consistent with the authority of the Program under Regulation 894 sections 6.4 and 9 which gives the Program the power to limit the number of homes which the Registrant can build.

The Tribunal finds that paragraph 3.5 of the Vendor Agreement and Builder Agreement requiring annual renewal, obliges the registrant to use the prescribed form provided by the Registrar, but does not impose an obligation on the Registrar to convey it to the registrant. The Tribunal finds that when the form is made available by the Registrar to the registrant, the Regulation has been complied with. Even though the Registrar has developed a practice of sending forms, it is not required to do so by law.

The Tribunal finds that there is presently no problem with paragraph 4.2 of the Vendor Agreement and Builder Agreement concerning the giving of notice, as it has been amended to comply with section 20 of the Act.

The Tribunal finds that the reporting of performance and compliance by the Registrar is a standard practice that has been in place since the original *Home Buyer's Guide* was published, and is an acceptable practice due to the consumer protection nature of the legislation. This paragraph in both of the new agreements puts a registrant on notice that information will be made available to the public and formalizes the procedure for registrants to correct any errors before the guide is released.

The Tribunal finds that the publication of the name, address, phone number and fax number in the *Home Buyer's Guide* on the Internet is a reasonable way to provide information to customers, and outweighs any inconvenience to the registrants in being exposed to "junk faxes" or telephone calls or other forms of advertising.

The Tribunal finds that the Applicant is English-speaking and does not have French speaking partners. He requires the documents in English. In paragraph 4.12 of the new agreements, the registrant requests that documents and instruments be drawn in English. In the case of this registrant, this term is not unreasonable as he corresponds in English.

The terms of the Agreements are found by the Tribunal to be reasonable to carry out the objectives of the Act and the Regulations, and are within the jurisdiction of the Registrar for the purposes of registration or renewal. These changes simply clarify the existing practices which are within the jurisdiction of the Registrar, and have not materially different from the 1996 Agreement or the practices now in place. By failing to sign the new Agreements, Dynasty is in breach of the terms of the 1996 Agreement and is thereby in breach of Regulation 894, section 1.3 which requires Dynasty to diligently carry out obligations imposed under any agreement made with the Corporation in respect of the Plan.

THE PAYMENT OF THE FEE

The Tribunal finds that the payment of the renewal fee does not guarantee the automatic renewal of the registrant under section 10 (4) of Regulations 892. The Regulation requires Dynasty to provide full particulars of any changes in the facts set out in the most recent application for registration or renewal and requires the filing of any forms or other documentation provided by the Registrar. This renewal process therefore involves an evaluation of information, and a decision to be made by the Registrar. The fee is paid for the application process to take place, and not as a guarantee of the final result or it would defeat the purpose of requiring the decision by

the Registrar. There is no mechanism in the Act or Regulations for the return of the fee if the renewal application is not successful.

On the basis of these findings of fact and their application to the law, this Tribunal finds that due to the failure of Dynasty to meet its obligations under the Act, the Regulations and the Agreement signed in 1996, the Registrar was unable to carry out the financial assessment required, and obtain the necessary signed agreements. The Registrar could therefore not grant the renewal and the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 9(4) of the *Ontario New Home Warranties Plan Act*, the Licence Appeal Tribunal directs the Registrar to carry out his proposal to revoke the registration of Dynasty Homes Ltd.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair, Presiding

RELEASED: June 25, 2001

SOLTY

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PETER S. SOLTY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 25, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PETER S. SOLTY

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 23 and 24, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Monday, August 27, 2001 and to continue August 28, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 26, 2001

PICCININ

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
NILLO PICCININ

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

NILLO PICCININ

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

AFFINITY CUSTOM HOMES & CONTRACTING INC.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 16-17, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Superior Court of Justice, Courtroom # 2, 245 Windsor Avenue, Windsor, Ontario, at 9:30 a.m., on Monday, July 30, 2001, and to continue July 31, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 28, 2001

PARK, SHAWNA YOO-KYUNG o/a HANA TRAVEL AND TOURS

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
SHAWNA YOO-KYUNG PARK O/A HANA TRAVEL AND TOURS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 6, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SHAWNA YOO-KYUNG PARK O/A
HANA TRAVEL AND TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Shawna Yoo-Kyung Park o/a Hana Travel and Tours, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 15, 2001

BETWEEN:

SHAWNA YOO-KYUNG PARK O/A HANA TRAVEL AND TOURS

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS **BACKGROUND**

1. Shawna Yoo-Kyung Park o/a Hana Travel and Tours (hereinafter referred to as the "Registrant") has been registered, under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 3214945) since March 22, 1990.
2. The Registrant is subject to the prescribed terms and conditions of registration as are set out in Regulation 806/93 made under the Act (hereinafter "the Regulation"). The Registrant is required to participate in the Ontario Travel Industry Compensation Fund by making "Form 1" filings and providing corresponding payments, based on the Registrant's reported sales, to the Travel Industry Council of Ontario ("TICO"), within 45 days of the Registrant's fiscal year and fiscal half-year.

FORM 1 FILING – GROUNDS FOR THE PROPOSAL

3. By letter dated February 26, 2001, TICO advised the Registrant that it had failed to file its Form 1 and make the required payment for the period ended December 31, 2000, which was due on or before February 15, 2000. The Registrant was requested to submit the required filing by March 12, 2001.
4. On March 12, 2001, TICO provided the Registrant with a deadline to submit the required filing by March 26, 2001, failing which a proposal to revoke the Registrant's registration would be issued.
5. By April 6, 2001, the Registrant failed to submit its filing. On that date, the Registrar issued a proposal to revoke the Registrant's registration.

EVENTS AFTER THE ISSUANCE OF THE PROPOSAL

6. On April 27, 2001, the Registrant filed its Notice of Appeal with the Licence Appeal Tribunal.
7. On May 1, 2001, the Registrant made its Form 1 filing and payment of \$785.59 based on reported sales of \$2,732,468.00. The Registrant's total sales reported in its Form 1

filings for its fiscal year 2000 differed from those reported in the its financial statements for that year. There are also discrepancies between the sales reported in the Registrant's Form 1 filings and in its financial statements for the fiscal years 1998 and 1999. The total discrepancy in sales reported for 1998, 1999, and 2000 is \$6,930,094.00. If correct, the discrepancy represents a shortfall of approximately \$2,772.00 in the Registrant's payments to TICO.

8. By letter dated May 9, 2001, TICO advised the Registrant of the discrepancy in its reported sales and asked the Registrant to address the discrepancy by May 30, 2001. To date, the Registrant has not addressed the discrepancy.

COMPLIANCE HISTORY

9. The Registrant has a history of filing its Form 1 filings late, as summarized in paragraphs 10 through 18.
10. The Registrant's Form 1 filing for the fiscal half-year ended January 31, 1995, which was due by March 15, 1995, was filed on May 17, 1995.
11. The Registrant's Form 1 filing for the fiscal year ended July 31, 1995, which was due by September 15, 1995, was filed on December 20, 1995.
12. The Registrant's Form 1 filing for the fiscal half-year ended January 31, 1996, which was due by March 15, 1996, was filed on April 1, 1996.
13. The Registrant's Form 1 filing for the fiscal year ended July 31, 1996, which was due by September 15, 1996, was filed on October 2, 1996.
14. The Registrant's Form 1 filing for the fiscal half-year ended January 31, 1997, which was due by March 15, 1996, was filed on April 3, 1997.
15. The Registrant's Form 1 filing for the fiscal half-year ended June 30, 1998, which was due by August 15, 1998, was filed on September 24, 1999.
16. The Registrant's Form 1 filing for the fiscal year ended December 31, 1998, which was due by February 15, 1999, was filed on September 24, 1999.
17. The Registrant's Form 1 filing for the fiscal half-year ended June 30, 1999, which was due by August 15, 1999, was filed on September 24, 1999.
18. The Registrant's Form 1 filing for the fiscal half-year ended June 30, 2000, which was due by August 15, 2000, was filed on September 11, 2000.
19. The Registrant has a history of filing its financial statements late as summarized by paragraphs 20 through 28.
20. The Registrant's financial statements for its fiscal year ended July 31, 1991, which was due by October 31, 1991, were filed on September 3, 1992. These statements revealed a working capital shortfall of \$7,300.00, which the Registrant subsequently corrected.
21. The Registrant's financial statements for its fiscal year ended July 31, 1992, which was due by October 31, 1992, were filed on April 6, 1993. These statements revealed a working capital shortfall of \$26,642.00, which the Registrant subsequently corrected.
22. The Registrant's financial statements for its fiscal year ended July 31, 1993, which was due by October 31, 1993, were filed on November 12, 1993.

23. The Registrant's financial statements for its fiscal year ended July 31, 1994, which was due by October 31, 1994, were filed on December 2, 1994.
24. The Registrant's financial statements for its fiscal year ended July 31, 1995, which was due by October 31, 1995, were filed on December 8, 1995.
25. In 1996, the Registrant changed its year end to December 31st. The financial statements for that year, which were due by March 31, 1997, were filed on April 4, 1997.
26. The Registrant's financial statements for its fiscal year ended December 31, 1997, which were due by March 31, 1998, were filed on May 29, 1998
27. The Registrant's financial statements for its fiscal year ended December 31, 1998, which were due by March 31, 1999, were filed on June 18, 1999.
28. The Registrant's financial statements for its fiscal year ended December 31, 1999, which were due by March 31, 2000, were filed on April 28, 2000. These financial statements revealed a working capital shortfall of \$73,480.00 based on the Registrant's reported sales of \$5,262,719.00. The Registrant subsequently corrected this shortfall.
29. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 6, 2001;
- (ii) the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall complete its Form 1 filing for its fiscal half year ending June 30, 2001 and make all applicable payments to TICO by August 15, 2001, as required by section 47 of the Regulation;
 - (b) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2001 and make all applicable payments to TICO by February 15, 2002, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (c) The Registrant shall complete its Form 1 filing for its fiscal half year ending June 30, 2002 and make all applicable payments to TICO by August 15, 2002, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (d) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2002 and make all applicable payments to TICO by February 15, 2003, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (e) The Registrant shall complete its Form 1 filing for its fiscal half year ending June 30, 2003 and make all applicable payments to TICO by August 15, 2003, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.

- (f) The Registrant shall account for the discrepancy between its Form 1 sales and the sales reported in its financial statements, to the satisfaction of the Registrar, *Travel Industry Act*, by July 31, 2001;
 - (g) The Registrant shall file complete financial statements as required by section 24 of the Regulation, for the fiscal year ended December 31, 2001, no later than March 31, 2002;
 - (h) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for the fiscal year ended December 31, 2002, no later than March 31, 2003; and
 - (i) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for the fiscal year ended December 31, 2003, no later than March 31, 2004;
 - (j) If any of the Registrant's financial statements for its future fiscal years reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with conditions (ii) (a) to (j) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- (iv) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of June, 2001

Ms Shawna Yoo-Kyung Park
Shawna Yoo-Kyung Park o/a Hana Travel and Tours
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

RELIABLE CAR SALES LTD. AND DANIEL G. RIVARD

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RELIABLE CAR SALES LTD. AND DANIEL G. RIVARD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: February 1, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RELIABLE CAR SALES LTD. AND DANIEL G. RIVARD

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Reliable Car Sales Ltd. and Daniel G. Rivard, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 28, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Daniel Rivard
Reliable Car Sales Ltd.
145 Ottawa Street
Kitchener, ON N2G 3T2

Daniel Rivard
145 Ottawa Street
Kitchener, ON N2G 3T2

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Daniel Rivard and Reliable Car Sales Ltd. (hereinafter referred to as "the Registrants"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Registrants acknowledge and understand that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Registrants further acknowledge that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchasers or lessees or any form of negotiation concerning the purchase, sale or lease of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Registrants agree to maintain a garage register in accordance with the *Highway Traffic Act* and will maintain all books and records as required by the *Motor Vehicle Dealers Act*. The Registrants further agrees to store its books and records at the location approved by the Registrar.
4. The Registrants will ensure that all advertisements placed by or on behalf of the Registrants will identify its registered name and the address of the location approved by the Registrar.
5. The Registrants agree not to invite the public to deal at a place other than its approved location.
6. The Registrants agree to comply with the premises requirements set out in the *Motor Vehicle Dealers Act*. The minimum premises requirements include posting a sign that is clearly visible to the public and maintaining an office for the purpose of conducting the business.

7. The Registrants agree to operate exclusively from the registered premises approved by the Registrar. The Registrants agrees to apply for the Registrar's approval, by way of prior written notice, of any change in registered premises address in the form required by the Registrar.
8. The Registrants will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Registrant under the *Motor Vehicle Dealers Act*.
9. The Registrants will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
10. The Registrants will not purchase vehicles without ensuring that the vehicle is registered to the seller.
11. The Registrants agree to register all vehicles purchased within 6 days in accordance with the *Highway Traffic Act*.
12. The Registrants agree to meet all their financial obligations in accordance with the *Retail Sales Tax Act*.
13. The Registrants agree that they are under a positive obligation to disclose, in writing, all material facts about the vehicles it sells or leases to its purchasers or lessees. Material facts include, but are not limited to disclosure of salvage, previous salvage, accidented and repaired, frame damage and unibody damage. The Registrants agrees to make reasonable efforts to research the history of all vehicles prior to sale or lease to ensure all material facts are disclosed. The Registrants agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Registrants has sold or leased, the Registrants will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser or lessee.
14. The Registrants agree to conduct a thorough audit of all sales of used motor vehicles sold or leased within the last 1 year, and contact all purchasers or lessees who purchased or leased vehicles without full disclosure of material fact. The Registrants further agree to provide reasonable compensation to all purchasers or lessees of vehicles who purchased or leased same without full disclosure of material fact. The Registrants shall provide written proof that it has complied with this term of the Term and Conditions to the Registrar within 90 days of the date of this order. Said proof shall include a list of all vehicles sold or leased without full disclosure of material fact, copies of the purchase and sale contracts or lease contracts, and the nature of reasonable compensation made or offered to the purchasers or lessees.
15. The Registrants acknowledge and understand that their registration will not be used to buy or sell motor vehicles where the Registrants knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.

16. The Registrants agree to immediately enrol in the Ontario Motor Vehicle Industry Council's Automotive Certification Course and to be responsible for all fees in relation to enrolment. The Registrants further acknowledges that he will pass the certification course within 60 days of having his registration reinstated pursuant to this Order.
17. The Registrants acknowledge that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
18. The Registrants agree to comply with the Ontario Motor Vehicle Industry Council Code of Ethics and Standards of Business Practice.
19. The Registrants hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
20. The Registrants agree and acknowledge that should either of the Registrants breach any of the terms and conditions set out herein, in a material or significant way, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Dealer's and Salespersons' registrations shall automatically be revoked.
21. The Registrants hereby withdraw their appeal to the Licence Appeal Tribunal.
22. The Registrants hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____, 2001.

(Signature) Reliable Car Sales Ltd.
I have authority to bind the dealership.

Daniel Rivard (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar

KUZYK

SHELLY ANN KUZYK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: SHEENA MACASKILL, Vice-Chair,

APPEARANCES: SHELLY ANN KUZYK, representing herself
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: May 2, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from Notice of Proposal dated November 29, 2000 issued by the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Shelly Ann Kuzyk (the "Applicant") as a motor vehicle salesperson under the provisions of the Act.

The Registrar bases her Proposal on the provisions of section 6 of the Act as read with section 5(1)(b) of the Act.

THE FACTS:

The Tribunal received the testimony of Laura Gordon, Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC"). The Tribunal also received the evidence of the Applicant.

The Tribunal finds, pursuant to the evidence given in this proceeding, the following as proven facts.

1. The Applicant submitted an application for registration as a salesperson, which application was dated September 27, 2000. The Applicant signed the application immediately below a paragraph which read "NOTE: PLEASE ENSURE THAT YOU HAVE READ THIS SECTION IN FULL BEFORE SIGNING BELOW. IT IS AN OFFENCE UNDER SECTION 22(1)(a) OF THE MOTOR VEHICLE DEALERS ACT TO KNOWINGLY PROVIDE FALSE INFORMATION ON THIS APPLICATION.

At item 4 of the application, the following question is asked:

Do you have a current and valid Ontario drivers licence? Please provide an explanation if you have indicated that you will be buying or selling vehicles on behalf of the dealer but do not have a valid Ontario drivers licence.

The Applicant answered "yes" to this question.

At item 6 of the application, the following question is asked:

Are you engaged now or have you ever been involved in personal bankruptcy proceedings? If yes, attach a copy of the Assignment in Bankruptcy or proof of discharge.

The Applicant answered "yes" to this question and did attach a copy of a Certificate of Discharge dated August 28, 1998.

At item 9 of the application, the following question is asked:

Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered.) If yes, list all charges and/or convictions, and the circumstances surrounding each.

The Applicant answered "no" to this question.

2. By letter dated October 24, 2000, the Ontario Provincial Police wrote to the Registrar providing the results of a CPIC Data Bank check based on the Applicant's name and date of birth. The following criminal record was recorded:

Date and Place	Charge	Disposition
October 18,1991 probation	(1) public mischief	(1) suspended sentence and
	Sec. 140 (1)(A) CC	(2) probation 24 months
	(2) poss of property obtained by crime under \$1000 Sec. 355(B) CC	
March 31, 1995 probation	Forgery	Suspended sentence and
	Section 367 CC	18 months & 80 hours community Service work

In addition, entries on the CPIC Investigative Data Banks revealed that as of October 24, 2000, the Applicant was prohibited from driving because of outstanding unpaid fines.

3. By letter dated October 27, 2000 the Registrar wrote to Tim Bartolozzi, the dealer indicated on the application form, to inform him that the Applicant's conditional registration was cancelled. The Registrar's office asked Mr. Bartolozzi to review the matter with the Applicant. Further, the Applicant was asked to respond in writing to explain why the information concerning the criminal convictions was not disclosed and to provide the circumstances surrounding each charge or conviction.
4. By letter dated November 6, 2000, the Applicant wrote to OMVIC stating that she did plead guilty to a mischief charge. In her letter, the Applicant makes no mention of any other convictions. In her evidence, the Applicant stated that "Indu", the person with whom she spoke at OMVIC, only mentioned the mischief charge and therefore the Applicant made no mention of the other convictions.
5. According to the Applicant's driving record, filed as Exhibit 3, Tab 8, the Applicant's drivers licence was suspended eight times from 1996 to 2001 for non payment of fines. In addition, the Applicant has numerous convictions for driving offences, including speeding, disobeying a red light, failure to use a seat belt, following too close and failure to share the road. Exhibit 3, Tab 8 indicates that the Applicant's licence was suspended on August 17, 2000 and not reinstated until January 9, 2001.
6. In her evidence, the Applicant denied that her drivers licence had been suspended more than three times, or, if it had, she stated that she could not recall all of the suspensions. The Applicant stated that she believed that she did have a valid drivers licence on September 27, 2000 when her application for registration as a salesperson was completed.
7. The Applicant testified that she has been offered a job as a Business Manager at Kia of Hamilton. She has been employed at this dealership for approximately one year as an accountant/office administrator. She states that her employer is aware of her criminal record and driving record. At the time of her conviction for forgery in 1995, the Applicant states that she was in an abusive relationship and under the care of a psychiatrist for treatment of depression.

ISSUE:

Does the Registrar have reasonable grounds for refusing to grant registration of the Applicant as a salesperson?

THE LAW:

The relevant portion of the Act that is applicable to these proceedings is section 5(1)(b) which reads:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

In *Brenner v Ontario (Registrar of Motor Vehicle Dealers)* (1983) O.J. No. 1017, the Divisional Court held:

...the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

APPLICATION OF LAW TO THE FACTS:

The Registrar based her refusal on three grounds. First, the criminal convictions which were economic in nature; one involving the proceeds of a theft and the second involving forgery to obtain drugs. Second, the fact of non and then incomplete disclosure by the Applicant of her criminal record and suspension of her driver's licence. Third, and to a much lesser extent, the Registrar relies on the Applicant's bankruptcy in November, 1997.

In her evidence, the Applicant stated that she was convicted for possession of stolen property in 1991 because her best friend stole some gold jewellery and then denied taking it. The Applicant stated that it came down to "her word against mine". In 1995, the Applicant was convicted of forging a doctor's prescription in order to obtain prescription medications because her abusive boyfriend was taking her anti depressant medications. The Applicant stated that she is no longer seeing a psychiatrist and that she has left the abusive relationship. In her submissions, the Applicant stressed that she has turned her life around and that she is much older and wiser since the date of the offences. While the Tribunal has taken note that the forgery offence was committed six years ago, there is no evidence that the Applicant feels any remorse for her actions. Infact, she continues to blame others for her troubles with the law.

The Tribunal is very concerned about the Applicant's extensive twelve year history of driving offences and her cavalier attitude towards her driving record. The Applicant gave no reason for her abysmal driving record other than to say that when she was younger, she was "wild and spoiled" and this is why she would speed and not wear a seatbelt. The repeated convictions for speeding, failing to obey a red light, failing to use a seatbelt, failing to share the road and following too close, show a reckless disregard for her own safety and the safety of others. The eight licence suspensions for non payment of fines show a high level of financial irresponsibility and a total disregard for the laws of the road.

The Registrar's second ground is the failure to disclose fully and completely. The Tribunal finds that the Applicant was not truthful in answering questions about criminal charges and convictions on the application form, nor was she truthful when asked to respond by letter to the information revealed by the CPIC check. Even if the Tribunal accepted the Applicant's evidence that she "forgot" about the criminal convictions at the time that she completed the form, she had ample opportunity to correct herself when

asked by OMVIC to respond in writing. Instead, the Applicant provided a half-truth and blamed an OMVIC employee for misleading her in a telephone conversation.

As stated by the Tribunal in *Moodie (Re)* (1998) O.C.R.A.T.D. No. 120, para. 12:

"While the subsequent failure to provide complete disclosure may also have been due to the lack of thoroughness on the part of the Applicant rather than an attempt to mislead, this too raises doubts about the Applicant's ability to carry on the business of a salesperson in accordance with the law."

The above principle is also applicable to the issue of whether the Applicant failed to disclose the fact that she had no valid drivers licence at the time that she applied for registration. Even if the Tribunal accepts that the Applicant was not aware that her licence had expired in August, 2000, Exhibit 3, Tab 8 shows that her eighth suspension occurred on January 30, 2001 which is one month after filing her appeal in this matter. Even after she was refused registration, the Applicant's behaviour did not change.

With respect to the third ground, counsel for the Registrar acknowledged that the Applicant did disclose the fact of her bankruptcy in 1997 and discharge from bankruptcy in 1998. However, counsel submitted that the bankruptcy, coupled with the continued and systemic driving offences and suspensions due to unpaid fines, provide cogent evidence of financial irresponsibility.

Section 5(1)(a) of the Act states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business:

The Tribunal finds that the Registrar's decision is reasonably based on the Applicant's past conduct, non-disclosure and financial irresponsibility.

DECISION:

Pursuant to the authority vested in it by section 7(4) of the Act, the Tribunal directs the Registrar to carry out her Proposal dated November 29, 2000 to refuse the application of Shelly Ann Kuzyk for registration as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill,
Vice-Chair

Released: June 21, 2001

DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

APPEAL FROM A PROPOSAL OF THE DIRECTOR,
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TRIBUNAL:

BEVERLEY J. READE, Vice-Chair, Presiding
CECILIA TAYLOR, Member
CHARLES SANDIFORD, Member

APPEARANCES:

LISA STICHT, Counsel, representing Duke Oliogu and
Danny's Place Support Services a.k.a. Onyeka Ventures
KATHARINE RENISON, Counsel, representing the Ministry
of Community and Social Services

DATES OF	December 11, 12, 13 & 14, 2000 &	
HEARING:	January 15 & 16, 2001	Toronto

ORDER

PURSUANT to the provisions of the *Child and Family Services Act*, R.S.O. 190 Chapter 11 as amended, Mr. Duke Oliogu (the "Applicant") representing Danny's Place Support Services a.k.a. Onyeka Ventures appealed a proposal of the Director, under the *Child and Family Services Act*, (the "Director") dated July 4, 2000 to Refuse to Renew the licence of the Danny's Place Support Services Group Home under Section 195 and Section 196 of the *Child and Family Services Act*.

WHEREAS, the hearing was heard on December 11, 12, 13 and 14, 2000 at the Tribunal, and at the end of the day on December 14, 2000 the hearing was not completed and was to continue on January 15, 16, 17 and 18, 2001 at the Tribunal's Chambers;

AND WHEREAS, the hearing continued on January 15, 2001, and on the second day of hearing on January 16, 2001, counsel for the Respondent requested that the matter be adjourned due to the illness of a witness;

AND WHEREAS, counsel for the Applicant consented to the adjournment and additional dates were set;

This Tribunal Orders that:

- 1) The hearing in this matter is adjourned on consent of both parties to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Tuesday, February 6, 2001 and to continue February 7, 8 and 9, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Beverley Reade, Vice-Chair,
Presiding

Cecilia Taylor,
Member

Charles Sandiford,
Member

RELEASED: January 19, 2001

MAYBEE

KENNETH MAYBEE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

B. EDWARD SOUTHCOTT, Counsel, representing the
Applicant

AVIVA R.HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

December 7, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Kenneth Maybee (the "Applicant") to the Licence Appeal Tribunal from a Notice of Proposal dated June 28, 2000, issued by the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of the Applicant as a salesperson.

The Proposal is based upon subsection 5(1) of the Act. The Registrar argues that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty, and that, having regard to the financial position of the Applicant, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

FACTS:

The Applicant was born on November 10, 1952. He has been registered as a motor vehicle salesperson since 1983. Currently the Applicant is employed as a Used Car and Truck Manager at Michael Boyer Pontiac Buick in Ajax, Ontario.

The Applicant has owned and operated various auto sales businesses in Norwood, Ontario. The history and succession of these businesses is rather complicated. In 1983, the Applicant owned K & R Auto Sales which became Ken's Automotive Collision in 1989. In 1991, a fire destroyed a substantial portion of the Applicant's property. The Applicant used the insurance proceeds from the fire to expand his business, incorporating Norwood Auto Centre Ltd. This new company was registered under the Act as a motor vehicle dealer.

In 1996, the Applicant's ex spouse, Rosemary Maybee, registered Norwood Sales and Service as a motor vehicle dealer under the Act. Although it is agreed that the Applicant operated this business on behalf of Rosemary Maybee, he was never registered as a salesperson to Norwood Sales and Service.

In 1996, the Applicant incorporated 1160081 Ontario Inc. carrying on business as Norwood Auto Leasing. Norwood Auto Leasing has never been registered as a motor vehicle dealer under the Act.

Due to an unsuccessful business venture and ensuing financial difficulties, the Applicant was forced to close Norwood Auto Centre Ltd. in 1997. In the fall of that year, the Applicant formed a sole proprietorship known as Norwood Auto. This business was registered under the Act. The Applicant continued to operate this business until August, 1998. At or about that time the Applicant became bankrupt.

The Applicant's registration as a salesperson was transferred to Michael Boyer Pontiac Buick in September, 1998.

THE ISSUE:

The issue before this Tribunal is whether the evidence affords reasonable grounds for the Registrar's belief, and, as a result, whether the Registrar's Proposal should be carried out.

THE LAW:

Section 5 of the Act states as follows;

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

Section 6 of the Act states as follows;

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitled the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

THE EVIDENCE

(1) Past Conduct of the Applicant

Laura Gordon, Director of Compliance with the Ontario Motor Vehicle Industry Council ('O.M.V.I.C.') and Manager of O.M.V.I.C.'s Compensation Fund gave evidence on behalf of the Registrar.

Ms. Gordon stated that the Registrar based his conclusion that the Applicant will not carry on business in accordance with the law and with integrity and honesty on the following evidence:

- a) On April 13, 2000, the Applicant was convicted on a global count of possession of a number of motor vehicles, knowing that the vehicles were obtained by crime;
- b) The Applicant acted as a unregistered salesperson for Norwood Sales and Service;
- c) The Applicant is a director of 1160081 Ontario Inc. (Norwood Auto Leasing) which has never been registered as a motor vehicle dealer under the Act; and
- d) The Applicant failed to disclose his bankruptcy on his application form for re-registration to O.M.V.I.C. dated September 19, 1998.

Question 6 on the September 19, 1998 application (Ex. 8) states:

Are you now or have you ever been involved in personal bankruptcy proceedings? If yes, attach Assignment or Discharge papers.

The Applicant responded “no” to this question; however, documentation from the Applicant’s Trustee In Bankruptcy indicates that the Applicant filed a proposal under the Bankruptcy and Insolvency Act on July 2, 1997 (Ex. 7).

With respect to the criminal conviction, the copy of the information of Constable David Robinson, Ontario Provincial Police (Ex. 5, Tab 7) states that between April 1 and April 30, 1999, the Applicant had in his possession vehicles or parts from eighteen vehicles which were stolen, contrary to section 354(1) of the Criminal Code of Canada.

The transcript of the Applicant’s guilty plea before Mr. Justice R.P. Taillon on April 13, 2000 was filed before this Tribunal (Ex. 5, Tab 10). At page 3 of the transcript, the Clerk of the Court reads the charge:

CLERK: Kenneth Maybee you are charged between the 1st day of April 1999 and the 30th day of April 1999 in the Village of Norwood and elsewhere in the Province of Ontario, did have in his possession vehicles to wit: a 1994 Ford motor home, the property of Brian Roddy, a 1993 Ford Escort, the property of Renata Vesquez, a 1994 Ford Escort, the property of Lesley Brown, a 1998 Dodge truck, the property of Canadream Inc., a 1996 G.M.C. truck, the property of Abrams Towing, a 1998 Dodge truck, the property of Chrysler Insurance Canada, a 1997 Chevrolet Cavalier, the property of Norma Deacon, a 1997 Chevrolet Cavalier, the property of Jennifer Scaccia, a 1990 Chevrolet truck, the property of William Orange, a 1990 Chevrolet truck, the property of Ian Scott, a 1995 G.M.C. truck, the property of Designcrete Ltd., a 1997 G.M.C. truck, the property of persons unknown, a 1995 G.M.C. truck, the property of James Waite, a 1995 Ford Truck, the property of Cheryl Tower, a 1993 G.M.C. truck, the property of Laurie Balmer, a 1992 G.M.C. the property of Todd Fortney, of a value exceeding five thousand dollars, knowing that the said property had been obtained by the commission in Canada of an offence punishable by indictment, contrary to the provisions of section 354(1) of the Criminal Code of Canada.

.....

CLERK: How do you plead? Guilty or not guilty?

MR. MAYBEE: Guilty.

Further on in the transcript at page 11, the Judge addresses counsel for the Applicant:

BY THE COURT: Before we get to that, I take it from your comments that that Mr. Maybee does acknowledge the facts that have been alleged in support of the offence?

MR. BAKER: Quite right.

BY THE COURT: Is that correct Mr. Maybee?

MR. MAYBEE: Yes Your Honour.

Ms. Gordon testified that the Registrar is particularly concerned about the criminal conviction because it is an industry related offence committed at a time when the Applicant was registered as a salesperson. Further, the Applicant was convicted in April, 2000 – only eight months prior to this hearing.

The Applicant testified on his own behalf. He did not call any other witnesses.

The Applicant is divorced with two dependent children. His sixteen year old son lives with his ex spouse and his nineteen year old son lives with him. The Applicant has a grade 12 education. After graduating from high school, he began a mechanics training course for two years but left this vocation to work as a correctional officer at Warkworth Penitentiary. The Applicant stated that he rose in the ranks to a senior management position with significant responsibility. In 1989, after sixteen years service, the Applicant was offered a severance package and he retired from the correctional service. That same year he expanded his auto sales business by adding two bays, a mechanical shop and a body shop. In 1991, the Applicant built a “state of the art” building with ten bays, a showroom and house on the adjoining property lot. By 1993, the Applicant had twenty employees working at Norwood Auto Centre Ltd.

With respect to the criminal conviction, the Applicant describes himself as the victim of an unscrupulous group of car thieves who held themselves out as reputable businessmen from Quebec. The Applicant first became acquainted with Claude’s Autowreckers in 1993 through attendances at the insurance auctions in Ontario. Automobile insurance companies sell vehicles by auction that have been either damaged or stolen. There is no evidence before this Tribunal that the Applicant did not enjoy legitimate business dealings with Claude’s Autowreckers from 1993 to 1995. In the first few years, the Applicant purchased car parts for insurance vehicles that he had purchased at auction. The attractive service offered by Claude’s was the ability to supply “hard to find parts” for salvage vehicles. The Applicant stated that while not all parts were stamped with serial numbers, the parts that he received from Claude’s generally came with appropriate serial identification.

In 1996, Claude's Autowreckers announced that it had opened up its own body shop in Quebec. Accordingly, if the Applicant had a vehicle that required a part, Claude's would transport the vehicle to Quebec for installation of the part and complete repairs. The Applicant conceded that the labour costs were more expensive, however, he stated that the arrangement was often well worth it if he had a customer waiting to buy the vehicle. The Applicant also stated that he only used Claude's bodyshop service if he was too busy in his own shop.

According to the Applicant, he received approximately 200 vehicles from Claude's Autowreckers between 1996 and September 1998. He claims that he received ownership documents and bills of sale for all vehicles except the last vehicle received, a 1994 Ford bus, which was purchased by the Applicant at an auction in September, 1998. Claude's Autowreckers told the Applicant that it had the parts for the bus and could have the vehicle fixed within three weeks. When the vehicle was returned, it had been converted from a bus to a motor home without the consent or knowledge of the Applicant. The Applicant states that he noted no serial numbers on the motor home portion of the vehicle. When he made inquiries of the employees from Claude's Autowreckers, he was told that the motor home was a theft recovery vehicle. The Applicant stated that he had no suspicions at this time because it is not uncommon for serial numbers to be removed from stolen vehicles. However, when the Applicant asked for ownership papers, none were forthcoming. The Applicant claims that he "forgot" about the ownership papers over the winter. In April, 1999 he was in the process of transporting the motor home to Michael Boyers Pontiac Buick in Ajax when he was stopped by the police.

The Applicant takes the position that he did not comprehend the meaning of a guilty plea to the charge of possession of stolen property with a value over \$5000. He claims that he was ill advised by his then lawyer who never explained to him the circumstances or elements of the charge. The Applicant claims that he never knew that any of the vehicles were stolen. He erroneously thought that he was guilty of the offence because he was driving the motor home, which he subsequently learned was stolen, at the time he was stopped by the police. In other words, he believed that because he was driving a motor home that was stolen, he would be found guilty.

The Tribunal finds the Applicant's evidence on this issue wholly incredible for several reasons. Firstly, if the Applicant truly believed that he was guilty of possession of stolen property simply because he was driving the motor home, it does not explain why he pleaded guilty to the global charge involving seventeen other vehicles, one of which was parked on his ex spouse's property.

Secondly, the Applicant was employed as a correctional officer at Warkworth Penitentiary for sixteen years. Everyday he interacted with inmates who were convicted of Criminal Code offences and sentenced to periods of incarceration. It

is incomprehensible to this Tribunal that the Applicant did not understand the *mens rea* element of an offence for which he was charged, or, at the very least, question his lawyer closely regarding the ramifications of a guilty plea.

Thirdly, the Applicant related in detail the negotiations that took place between his lawyer and the Crown Attorney leading up to the plea bargain. According to the Applicant, these negotiations took place over a period of at least two days. Indeed, the Applicant was in receipt of the information several months before his sentencing and certainly had knowledge that the vehicles were stolen at least one year prior to the guilty plea.

(2) Financial Position of the Applicant

Ms. Gordon testified that the Registrar also has concerns regarding the Applicant's financial responsibility and this is the second ground for refusing to renew his registration.

An Insolvency Search done in June, 2000 reveals that the Applicant filed a Consumer Proposal under the Bankruptcy and Insolvency Act in 1997, which subsequently failed in 1998 (Ex. 5, Tab 9). The Applicant filed for bankruptcy on November 24, 1998 and, at the date of the hearing, remained an undischarged bankrupt. The Canadian Customs and Revenue Agency (formerly known as Revenue Canada) is contesting the discharge on the basis of allegations that the Applicant is hiding assets. The issue in dispute is a debt owed by Norwood Auto Centre Ltd. and/or Norwood Auto for GST monies. Counsel for O.M.V.I.C. filed a copy of the transcript of the bankruptcy discharge proceeding held before Mr. Justice Farley on March 26, 2000 (Ex. 5, Tab 15). In refusing to grant the discharge from bankruptcy, Mr. Justice Farley concluded at page 33:

"The bankrupt has demonstrated that he has played a shell game with respect to his finances. His books and records are incomplete and to the extent available are meaningless since he acknowledges that the accounts deal with matters for which they are not set up. Arrangements with respect to child support payments are, in my view, an exercise in fictitious bookkeeping."

The Applicant testified that he began to encounter financial difficulties in 1995 after he purchased an Esso service station. According to the Applicant, the Royal Bank reneged on an agreement to help finance the purchase. This resulted in the Applicant having to carry a large debt load, servicing the vendor take-back mortgage on the gas station and the cost of the improvements to the property. The Applicant stated that all of the money earned from Norwood Auto Centre Ltd. was invested in the gas station.

In 1996, the Applicant incorporated Norwood Auto Leasing. He stated that all of the vehicles used in the day to day business of Norwood Auto Centre Ltd. were

transferred to Norwood Auto Leasing. The Applicant claims that this was done to satisfy a property equalization claim brought by his ex spouse under the Family Law Act. According to the Applicant, property owned by Norwood Auto Centre Ltd. was rolled into Norwood Auto Leasing, then he assigned 100% of the shares in the new company to his ex spouse. Arguably, the other purpose of these transfers was to defeat creditors of Norwood Auto Centre Ltd.

In late 1996, when he still had not secured financing, the Applicant decided to put the Esso station up for sale. In December, 1996 the gas station was sold back to the original owner for \$15,000.

By this time, the Applicant had accumulated numerous bad debts to a variety of creditors. These debts and creditors are listed at Ex. 5, Tab 6. The Applicant stated that he attended Alan Lawson, Trustee In Bankruptcy, in 1997 for the purposes of filing a Consumer Proposal. The Applicant claims that this Proposal was accepted by his creditors; however, the Insolvency Search confirms that the Consumer Proposal was annulled on July 2, 1997 and failed on May 20, 1998.

The Applicant stated that during the winter of 1997-1998, creditors began re-possessing his equipment. This had the deleterious effect of preventing him from operating his business. Ultimately, the Applicant was forced into bankruptcy on November 24, 1998.

With respect to the discharge from bankruptcy, the Applicant testified that he is confident that the issue of the GST monies owing will be resolved by the summer of 2001, however he has produced no evidence to support this contention. He remains, as at the time of the hearing, an undischarged bankrupt.

The second factor causing the Registrar to be concerned that the Applicant will not act with financial responsibility relates to a claim made by Gerry McGowan to the O.M.V.I.C. Compensation Fund. Mr. McGowan is a contractor who was hired by the Applicant to perform work on the dealership as well as the Applicant's home. The Applicant and Mr. McGowan agreed that in return for the contracted work, the Applicant would "pay" Mr. McGowan by giving him vehicles that were worth the same amount as the work that was done.

According to a Statutory Declaration sworn by Gerry McGowan on April 18, 2000 (Ex. 5, Tab 11), three vehicles were paid as barter by the Applicant: a 1995 Ford Half Ton truck on November 13, 1998, a 1995 G.M.C. Truck on March 18, 1999 and a 1990 Chevy Truck on March 18, 1999. In May, 1999 the Ontario Provincial Police seized all three vehicles advising Mr. McGowan that they were stolen.

Unfortunately, Mr. McGowan's claim for compensation was denied. Ms. Gordon stated that this was because of specific language in the regulation to the Act which disqualifies claims that arise from "bartered" transactions. According to

Ms. Gordon, Mr. McGowan and his company were not deemed to fall within the definition of “customer” in the regulation.

By letter dated May 12, 2000, Yvonne Hallitt, Compensation Fund Administrator, wrote to the Applicant to advise him that Mr. McGowan had made a claim against the Fund in the total amount of \$53,125.19 on account of three vehicles purchased from the Applicant (Ex., Tab 12, pg. 25). By facsimile letter dated May 17, 2000, the Applicant responded to Ms. Hallitt:

"In June 1998 the Kawartha detachment of the O.P.P. charged me with 18 counts of possession of stolen vehicles. In the 10 years prior, I had bought and sold insurance salvage vehicles on a regular basis. It was alleged that the auto body repair shop/wreckers that we paid to repair the vehicles had turned to using stolen parts and stolen vehicles to do the repairs sometime in 1997. As I had used due diligence in all my dealings with them and all other dealers as well as the fact that I am a retired federal law enforcement officer my lawyer was confident in a full acquittal on all of the charges.

The prosecutor, knowing that I would win at trial offered my lawyer to settle the case by me pleading guilty to one count of possession of stolen property (covering all 18 vehicles) with a nine month term of probation. No fine, jail time or licensee suspension was asked for due to the fact that I was not involved in the theft and had no knowledge of what they were doing.

Due to financial costs (\$30,000) to win at trial I reluctantly agreed to the deal. As I was as much a victim as my customers in that I lost 9 of my own vehicles that were financed I was forced to file a consumer proposal/bankruptcy." (Ex. 5, Tab 12, pg. 26)

There are two statements made in this letter that are at odds with the viva voce evidence given by the Applicant. The Applicant testified that he pleaded guilty to possession of stolen vehicles because he did not understand the elements of the offence, ie. he did not appreciate that he had to have known that the vehicles were stolen. In the above correspondence, the Applicant states that he pleaded guilty to avoid the financial costs of a trial. Secondly, the Applicant testified that he was forced to file a Consumer Proposal/Bankruptcy in 1997 because of the failure to meet his creditor's demands after the Esso station was purchased. In the letter, he suggests that he was forced to file a Consumer Proposal after the police seized nine of his own vehicles that were financed. The evidence is uncontroverted that the Applicant's bankruptcy occurred on November 24, 1998 – long before the police seized any of the stolen vehicles.

It should also be noted that the Applicant makes no mention in his letter to Ms. Hallitt of making restitution for the significant financial loss suffered by Mr. McGowan. The Applicant did testify that a mechanic's lien had been registered by Mr. McGowan against the house, which is now owned by his ex spouse. He stated that once the house is sold, Mr. McGowan will be compensated.

APPLICATION OF LAW TO FACTS:

Section 6 of the Act provides that the Registrar may refuse to register an Applicant under the Act when the Applicant under section 5 cannot reasonably be expected to be financially responsible or the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

With respect to the issue of financial responsibility, the Applicant does not present an entirely unsympathetic picture. It would appear that up until 1995, the Applicant had a thriving and successful auto sales business. A poor investment choice by the Applicant lead to the downfall of his business and, it would appear, set the stage for all of the other difficulties that beset the Applicant. That being said, the totality of the evidence indicates that the Applicant has been the author of his own misfortune. It is the finding of this Tribunal that the Applicant is not financially responsible when it comes to monitoring and controlling his own personal and business related finances. He is an undischarged bankrupt with no clear plan to rectify his financial affairs. He showed little or no remorse for having caused significant financial loss to Gerry McGowan.

With respect to the Registrar's decision that the Applicant would not conduct business in accordance with the law and with integrity and honesty, it is the Applicant's past conduct and the cumulative effect of the past conduct which must be considered by this Tribunal.

The Tribunal should only refuse to direct the Registrar to carry out his proposal if it believes that the Registrar is in error in concluding that reasonable grounds exist for his belief. The case of *Brenner and the Registrar of Motor Vehicle Dealers and Salesmen* 19 CRAT SCO Decisions and Orders (1971-1989) sets out the test to be applied by the Tribunal as follows:

"The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that

Brenner would not carry on business in accordance with law and integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

It is critical that an Applicant show through a recent and sufficiently long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. The Applicant is unable to satisfy this test. Insufficient time has passed since his conviction eight months ago, but more importantly, the Applicant refuses to accept responsibility for his actions. He continues to blame others for his criminal conviction. It is the Tribunal's finding that a greater amount of time is needed to persuade the Tribunal that the Applicant is truly remorseful and that he has established a new and reliable course of honest conduct in all his dealings.

Following the test set out in *Brenner*, the Tribunal finds that the Registrar was not in error in concluding that the past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with the law and with integrity and honesty. He failed to disclose his bankruptcy proceedings on the 1998 application, he acted as an unregistered salesperson and he has a recent industry specific conviction against him.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of Kenneth Maybee as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: January 10, 2001

WATT

NOEL THOMAS WATT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

NOEL THOMAS WATT, the Applicant,
AVIVA HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

October 5, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a notice of proposal dated May 16, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of Noel Thomas Watt (the "Applicant") as a motor vehicle salesperson under the provisions of the Act. By Notice of Appeal dated May 23, 2000, the Applicant requested a hearing before the Licence Appeal Tribunal (the "Tribunal"). By Notice of Further or Other Particulars dated September 12, 2000, the Registrar provided further particulars for its proposal to revoke the registration of the Applicant.

REGISTRAR'S POSITION

It is the Registrar's position that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. On or about July 8, 1997, the Applicant signed terms and conditions that stated that he must inform his employer and the Registrar in writing of any new charges or convictions which may be laid against the Applicant.
2. At the time of signing the said terms and conditions, the Applicant had the following convictions:

- (a) drive with more than 80 mgs of alcohol in blood - November 25, 1988; and
 - (b) drive with more than 80 mgs of alcohol in blood - February 6, 1989.
- 3. On or about June 2, 1999, the Applicant submitted an application to the Registrar to renew his registration and in response to Question 1C: "Are there currently any charges pending or has the applicant ever been found guilty or convicted under any law? If yes to any of the above questions and you have not previously disclosed this information in writing, attach particulars on a signed and dated statement.", the Applicant responded "yes" however, no written disclosure was provided.
- 4. A criminal history check revealed to the Registrar that the Applicant has the following convictions:
 - (a) theft over \$200.00 - September 6, 1978;
 - (b) forgery - September 6, 1978;
 - (c) drive with more than 80 mgs of alcohol in blood - November 25, 1988;
 - (d) drive with more than 80 mgs of alcohol in blood - February 6, 1989; and
 - (e) theft under \$5,000.00 - August 30, 1999.

In addition to the foregoing charges, the criminal record check also indicated that the Applicant was wanted by the Ontario Provincial Police, Whitby Detachment, for driving while prohibited with an offence date of February 28, 1989.

- 5. The Applicant failed to disclose all of his criminal convictions.
- 6. The Applicant has been convicted and fined under the *Income Tax Act*.
- 7. The Applicant has breached his terms and conditions of registration.

By Notice of Further and Other Particulars dated September 12, 2000, the Registrar gave notice to the Applicant that further information had come to the attention of the Registrar relating to the fitness for registration of the Applicant which further particulars are as follows:

1. The Applicant provided a false document to the Registrar's office in support of the hearing before the Tribunal.
2. The Applicant failed to make full disclosure on applications submitted to the Registrar's office.

THE EVIDENCE:

Mary Jane South, Deputy Registrar and Director of Operations of the Ontario Motor Vehicle Industry Council ("OMVIC"), after providing a history of her employment with OMVIC and the purpose of OMVIC, testified that the proposal to revoke was based on three primary matters:

1. the Applicant's non-disclosure;
2. the nature of the convictions against the Applicant; and
3. the Applicant's income tax conviction.

Ms. South provided a history of the Applicant's registration which appears at Tab 21 of the Book of Disclosure which was entered as Exhibit 4 in these proceedings and which indicates that the Applicant was originally registered on April 8, 1983, which registration was terminated on November 2, 1992.

On or about June 16, 1997, the Applicant applied for registration or reinstatement, which application appears at Tab 12 of Exhibit 4 and was received by OMVIC on June 18, 1997 (the "1997 Application").

Ms. South testified that in completing the 1997 Application the Applicant answered "no" to Question 10 which asks: "Have you ever been found guilty or convicted of an offense under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars on a separate signed and dated statement. Note: Where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed."

Ms. South stated that a criminal record check was requested and received by OMVIC dated June 23, 1997, which is at Tab 13 of Exhibit 4 and discloses the two previously referred to convictions for driving with more than 80 mgs of alcohol in blood dated November 25, 1988 and February 6, 1989 and that the Applicant was wanted by the Whitby Detachment of the Ontario Provincial Police for driving while prohibited.

Ms. South testified that on June 24, 1997, OMVIC sent to the Applicant its standard form of letter where OMVIC has received a criminal record check indicating that there are charges against an individual of the same name and date of birth requesting that if there are any charges and/or convictions which were not disclosed to please explain in writing why they were not disclosed and the circumstances surrounding each charge or conviction.

The Applicant's response to that letter is a letter dated June 26, 1997, at Tab 15 of Exhibit 4 wherein the Applicant states that he was a little confused by the aforesaid letter from OMVIC and that the only thing that he believed OMVIC could be referring to was an impaired charge in 1989 and another charge in 1990 which was dropped. The letter also states that the Applicant's reason for not referring to the impaired charge was that he had honestly forgotten that it was a criminal offence.

Ms. South testified that by letter dated July 5, 1997, a copy of which appears at Tab 16 of Exhibit 4, the Applicant wrote to Tim Snell at OMVIC referring to a conversation between Mr. Snell and the Applicant and enclosing a copy of a letter from the Applicant's lawyer stating that the matter of the warrant was being looked after and that the Applicant hoped this would satisfy OMVIC. Further, by letter dated July 8, 1997, appearing at Tab 17 of Exhibit 4, Tim Snell of OMVIC wrote to the Applicant advising that the Registrar had approved the Applicant's application for registration however, as had been discussed in a telephone conversation between the parties, because of the impaired driving charges in 1988 and 1989, such approval was subject to terms and conditions and a copy of the said terms and conditions was attached to OMVIC's correspondence. A copy of the terms and conditions dated July 8, 1997 signed by the Applicant and the Applicant's dealer/employer is at Tab 17. Ms. South stated that the signed terms and conditions were received by OMVIC from the Applicant with the letter to OMVIC dated July 9, 1997, a copy of which appears at Tab 18 of Exhibit 4.

Ms. South testified that a renewal form was sent to the Applicant and received back from him on June 2, 1999 and that in response to Question 1.a), "Are there currently any charges pending or has the applicant ever been found guilty or convicted under any law?", the Applicant responded "yes" but did not provide a signed and dated statement as requested in the renewal form.

It was Ms. South's testimony that, in response to a consumer complaint received by OMVIC with respect to the Applicant, a criminal record check was conducted in April 2000 and a copy of the criminal record check response, dated April 17, 2000, appears at Tab 7.

The criminal record check discloses that in addition to the two driving while impaired charges in November 1988 and February 1989, there were convictions on September 6, 1978 in Leduc, Alberta for theft over \$200.00 and forgery for which the Applicant received six weeks detention and 18 months probation

concurrently on each offence and a conviction on August 30, 1999 for theft under \$5,000.00 in Kamloops, British Columbia with a disposition of one year conditional sentence and restitution of \$60,375.00. In addition to the foregoing, the criminal record indicated that the Applicant was on probation for the theft under \$5,000.00 conviction and uttering forged documents with a starting date of August 30, 1999 through to August 29, 2000. Copies of the indictment for the offences of theft and uttering forged documents appear at Tab 8 of Exhibit 4 and the order of the Supreme Court of the Province of British Columbia ordering the Applicant to pay restitution in the amount of \$60,125.00 to the B.C. Insurance Company and \$250.00 to Kamloops Lincoln Mercury appears at Tab 9.

In addition to the foregoing, Ms. South testified that OMVIC received a copy of an information laid against the Applicant which contained nine counts with respect to the making of false or deceptive statements in the Applicant's individual tax returns for the 1994, 1995, 1996 and 1997 taxation years and that the Applicant willfully evaded or attempted to evade payment of taxes imposed under the *Income Tax Act* for the 1996 and 1997 taxation years. The Applicant was convicted on Count #9 of the aforementioned information and ordered to pay a fine of \$28,325.00 with the first of two payments in the amount of \$10,000.00 to be paid forthwith and the balance of \$18,325.00 to be payable by March 31, 2003.

Ms. South testified that when the Notice of Appeal dated May 23, 2000, which appears at Tab 3 of Exhibit 4 was received, there was attached to it an Application for Employee Registration or Reinstatement dated November 25, 1997, which contained a notation that there were "Also pending charges to be dealt with in B.C. in Jan/99." It was Ms. South's evidence that OMVIC had no record of ever having received such an Application for Employee Registration or Reinstatement from the Applicant. Ms. South testified that in November 1997, OMVIC was not aware of the charges against the Applicant.

It was Ms. South's evidence that the Registrar was concerned about the serious nature of the recent convictions and the apparent fraudulent behaviour of the Applicant. It was Ms. South's position, on behalf of the Registrar, that the Applicant had failed to advise OMVIC of his convictions or pending charges during the two year period of the terms and conditions of his registration; had submitted a false document with the Notice of Appeal; and that the type of charges against the Applicant clearly indicated a lack of honesty and integrity.

On cross-examination, Ms. South was asked if the document appearing at Tab 20 of Exhibit 4 being a Notice of Employee Change was double-sided and why the backside of that document had not been produced. Ms. South responded by indicating that the reverse side is similar to the second page of the document at Tab 19 which is also a Notice of Employee Change and that this form does not ask any questions about criminal convictions. Ms. South, when questioned about the procedure where a salesperson's employment with a dealer is terminated

and the salesperson does not apply for a Transfer of Registration within 60 days, referred to Regulation 801 of the Act, Section 13(10). It was Ms. South's testimony that the Notice of Employee Change appearing at Tab 20 was not processed until March 17, 1998 as indicated on the Applicant's registration history appearing at Tab 21 of Exhibit 4.

Ms. South testified, in response to the suggestion that OMVIC had received the document at Tab 4 but sent it back because it was the wrong form, that if OMVIC had received the form, it would have been date-stamped even if it was subsequently returned and the document at Tab 4 was not date-stamped.

Ms. South confirmed that the terms and conditions were in place for a two year period from July 16, 1997 to July 16, 1999. When her attention was drawn to the notation on page 2 of the information appearing at Tab 10 that states: "Summons to issue June 7, 1999", Ms. South acknowledged that OMVIC had no way of knowing when the Applicant learned of the charges contained in the information appearing at Tab 10.

The Applicant testified that on September 30, 1997, he was placed in custody and taken back to Kamloops, British Columbia and not permitted to return to Ontario until November 21, 1997. After his return on November 25, 1997, the Applicant filled out an Application for Reinstatement. It was the Applicant's testimony that he asked his employer what he should say with respect to the situation in British Columbia and it was his employer's suggestion that he merely say there were pending charges.

The Applicant stated that he subsequently learned that he did not need to fill out an Application for Reinstatement and filled out the Notice of Change appearing at Tab 20. When he had not received his licence, the Applicant's employer called and sent the form in again and that is why the notation on the form "Att Chris copy of what was sent to you last year." appears on that document.

The Applicant testified that his employer was fully aware of the charges including the charges in 1976 and the pending charges for theft and that the Applicant was not aware of the charges for theft and forgery until after August 30, 1999, when he returned to British Columbia which was after the two year period for the terms and conditions had expired.

The Applicant testified that a Notice of Employee Change had been sent in after his employer had been contacted by OMVIC and told that the Application for Reinstatement was the wrong form. Further, that the letter that was attached to the letter appearing at Tab 16 of Exhibit 4 was a letter from the Applicant's lawyer saying that those charges relating to the warrant had been dismissed.

When asked on cross-examination as to the whereabouts of the original form which was faxed to OMVIC with the Notice of Appeal, the Applicant advised that

the file was with a paralegal and he did not have the original nor did he have a copy of the cheque which the Applicant indicated would have been sent by his employer.

With respect to the charges in British Columbia, the Applicant testified that he was the general sales manager at Kamloops Lincoln Mercury where there was a "scam" being carried out with respect to deposits and that the \$60,000.00 amount which appears in the Restitution Order at Tab 9 of Exhibit 4 represented the amount of the deposits received for leased vehicles which were cashed and he admitted that this amount has not been repaid.

With respect to the fine levied pursuant to the Fine Order appearing at Tab 11 of Exhibit 4, the \$10,000.00 has been paid and that the \$18,325.00 would be paid by 2003.

With respect to the Applicant's non-disclosure of the theft over \$200.00 and forgery offences for which he was convicted in September 1978, it was the Applicant's position that these offences had been pardoned and that the pardon had not been revoked until August 1999. The Applicant testified that these charges related to automobile parts and that the forgery related to a note with respect to automobile parts. A copy of the pardon was tendered and made Exhibit 5 in these proceedings.

With respect to his negative answer to Question 10 on the Application filed on June 16, 1997, appearing at Tab 12 of Exhibit 4, the Applicant testified that this was a mistake as he did not believe that the impaired driving charges were criminal offences.

Tom Onaczyszyn was called as a witness for the Applicant and stated that he is the general manager of Woodstock Auto Brokers. The witness identified the letter dated September 6, 2000, addressed "To Whom it may Concern" with respect to the Applicant which was made Exhibit 6 in these proceedings. The witness testified that he thought that when an employee changed positions, an Application of Employee Registration form was to be sent to OMVIC and that there was a fee involved but he did not have a copy of the cheque paid when the document at Tab 4 was sent to OMVIC.

The witness testified that it was his suggestion that the Applicant indicate that charges were pending. With respect to the Notice of Employee Change, the witness testified that this had originally been sent but there had been some sort of mix-up and had to be re-sent and that it was his recollection this occurred about three years ago. The witness testified that he was aware of the terms and conditions appearing at Tab 17 of Exhibit 4 and knew of all of the charges set forth in the criminal record check appearing at Tab 17. The witness testified that he had known the Applicant since the mid-1980's.

On cross-examination, Mr. Onaczyszyn stated that Woodstock Auto Brokers was involved in both the wholesale and retail aspects of the automobile business but had concentrated on wholesale over the last few months and that the Applicant looks after the dealership. The witness testified that the Applicant was successful at what he does and helps make the business profitable. The witness had met the Applicant at Royal Chevrolet Oldsmobile where the Applicant previously worked and understood that there had been a conflict between the Applicant and his employer and the witness had hired the Applicant after his employment was terminated with Royal Chevrolet Oldsmobile.

The witness testified that the Application of Employment Registration appearing at Tab 4 was the form filed when the Applicant changed from Royal Chevrolet Oldsmobile to Woodstock Auto Brokers and that he provided the form and had several blank copies in his files. The witness was unclear as to whether the document had been dated at the time that he signed it.

The witness reiterated that it was he who told the Applicant to state that there were pending charges because, as he understood it, the charges had not been laid but he knew about what the witness referred to as the "income tax thing." The witness did not know who had paid the \$175.00 fee for filing the application.

The witness did not recall if the Application for Employee Registration appearing at Tab 4 of Exhibit 5 had been returned and had no correspondence with respect to the form however, he indicated that he did get a call and faxed back the form appearing at Tab 20. The witness indicated that he was aware of the *Income Tax Act* issues when the Applicant had to go to British Columbia in September of 1997.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant was originally registered in 1983 which registration terminated in 1992.
2. By application dated June 16, 1997, the Applicant applied for registration and completed an Application for Employee Registration or Reinstatement and in response to Question 10 with respect to whether he had ever been found guilty or convicted of an offence, the Applicant answered "no."
3. At the time the Applicant made his application in June 1997, he had two convictions for driving with more than 80 mgs of alcohol in his blood, the first being November 25, 1988 and the second being February 6, 1989 and that he was, at that time, wanted by the Whitby Detachment of the Ontario Provincial Police for driving while prohibited.

4. Notwithstanding his failure to disclose his convictions in the 1997 Application, the Applicant was permitted to be registered with terms and conditions which included a requirement that the Applicant, if criminally charged in the future, would notify the Registrar of the charges filed against him and also agreed not to transfer his registration as a salesperson to another dealer without first obtaining the approval of the Registrar and that he would voluntarily surrender his registration, if in the opinion of the Registrar, the Applicant had breached any terms and conditions set out in the document setting forth the terms and conditions under which his registration was granted. The terms and conditions were for two years from July 16, 1997 to July 16, 1999.
5. The Applicant's employment with Royal Chevrolet Oldsmobile was terminated on October 2, 1997 and a notice to that effect was filed with OMVIC on or about October 8, 1997 by Royal Chevrolet Oldsmobile.
6. There is no record in the files of OMVIC that the Application for Employee Registration appearing at Tab 4, Exhibit 4 was ever received by OMVIC prior to receipt of the Notice of Appeal.
7. The only record in the files of OMVIC of the Notice of Employee Change whereby the Applicant changed employers from Royal Chevrolet Oldsmobile to Woodstock Auto Brokers was received on March 17, 1998.
8. The Applicant did not obtain the Registrar's approval prior to the transfer of his registration to Woodstock Auto Brokers.
9. The Applicant was found guilty of the charge of committing theft of cheques in the City of Kamloops on August 30, 1999.
10. The Applicant was ordered, pursuant to the finding of guilt with respect to the charge of theft under the Criminal Code, to pay \$60,125.00 to the B.C. Insurance Company and \$250.00 to the Kamloops Lincoln Mercury. That money has not been paid.
11. The Applicant was convicted on the charge that he willfully evaded or attempted to evade the payment of taxes imposed under the *Income Tax Act* and was ordered to pay a fine in the amount of \$28,325.00.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to revoke the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsection 5(1)(b) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant should be revoked.

The question to be determined is whether the past conduct of the Applicant provides the Registrar with reasonable grounds for the belief that the Applicant will not carry on business as required by section 5(1)(b) of the Act. It is the Registrar's belief which is at issue in these proceedings not that of the Tribunal.

In order for the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and

with integrity and honest. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed might have reformed himself.

Due to the particular facts in this case Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051 the Court held:

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.

APPLICATION OF LAW TO FACTS:

Having considered the evidence given at this hearing, the Tribunal finds that the Application for Employment Registration dated November 25, 1997 which was included with the Applicant's Notice of Appeal was never previously received by OMVIC and was only created by the Applicant to provide the appearance that the Applicant had, by inserting the words: "Also pending charges to be dealt with in BC Jan/99", provided notice to the Registrar in accordance with the terms and conditions which the Applicant had entered into in July 1997. Therefore, the Applicant failed to notify the Registrar of these charges as he was required by the terms and conditions.

When one considers the Applicant's criminal record as it stands today, there are charges dating back to 1978 which relate to the theft of auto parts and forgery

and charges in 1999 relating to incidences which occurred in 1995 and 1997 in Kamloops, British Columbia relating to the Applicant's activities in the automobile industry in that province which provide reasonable grounds for the revocation of the Applicant's registration.

In addition to the Applicant's criminal record, there is the conviction under the *Income Tax Act* for having willfully evaded or attempted to evade the payment of income taxes which raises real concerns that the Applicant will not carry on business in accordance with the law.

Returning to the matter of the terms and conditions, it must be noted that the Applicant clearly breached the terms and conditions by failing to seek the Registrar's consent for his change of employment to Woodstock Auto Brokers. The issue of the timely filing of the Notice of Employee Change appearing at Tab 20 of Exhibit 4 has not been satisfactorily explained by the Applicant.

In applying the evidence placed before the Tribunal to the relevant legal principles, the Tribunal finds that the Registrar has satisfied the onus of proof that the past conduct of the Applicant did afford reasonable grounds for Registrar to believe that the Applicant would not carry on business in accordance with the law and with integrity and honesty.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out the Registrar's proposal dated May 16, 2000 to revoke the registration of Noel Thomas Watt as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: January 11, 2001

BEHNAMY, SAM O/A SILVER AUTO

SAM BEHNAMY o/a SILVER AUTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

AMIN SHOUKRI, Agent, representing the Applicant
MITCHELL GOLDBLOOM, Counsel, representing the
Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING:

November 1, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal brought by Sam Behnamy (the "Applicant") to the Licence Appeal Tribunal from a Proposal of the Registrar of *Motor Vehicle Dealers Act* (the "Registrar") dated June 7, 2000 proposing to refuse the registration of the Applicants under the *Motor Vehicle Dealers Act* R. S.O. 1990, c. M. 42 and Regulations as amended (the "Act"). The Registrar stated in the proposal that the refusal was based upon the belief that due to the past conduct of the Applicant, he would not meet the Act's requirements to be financially responsible in the conduct of business and to carry on business in accordance with the law and with honesty and integrity.

FACTS:

The Particulars listed in the Notice of Proposal included the fact of the cancellation of a 1999 Registration as a Motor Vehicle dealer granted to the Applicant in August of that year. The cancellation occurred approximately 6 weeks after having been granted and within the conditional period set out in section 13(1) of the Act.

Additional particulars included the following assertions:

1. On or about May 2, 2000 a further application for registration was made by Sam Behnamy o/a Silver Auto.
2. Sam Behnamy provided false information on his application in that he failed to disclose a conviction *for contravention of* Section 198(1) of the *Bankruptcy and Insolvency Act*.
3. Sam Behnamy filed an assignment in Bankruptcy on August 14, 1997, and cannot reasonably be expected to be financially responsible in the conduct of business.

ISSUES:

The issue before the Tribunal is whether the Registrar erred in his decision to refuse registration to the Applicant under the Act.

THE LAW:

Section 6(1) of the Act grants to the Registrar the power to refuse an application for registration. It reads:

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

.....

Section 5 outlines the exceptions to the entitlement of registration to an applicant. It reads:

(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for the belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;

EVIDENCE:

Counsel for the Registrar submitted there was evidence to support the Registrar's decision on both of the exceptions stated in section 5 even though as the section is written disjunctively, evidence supporting the grounds in either (a) or (b) would be sufficient for the Tribunal to enter a finding directing the Registrar to carry out the proposal to refuse the registration of the Applicant.

In the view of the Tribunal, the most serious allegations against the Applicant is that he provided false information to the Registrar on his application form. Counsel submitted that this should constitute sufficient grounds for the Registrar exercising his discretion to refuse to grant a registration in that such conduct is clear evidence that the Applicant will not carry on business "with honesty and integrity" as provided for in section 5(1)(b).

In the spring of 2000, the Applicant applied to become registered under the Act . He was to file both a registration on behalf of his company Silver Auto and an individual registration for himself. He obtained the relevant application forms for each. The application filed on behalf of Silver Auto was signed by Mr. Behnamy as owner on April 26, 2000, and his individual application was signed April 28. Both applications were received by the Registrar May 2, 2000. Both were entered as exhibits. Mr. Behnamy was listed on page 2 of the company's application as the person who was to have "effective control of the day to day operations of the dealership".

Question 9 on Mr. Behnamy's individual application states:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending?"

There is a note after this question to the effect that checks will be made and that it is an offence under the Act to submit false or incomplete information and that doing so will result in disqualification. Mr. Behnamy checked off the "no" answer.

The Applicant had filed an assignment in bankruptcy August 14,1997.

The Registrar entered into evidence at the hearing before this Tribunal a certified copy of the record of the conviction of the Applicant dated March 24, 2000 on a charge of obtaining credit by false representation while an undischarged bankrupt, in contravention of Section 198(1) of the *Bankruptcy and Insolvency Act*. The record shows that the Applicant was convicted on one count of 15 and was granted a conditional discharge and 3 years probation with restitution at \$200.00 per month until the amount of \$7,200.00 is repaid.

On cross-examination, the Applicant admitted to the conviction as presented in evidence.

The Registrar upon receipt of the applications checked the Applicant's answers with the Ontario Provincial Police, and by letter of May was informed by the OPP of a conviction in the Applicant's name. A letter dated June 6, 2000 was in turn forwarded to the Applicant requesting verification of the fact of the conviction and a response. The Applicant responded by going to the offices of the Respondent and offered an explanation, verbally and in writing which included the assertion that he did not think all questions needed to be answered, that he was in a rush when the application form was being filled out, and that he only spent 5 minutes filling out the information. The Respondent was apparently less than satisfied with the explanation and issued the Notice of Proposal dated June 7, 2000 proposing to refuse the registration of the Applicant.

When cross-examined upon the events surrounding the filling out of the application, the Applicant could not square his testimony regarding his apparent haste and the fact that the applications had a lapse of 7 and 5 days respectively between their completion and their reception by the Respondent. The Tribunal finds the testimony of the Applicant on the issue of the false application not credible as an explanation.

Ms. Laura Gordon, Director of Compliance at the Ontario Motor Vehicle Industry Council, who testified on behalf of the Registrar was asked as to the position of the Registrar regarding false information on application forms. She testified that it is taken seriously as the application form is the only real contact between the regulator of the industry and the registrants who are granted the right under the Act to deal with the public.

The Respondent further submitted that pursuant to section 5(1)(b) of the Act, the entirety of the Applicant's past conduct is to be taken into account in arriving at a finding on the issue of his fitness to become a registrant under the Act. On this point, Ms. Gordon outlined the circumstances surrounding the cancellation of the Applicant's registration as a motor vehicle dealer granted in 1999. That registration was granted pursuant to an application signed by Mr. Behnamy on June 15, 1999 and is dated stamped as having been received by the Respondent on June 19. As a registrant, the Applicant agrees to abide by the terms and conditions under which the registration is granted. These were provided in writing to Mr. Behnamy and signed by him on August 3. As with the application in 2000, Mr. Behnamy completed two application forms, one for the Silver Auto dealership and another required under the Act for all persons with an interest in the dealership as salespersons, proprietors, directors or other listed affiliations. As with the April 2000 applications, questions are asked regarding the legal position of the applicant. One of the questions related to the status of the applicant company and individual in relation to the laws of bankruptcy. Mr. Behnamy apparently understood the meaning and import of the questions as he answered correctly on both forms; namely, that the corporation had not been involved in bankruptcy proceedings but that he personally had been. Despite this fact, a registration was granted to Mr. Behnamy.

All registrations under section 13(3) of regulation 801 of the Act, are conditional for 60 days. During this conditional period, investigations were carried out by members of the Respondent's staff. Two sets of reports entitled "Inspection Findings" were issued, one dated August 8 and the other September 2. The August 8 report has noted on it that it was left on the dealer's premises. The September 2 report has the signature of Mr. Behnamy in the "Acknowledgment" section. This section states that the signature is only notice of the receipt of the inspection report, not an admission of findings of non-compliance.

In his report of September 2, the one acknowledged by Mr. Behnamy as having been received, Mr. McKenzie, a member of the Registrar's staff, found contraventions of the conditions of Silver Auto's registration. Mr. Behnamy testified that he was told by a person at the neighbouring dealership that Mr. McKenzie had indicated to him that these contraventions were a failure to register a car within 6 days of purchase and a salesman from another dealership selling Silver Auto's cars. Mr. Behnamy also testified that one month after receiving his registration, he departed for Iran on account of a family illness and that when he had been there two weeks he had received word that his registration had been cancelled. He further stated that he returned to Canada two months later. There was confusion in the testimony of Mr. Behnamy in that he claims to have learned of Mr. McKenzie's findings from his neighbour when his signature appears on McKenzie's inspection report of September 9. The Tribunal found unconvincing Mr. Behnamy's testimony on cross-examination as to his whereabouts during this period.

DECISION AND REASON:

The Registrar has the burden to prove that he had reasonable grounds for his belief that the Applicant can not reasonably be expected to be financially responsible in the conduct of business and would not carry on business in accordance with the law and with honesty and integrity as required by the Act.

Counsel on behalf of the Registrar led evidence as to the fitness of Mr. Behnamy to become a registrant based upon the entirety of his past conduct. This evidence centered around his activities as a conditional registrant in 1999. The Registrar granted his conditional registration in the full knowledge that he was an undischarged bankrupt. Accordingly, the Tribunal cannot find that this history, in itself, can be the basis for the Registrar's belief that the Applicant would not carry on business in a financially responsible manner.

The Applicant failed to disclose the fact of a conviction under the *Bankruptcy and Insolvency Act* on his application form to become a registrant as required by the Act. The Applicant subsequently admitted the conviction. He had filled out similar forms the previous year, at a time when he did not have a conviction, and had answered correctly. The Tribunal finds that the Applicant could not reasonably be said to have been confused by the application form. In addition, the Tribunal finds that the Applicant offered no acceptable reason for failing to

disclose the conviction despite the fact the application form stated that such failure to disclose is an offence under the Act and would result in the disqualification of his application.

The Tribunal accepts the evidence of Laura Graham, called on behalf of the Registrar, that the honesty of disclosure by persons seeking to become registrants under the Act is extremely important to the Registrar who is to ensure that only trustworthy people become entitled to deal with public. Ms. Graham said that the application form is the primary connection between the Registrar and the applicant. The proper administration of the Act requires that the Registrar require the persons who apply for registration be honest. It is equally obvious that the Registrar should act upon knowledge that persons seeking to become registrants have not been forthright. Where a person conceals the very information necessary for the Registrar to make an informed opinion as to the fitness of the person to do business honestly, the Registrar is justified in considering that as a ground to refuse that person registration under the Act.

There was evidence introduced in the form of inspection reports of Mr. McKenzie, an employee of the Respondent, that certain conditions of the Applicant's conditional registration had been breached. Apparently on this basis the 1999 registration was canceled. Mr. Behnamy receipted one of these inspection reports which contained findings that he breached his registration by failing to register cars in his own name within 6 days of their purchase and by allowing a salesperson from a neighbouring dealership to offer for sale his cars. Mr. Behnamy claims to have been in Iran when these findings were made despite the fact that his signature appears on the inspection report.

The Applicant submitted that evidence relating to the 1999 cancellation registration should not be taken into account as evidence of past conduct upon which the Registrar relies to form his belief that the 2000 registration should be cancelled. The seriousness of the breaches of the conditions which led to the 1999 cancellation registration had already been adjudged by the Registrar by the very act of the cancellation. The Applicant argued that the 1999 cancellation must be ignored otherwise every attempt at re-registration would fail because the Applicant's past conduct has already resulted in a previous cancellation. The Tribunal does not feel it necessary to rule on this point or any other save that of the non disclosure of the Applicant on his application form as to his conviction under the *Bankruptcy and Insolvency Act*. The Tribunal finds for the reasons stated that this is sufficient grounds upon which the Registrar could form a belief that the Applicant would not carry on business in accordance with the law and with honesty and integrity.

ORDER:

Therefore, by the authority vested in it by section 7(4) of the *Motor Vehicles Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of Sam Behnamy o/a Silver Auto.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: January 18, 2001

Filename: 0138.mvda.Behnamy

REID

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4



IN THE MATTER OF
LORI ANNE REID

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: June 15, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

LORI ANNE REID

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above
matter on January 22-23, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to
commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor,
Toronto, Ontario, at 9:30 a.m., on Monday, March 26, 2001, and to continue
March 27, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 16, 2001

OHRSTROM-COELHO

LINDA OHRSTROM-COELHO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair

APPEARANCES:

V. Charles Anipare, Counsel, representing the Applicant
George Drametu, Counsel, representing the Registrar of the
Real Estate and Business Brokers Act

DATE OF HEARING: November 14, 2000 &
January 25, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated June 15, 2000, issued by the Registrar of the *Real Estate and Business Brokers Act* ("the Act") to refuse to grant the Applicant, Linda Ohrstrom-Coelho ("the Applicant") her registration as a real estate salesperson. The refusal was based on the opinion of the Registrar that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business, and past conduct of the Applicant provides a reasonable ground for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Applicant requested a hearing before this Tribunal.

A pre-hearing in the matter was held on September 25, 2000. Certain facts were agreed to at that time. The hearing commenced on November 14, 2000. At that time, counsel for the Applicant, Mr. Anipare was seriously ill and could not attend. The matter was adjourned peremptorily to the Applicant to January 25, 2001.

THE FACTS:

The facts were not seriously in dispute between the parties. At the pre-hearing certain facts were admitted as follows:

1. The parties to the hearing are the Applicant and Registrar.
2. The issues to be dealt with at the hearing are contained in the Proposal of the Registrar.
3. The Applicant admits that:
 - (a) the judgment against the Applicant in favour of Canada Trustco Mortgage Company referred to in the Registrar's Book of Documents has not been paid by the Applicant as to the principal sum of such judgment, as well as costs and accrued interest.
 - (b) Davhill Investments obtained a judgment against the Applicant in 1996 in the sum of \$2,286.00.
 - (c) in January 1998, she was tried and convicted of the crime of fraud over \$5,000.00 and that pursuant to such conviction she was put on probation for a period of three years and was required to pay restitution of \$15,000.00.
 - (d) she has been charged with breach of the above probation order.

Prior to the commencement of the hearing, the counsel for the parties agreed to admit a series of documents. All documents that each of the parties intended to rely on were admitted.

The Tribunal heard oral evidence from Brian Schlotzhauer, the Assistant Registrar, and from the Applicant, who testified on her own behalf. Based on the evidence presented before it, the facts previously agreed and the documents tendered the Tribunal finds the following facts have been proven.

1. The Applicant was first registered as a salesperson under the Act on or about May 6, 1982. Her registration under the Act had been renewed from time to time. She applied for registration in 1998. That application was under consideration when, by way of another application dated May 19, 2000, the Applicant applied to reinstate her registration as a salesperson.

2. In the early 1990's, the Applicant fell on some hard times. In the course of her financial difficulties, the first mortgage on a condominium she owned, went into default and the first mortgagee, Canada Trust, took steps to sell the property by way of a power of sale. There was a shortfall on the amount of the mortgage debt following the sale. The Applicant was very distressed and did not contest the proceedings taken by Canada Trust. Canada Trust obtained judgment against the Applicant on or about July 5, 1993. As of May 1994, the amount of the judgment was in the order of \$31,796.41.
3. The Applicant also had several civil judgments for payments of money made against her during the 1990's. One judgment on behalf of Davhill Investments for \$2,286.00 was recently settled. A second judgment debt on the part of Canada Trust in respect of a credit card was also settled by the time of the hearing.
4. As at the date of the hearing, the judgment in favour of Canada Trust in respect of the deficiency on the mortgage debt is now approximately \$50,000.00. No payments have been made by the Applicant in respect of this outstanding judgment and the Applicant offered no plans to retire this debt. The Applicant cannot afford to pay the judgment.
5. In or about September 1997, the Applicant was charged with defrauding the Municipality of Metropolitan Toronto Community Services Department, Social Services Division, of a sum of monies of a value exceeding \$5,000.00 contrary to the *Criminal Code*.
6. The Applicant pled not guilty to the charge and was tried. On January 27, 1998, the Applicant was found guilty of the offence and given a conditional discharge with probation for three years. Also, there was a restitution order made that the Municipality was to be repaid the sum of \$15,000.00.
7. The Applicant made a small payment with respect to the restitution order, but it then went into default. She was subsequently charged with breach of probation. That matter was before the courts as at the time of this hearing. The Applicant retained a solicitor, Susan Hunter, to deal with this matter. There was no written documentation provided from Ms. Hunter's office or any particulars offered to advise the Tribunal of the status of those proceedings.
8. The Applicant suffered a breakdown of her marriage in 1981. She lost custody of her children for a period of ten years. These events were quite traumatic for the Applicant and still cause her a great deal of upset.

9. From March 1998 to October 1999, the Applicant attended The Day Hospital, followed by the Day Treatment Program for Adult Mental Health at the North York General Hospital. As of September 21, 2000, she was visiting her psychiatrist and a treating physician, Dr. K.D. Mohan, at least once a month. At that time she was also visiting her psychotherapist once a week. No medical evidence more recent than September 21, 2000 was offered at the hearing.

THE LAW:

The relevant sections of the *Real Estate and Business Brokers Act* are as follows:

Section 6

- 6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and integrity and honesty;.....
- 6.(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 9

-
- 9.(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

APPLICATION OF THE LAW TO FACTS:

In this case, the Registrar is denying the application by the Applicant that she be registered as a salesperson. While the financial difficulties that the Applicant finds herself in today were known to the Registrar at the time she made application to register in 1996, which registration was accepted, the Registrar now urges that a “global” approach be taken and particular emphasis be given to the fact that the Applicant was convicted of fraud in 1998. It is clear from the oral evidence of the Applicant at the hearing, that she does not accept any responsibility for the fraud conviction. At the hearing she continued to insist that the conviction was as a result of the failure of her solicitor to properly conduct her defence. She also claimed that the written application upon which the charge was prepared was completed by another person, namely a worker at the Municipality, and that she did not understand that a condominium was an asset that had to be disclosed to the Municipality when she applied for welfare. Apparently those arguments were also made to the criminal court during her trial as evidenced by a portion of the transcript of the trial that was set out in the Registrar’s proposal.

This Tribunal cannot go behind the conviction for fraud. It is apparent that Ms. Ohrstom-Coelho does not believe that she did anything wrong and maintains this position to date. To the extent that the Applicant does not admit wrongdoing in the face of conviction for fraud, it is difficult to believe that in future she will conduct herself in accordance with the law and with integrity and honesty.

The Tribunal is bound by the decision of the Divisional Court in *Brenner vs. Ontario* (Registrar of Motor Vehicle Dealers and Salesman) (1983) O.J. #1017 (Div. Ct.) 1983. In that case, the test is clearly enunciated. The Tribunal should only refuse to direct the Registrar to carry out its proposal if it thinks the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that she will not carry on business in accordance with law and integrity and with honesty. The Tribunal is not to be preoccupied with any sympathetic concerns as to whether or not the Applicant has been generally reformed or circumstances appear that an applicant should be given “a second chance”.

Indeed from 1994 to 1998, a time when the mortgage judgment from Canada Trust was outstanding, (and the debt was mounting rapidly) the Applicant did nothing to satisfy the judgment or take any steps to set up a payment plan or even make a proposal to the judgment creditor. At that time she was licenced

and was working in real estate. The Tribunal is at a loss to understand how the Applicant's counsel can urge that by refusing to carry out the proposal the circumstances will be in any way different than in the past.

When the Applicant had the opportunity to take some steps to put her own affairs back in order she did nothing to erase a significant debt arising from a failed real estate investment. The Tribunal is of the view that given the Applicant's financial position it is reasonable to conclude she will not be financially responsible in the conduct of business. She offered no persuasive evidence as to how she intended to get her own personal finances under control. The Applicant did make reference to the fact that another solicitor recently took some steps on her behalf to make some kind of arrangement with Canada Trust. However, the Applicant provided no particulars and no written evidence of these efforts and her counsel was "only vaguely aware" of the situation and could provide no particulars which would allow the Tribunal to make any finding of fact in this regard.

The Applicant did not offer any excuse as to why she had not paid the Canada Trust mortgage deficiency debt from 1994 to 1998 other than to advise she had been in and out of hospital since 1998. The Tribunal was placed in the difficult position of having no current medical evidence to assess the Applicant's medical difficulties, and indeed the doctor's letters placed in evidence by the Applicant were not at all detailed and hence were not persuasive or particularly helpful to allow the Tribunal to assess what is the prognosis for the Applicant and whether or not her mental health difficulties will prevent her from actively working as a real estate salesperson in future.

The Assistant Registrar, in his evidence, emphasized the fact that the Act is a consumer protection statute and that while a person has an entitlement to be registered, there are qualifications and limits on that right. There are fairly stringent conditions placed on the ability of a person to obtain a registration, if indeed their financial circumstances and past conduct suggests a possibility that they might not be able to be financially responsible or have difficulty acting in accordance with the law and with honesty and integrity. In the present case, the Applicant faces a substantial present debt load and her past conduct including a fraud conviction which carries an outstanding restitution award, suggests the Applicant cannot be expected to be financially responsible in the conduct of business and there are reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

Also, counsel for the Applicant suggested in argument that the nature of the offence was one which was not "as serious" a fraud as may be the case where individuals were defrauded. The Tribunal does not accept this submission and is concerned that the Applicant does not appreciate that she has been found guilty of an offence which speaks directly to the issue of her veracity and her ability to be forthright.

The Tribunal recognizes the difficulties the Applicant has had in the past. However while the Tribunal is sympathetic to those difficulties, that sympathy is not sufficient to permit the Tribunal to ignore the overriding public interest at issue. It does not appear that allowing the Applicant to continue to be registered as a real estate salesperson will create an opportunity for her to set her financial house in order, as indeed she did not do so during the period 1994 to 1998. The Tribunal agrees with the Registrar's assessment that it is reasonable to expect that the Applicant will not be financially responsible in the conduct of business.

The Tribunal also took note of the fact that the Registrar indicated that the real estate business is quite competitive, fast paced and requires salespersons to act independently. There was no evidence led by the Applicant of any particular support mechanism that would be in place for the Applicant if indeed the stress of the day to day affairs of being a real estate agent began to negatively impact on her mental health. The Tribunal is not convinced that the Applicant has accepted the findings of the Court with respect to her fraud conviction, and agrees with the Registrar's assessment that the Applicant's past conduct would not lead a reasonable person to believe that the Applicant would carry on business in accordance with law and with integrity and honesty.

DECISION:

Pursuant to the authority vested in it by Section 9(4) of the *Real Estate and Business Brokers Act*, the Tribunal hereby directs the Registrar to carry out his proposal dated June 15, 2000, to refuse the registration of Linda Ohrstrom-Coelho as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick, Vice-Chair,

RELEASED: January 31, 2001

GEOFFROY

PAUL AND FRANCYN GEOFFROY

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHANNE N. MORISSETTE, Vice-Chair

APPEARANCES:

PAUL AND FRANCYN GEOFFROY, appearing
themselves,
(the "Applicants")
MARK FRIEDMAN, Counsel, representing the Ontario
New Home Warranty Program, (the "Program")
REJEAN LAROSE, Agent, representing the Added
Party, Rejean Larose Construction, (the "Builder")

DATES OF
HEARING:

November 21 and 22, 2000

OTTAWA

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by Paul and Francyn Geoffroy (the "Applicants") from a written decision dated July 5, 2000 of the Ontario New Home Warranty Program (the "Program").

FACTS:

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

The Applicants took possession of their home on October 26, 1998. They notified the Program in writing by letter dated October 14, 1998, of various complaints from which the following were at issue for this hearing (for ease of reference I will use the numbering in the decision letter):

- 1) #3 hot water tank;

- 2) #12 toilet;
- 3) #13 marble-looking counter tops for the bathroom and kitchen;
- 4) #15 bathroom sink;
- 5) #16 brass lights in the bathroom;
- 6) #48 window frame;
- 7) #54 white front door;
- 8) #55 seal for the front door;
- 9) #56 original lock for front door;
- 10) #58 shingles on roof;
- 11) #60 side garage door;
- 12) #67 post for Clothes line;
- 13) #77 paint selection for interior of house.

The aforesaid complaints can be looked at in three different ways:

- 1) Pre-inspection complaint are the: items #3,12,15,48, and 55;
- 2) Agreement of Purchase and Sale: items #13,16,54,60,67, and 77;
- 3) Other complaints: items #56,and 58.

1) The pre-inspection complaints were those that the Program could not determine as to when the damage occurred. The Applicants testified that they had entered and inspected the property on a number of occasions prior to closing and taking possession of the property, however on those last few days, they inspected only at nighttime and therefore could not see very well. They also alleged that the Certificate of Possession was a forgery by the Builder, as they had not signed this document therefore rendering it irrelevant to the proceedings. The onus is on the Applicants to show that indeed this document should not be taken into consideration for the purpose of establishing the origin of the damages. No pictures were taken of the damages, at the time of taking possession.

Dealing with each item:

- #3 Hot water tank: the damage may have occurred as a result of humidity;
- #12 Toilet scratch: it is unclear as to when the damage occurred;
- #15 The basement sink was replaced with the upstairs sink; there is no evidence as to the cause of the scratch.
- #48 Window frame: there is no evidence as to when the scratch occurred or by whom.
- #55 Seal on door: There are numerous ways that this damage could have occurred.

There is no credible evidence to satisfy this Tribunal that the Certificate of Possession was a forgery. Nor is there any credible evidence as to when the damages occurred. As a result, the Tribunal finds that the Applicants have not

met the onus of establishing the above referenced items as claims warranted under the Act.

2) The complaints dealing with the Agreement of Purchase and Sale are those where the Applicants say that they did not get the color or type of material they had asked for. The Applicants testified that they recall having a color selection sheet done but never asked or got a copy of this selection sheet. The Builder's evidence is that there never was a color selection sheet done for the Applicants, since the choice of colors for the Applicants was the same as the Builder's home. The Tribunal accepts the evidence of Ms. Parent, the Builder's wife, when she described the wish of the Applicants to have their home in the same color coordination as the Builder's home.

Dealing with each item:

#13 The marble counter top: since there is no color selection sheet and this item was not specified in the Agreement of Purchase and Sale, it is therefore not warranted.

#16 The light fixtures: since there is no color selection sheet nor is this specified in the Agreement of Purchase and Sale, it is therefore not warranted.

#54
and

#60 The white front door and the side garage door: the Applicants say they wanted a manufactured white door. Nothing in the Agreement of Purchase and Sale indicated that it ought to be a manufactured door, except for the fact that it was to be white. It is white, and therefore not warranted.

#67 The post for the clothes line: the Applicants say that they requested a metal post and got instead a wooden post. Again nothing in the Agreement of Purchase and Sale indicates that specific request, and it is therefore not warranted.

#77 The interior paint for the house was to be semi-gloss; the Agreement of Purchase and Sale is silent on this point. The Builder's evidence is that it was painted with the exact paint they had in their home and as such is exactly as requested. There is no specific mention in the Agreement of Purchase and Sale as to the kind of paint, and it is therefore is not warranted.

3) The other complaints are those where there is no evidence of specific damage related to the Builder.

- #56 Lock on the front door: the Applicants evidence is that they took this lock to a locksmith to get it cleaned. It may not have been defective, but the Applicants just replaced it and threw out the old one. There is no evidence as to the defect.
- #58 Shingles on the roof: the evidence is that the winds turned a few shingles. This damage, if any, was caused by an Act of God and not a defect in the workmanship of the materials.

The Tribunal finds that these two items are not warranted.

Finally, the Builder testified that the Applicant still owed him \$4,450.00. The evidence about this is not clear. At the time of conciliation, this allegation was not disclosed by the Builder. It surfaced only in the fall of 2000. Also, Mr. Geoffroy, although testifying in chief that he owed no more money to the Builder on closing, in cross-examination advised that he did pay the Builder more money after closing. The Tribunal lacked sufficient evidence to make any findings respecting this allegation.

ISSUES:

The issues to be decided in these proceedings are as follows:

- 1) Whether the Applicants' claims fall within the warranty prescribed in section 13(1)(a) of the Act?
- 2) If so, did the Applicants derive a benefit from the Builder by still owing an amount to the Builder, pursuant to section 14(2) of the Act?

APPLICATION OF LAW TO FACTS:

Section 13(1) of the Act prescribes that:

"Every vendor of a home warrants to the owner:

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
-

Section 14(2) of the Act prescribes that:

.....

"In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source."

.....

The claims made in this matter were received by the Program within the one year warranty period provided under the Act. The onus is on the Applicants to show that their complaints falls within the warranty prescribed under section 13(1) of the Act. As set out above, the Tribunal finds that all items claimed herein, do not fall within the warranty.

DECISION:

Pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claims.

LICENCE APPEAL TRIBUNAL

JOHANNE N. MORISSETTE, Vice- Chair

Released: January 3, 2001

BRIDLE LANE HOMES INC.
CASTLEMARK DEVELOPMENTS INC.
SIPER CONSTRUCTION LTD.
FAIRMOUNT HOMES LTD.

BRIDLE LANE HOMES INC.
CASTLEMARK DEVELOPMENTS INC.
SIPER CONSTRUCTION LTD.
FAIRMOUNT HOMES LTD.

APPEAL FROM PROPOSALS OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN
ACT*

TO REFUSE TO RENEW REGISTRATIONS

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair, Presiding

APPEARANCES:

BRIAN CAMPBELL, counsel for Bridle Lane Homes Inc.,
Castlemark Developments Inc., and Fairmount Homes Ltd.;
and as agent for Joseph L. Bloomfield, counsel for Siper
Construction Ltd.
CAROL STREET, Counsel for the Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING: January 24, 2001 Toronto

ORDER

WHEREAS the Registrar, Ontario New Home Warranty Program (the "Registrar") under the Ontario New Home Warranties Plan Act (the "Act") has issued a written Notice of Proposal dated June 27, 2000, against Bridle Lane Homes Inc. ("Bridle Lane") to refuse to renew its registration under the Act; a proposal dated June 28, 2000 against Castlemark Developments Inc. ("Castlemark") to refuse to renew its registration under the Act; a proposal dated August 10, 2000 against Siper Construction Ltd. ("Siper") to refuse to renew its registration under the Act; and a proposal dated December 20, 2000 against Fairmount Homes Ltd. ("Fairmount") to refuse to renew its registration under the Act;

AND WHEREAS Bridle Lane, Castlemark, Siper and Fairmount have appealed the Registrar's proposals, by requesting hearings before this Tribunal;

AND WHEREAS the Tribunal was scheduled to hear the Bridle Lane and Castlemark appeals as a consolidated hearing, to commence on January 22, 2001, but on consent adjourned to January 24, 2001;

AND WHEREAS the Tribunal has not yet scheduled a hearing of the Fairmount appeal;

NOW THEREFORE, on the consent of the parties and peremptorily against Bridle Lane, Castlemark, Siper and Fairmount, the Tribunal orders that:

1. The appeals to this Tribunal by Bridle Lane, Castlemark, Siper and Fairmount shall be consolidated into one hearing before this Tribunal; and
2. The consolidated hearing shall be heard at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, commencing at 9:30 a.m. on Monday, February 12, 2001 and continuing, if required on February 13, 14, 15, 16, 2001; February 28, March 1, 2, 2001; April 2, 3, 4, 5, 6, 2001; May 14, 16, 17, 18, 2001; and May 22, 23, 24, 25, 2001.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair
Presiding

Released: January 26, 2001

RIZK

RAMZY RIZK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

RAMZY RIZK, the Applicant,
NICOLLE PACE, Law Clerk, representing the Registrar,
Motor Vehicle Dealers Act,

DATE OF
HEARING:

October 26, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a notice of proposal dated July 31, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Ramzy Rizk (the "Applicant") as a motor vehicle salesperson under the provisions of the Act. By Notice of Appeal dated August 18, 2000, the Applicant stated that he wished to appeal the proposal of the Registrar to the Licence Appeal Tribunal (the "Tribunal").

REGISTRAR'S POSITION

It is the Registrar's position that the Applicant's past conduct is inconsistent with the intention and objectives of the Act for the following reasons:

1. On the Applicant's application to become a registered salesperson dated June 16, 2000, the Applicant responded "yes" to Question 9 which asks: "Have you ever been found guilty or convicted of an offense under any law or are there any charges pending?" and disclosed that he had an assault conviction and a fraud conviction.

2. After conducting a criminal history background check, it came to the Registrar's attention that the Applicant has the following convictions:
 - (a) assault - December 21, 1994;
 - (b) uttering threats - October 19, 1995;
 - (c) forgery - June 6, 1997;
 - (d) uttering forged document - June 6, 1997;
 - (e) fraud under \$5,000.00 - June 6, 1997; and
 - (f) fraud under \$5,000.00 - October 9, 1997.
3. In a previous application for registration by the Applicant dated March 6, 1995, the Applicant did not disclose his past convictions and pending charges on the application form submitted to the Registrar.

THE EVIDENCE:

Aviva Harari, senior counsel for the Ontario Motor Vehicle Industry Council ("OMVIC"), in giving testimony on behalf of the Registrar referred to the Applicant's Application for Employee Registration or Reinstatement dated March 6, 1995, which appears at Tab 3 of the Book of Disclosure which was entered as Exhibit 3 in these proceedings and pointed out that in response to Question 10 which asks if the Applicant has ever been found guilty or convicted of an offence under any law or if there are any charges pending, the Applicant responded "no." Ms. Harari indicated that this application had subsequently been abandoned.

Ms. Harari referred to the current application of the Applicant at Tab 2 of Exhibit 3 wherein the Applicant answered Question 9, which is similar to Question 10 on the previous application, in the affirmative with the explanation that he had been found guilty of assault back in high school and one charge of fraud which he claimed that he did not do but for which he was still charged and that he now had no outstanding charges.

The criminal history check conducted by OMVIC which appears at Tab 5 of Exhibit 3 discloses a conviction on December 21, 1994 in London, Ontario for assault; a conviction on October 19, 1995 in London, Ontario for uttering threats; convictions on June 6, 1997 in St. Thomas, Ontario for forgery, uttering forged document and fraud under \$5,000.00; and a conviction on October 9, 1997 in London, Ontario for fraud under \$5,000.00.

It was Ms. Harari's testimony that in answering Question 10 on the original application in March 1995 in the negative, the Applicant had not been truthful and that although he answered a similar question in the affirmative in his June 2000 application, the notation which he provided failed to disclose the uttering threats, forgery, uttering forged documents and only disclosed one of two charges for fraud under \$5,000.00.

Ms. Harari testified that after receiving the criminal record check, OMVIC sent a letter to the Applicant indicating that OMVIC had not received a complete explanation from the Applicant of the convictions and the circumstances surrounding them and asking that the Applicant provide a response co-signed by the party sponsoring the application for registration within ten days from the date of the letter, being July 14, 2000.

OMVIC received a statement signed by both the Applicant and by Alyan Rizk as the dealer and owner, a copy of which appears at Tab 4 of Exhibit 3. In that statement, the Applicant explained that the uttering death threats related to his relationship with his ex-wife; the assault took place in high school when he endeavoured to defend his younger brother and the charge of fraud under \$5,000.00 related to a period when the Applicant worked for a variety store where he was sent to pick up groceries from a wholesaler with a cheque which the owner of the variety store denied having given to the Applicant. The Applicant stated the same thing had happened to others who worked at this variety store but as the Applicant did not have any money to go and fight the charge in court, he was sentenced to 40 days and paid a fine of \$4,000.00. Ms. Harari testified that it is the Registrar's position that this statement was not a full and complete disclosure of the charges against the Applicant.

Ms. Harari stated that although the Registrar has concerns with respect to all of the charges there is particular concern with respect to the forgery and fraud charges in 1997. The information with respect to the October 1997 charge of fraud under \$5,000.00 in London appears at Tab 7 of Exhibit 3 and indicates that the Applicant was to make restitution of \$3,745.77. A Certificate of Conviction appears at Tab 8 of Exhibit 3 which certifies that on June 6, 1997, the Applicant was convicted of forgery, uttering forged documents and fraud under \$5,000.00 and in addition to incarceration for 60 days concurrently on each charge, was ordered to make restitution in the amount of \$3,433.35 to National Grocers Co. Ltd.

The Applicant gave evidence on his own behalf and stated that he did not honestly know why he answered "no" to Question 10 on the 1995 application and testified that he had called OMVIC before making the application. With respect to the June 2000 application, the Applicant stated that he spoke to Ms. Harari and others with respect to the one charge of fraud, one charge of uttering and one charge of assault. The Applicant testified that the assault charge in 1994 arose as a result of his relationship with his ex-wife and that he provided a

peace bond and that the uttering threats was also as a result of the relationship that he had with his ex-wife. The Applicant testified that he charges in June 1997 in St. Thomas for forgery, uttering forged document and fraud under \$5,000.00 related to the variety store situation and that he had paid the amount ordered to be paid as restitution. The charge of fraud in October 1997 in London was also as a result of employment with the variety store. The Applicant stated that it would be foolish for him to have lied or tried to hide anything. The Applicant testified that the business that was sponsoring his application was his father's business and that he worked in the business doing mechanical work and detailing.

On cross-examination, the Applicant acknowledged that the assault was not a high school incident as noted on the June 2000 application but was with respect to his ex-wife.

The Applicant testified that the charges in St. Thomas in June 1997 and the charge in London in October 1997 were with respect to the same people and that he did not remember that they were separate charges and had thought that they were all one.

When asked if the criminal record check appearing at Tab 5 of Exhibit 3 was an accurate record, the Applicant acknowledged that it was.

When asked if it was his signature that appeared on the second page of the application dated March 6, 1995, the Applicant acknowledged that it was his signature and confirmed that his father had also signed the form. The Applicant stated that his father did not know of the assault charge and that the Applicant was trying to keep the assault charge from his father.

When asked about the notation which the Applicant made on the June 2000 application, the Applicant stated that he had told the truth because he referred to the fraud charge and the assault charge and if he had left out any of the other charges, it was not done on purpose. The Applicant repeated that he had paid the amount of restitution. The Applicant testified that he had worked with cars for the last three to five years doing anything that he could and if asked by people within his community who were considering purchasing a vehicle, he would send them to various dealers. The Applicant stated that he was known within his community as someone who knows about cars and would act as a form of consultant.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. In completing the March 1995 application, the Applicant did not truthfully answer Question 10 with respect to past convictions.

2. In completing the application in June 2000, the Applicant answered a similar question in the affirmative but did not provide full and complete disclosure.
3. In responding to the letter from OMVIC requesting that the Applicant provide a complete explanation of the convictions and the circumstances surrounding such convictions, the Applicant did not provide full and complete disclosure of the convictions against him.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to deny the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsection 5(1)(b) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant should be refused.

The question to be determined is whether the past conduct of the Applicant provides the Registrar with reasonable grounds for the belief that the Applicant will not carry on business as required by section 5(1)(b) of the Act. It is the Registrar's belief which is at issue in these proceedings not that of the Tribunal.

In order for the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honest. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed might have reformed himself.

Due to the particular facts in this case Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051 the Court held:

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.

APPLICATION OF LAW TO FACTS:

This Tribunal finds that the past conduct of the Applicant:

1. in making applications for registration, which, on the first occasion, failed to disclose any criminal record and on the second, failed to provide full and complete disclosure of his criminal record; and
2. having been convicted of offences which, by their very nature, are of direct concern to the Registrar as they relate to the forging of cheques and the committing of fraud during the course of the Applicant's employment, provide reasonable grounds for the Registrar to refuse the registration of the Applicant.

The explanations provided by the Applicant with respect to these matters do not satisfactorily address the Registrar's concerns either with respect to the failure to properly and fully disclose the convictions or the circumstances surrounding the various convictions.

In applying the evidence placed before this Tribunal to the relevant legal principles, the Tribunal finds that the past conduct of the Applicant did afford reasonable grounds for Registrar to believe that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out the Registrar's proposal dated July 31, 2000 to refuse the registration of Ramzy Rizk as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: January 11, 2001

TRINITY SOVEREIGN MOTORS INC. AND DEO NARAYAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
TRINITY SOVEREIGN MOTORS INC. AND DEO NARAYAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: August 22, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

TRINITY SOVEREIGN MOTORS INC. AND
DEO NARAYAN

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Trinity Sovereign Motors Inc. and Deo Narayan, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 4, 2001

ALI ABDUL-HUSSEIN o/a B & A AUTO SALE

ALI ABDUL-HUSSEIN o/a B & A AUTO SALE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: STEPHEN J. KELLY, Vice-Chair,
Presiding

APPEARANCES:

ALI ABDUL-HUSSEIN, representing himself
MARY JANE SOUTH, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: December 18, 2000 Ottawa

REASONS FOR DECISION

BACKGROUND:

This hearing arises from a notice of proposal dated August 22, 2000 issued by the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of the Applicant, Ali Abdul-Hussein O/A B & A Auto Sale, as a motor vehicle dealer under the provisions of the Act. The Registrar provided further particulars by way of a supplemental notice dated December 4, 2000. The Registrar bases his proposal on the provisions of section 6 of the Act as read with subsection 5(1) of the Act.

FACTS:

The Tribunal received evidence from the Applicant, Ali Abdul-Hussein, Mary Jane South, Deputy Registrar under the *Motor Vehicle Dealers Act*, Brian Lia, an inspector with the Ontario Motor Vehicle Industry Council, as well as Stephen Hogan and Zhen Zhu, consumers. Where the evidence of the Applicant was inconsistent with that of any of the other witnesses, the evidence of the other witnesses was accepted. The Tribunal finds that the following facts have been proven:

1. On May 5, 2000, the Applicant purchased a 1993 Mazda 626 from Impact Auto Auction Limited. The purchase and sale agreement stated that the

vehicle was being sold “on – salvage”. The Applicant sold the vehicle on May 22, 2000 and the purchase and sale agreement failed to record that the vehicle had been purchased “on-salvage”. The Applicant explained that the vehicle had been bought in his name by a cousin, without the Applicant’s authority. For family reasons, the Applicant agreed to complete the sale of the vehicle to a third party. As his cousin handled the transaction, he did not note that it was purchased “on-salvage” or that this was not recorded on the bill of sale to the third party. The Tribunal does not accept this explanation. If the cousin had acted without the Applicant’s authority, then this should have heightened the Applicant’s level of awareness. The transaction took place in the Applicant’s name and he had an obligation to complete this transaction correctly. The Tribunal also noted that both the original purchase and sale agreement and the purchase and sale agreement to the third party were located in the Applicant’s records.

2. On May 11, 2000 the Applicant purchased a 1992 GMC Jimmy pick-up truck with an odometer reading of 314,369 km. The Applicant sold the vehicle to Stephen Hogan on May 29, 2000, and the purchase and sale agreement indicated a distance travel of 186,123 km. The vehicle was not sold from the Applicant’s registered place of business, being 3208 Albion Road, Ottawa, but from the curb side at a residence. The Applicant explained that the dash had to be replaced, including the odometer. On the Applicant’s copy of the bill of sale, there is a hand-written note “true mileage unknown”. The Applicant explained that he wrote this to confirm that the mileage on the odometer was not accurate and also stated that he advised Mr. Hogan that the true mileage was in excess of 300,000 km. Mr. Hogan denies that the notation was on the bill of sale when he signed the same, and also denies that the Applicant advised that the true distance travelled exceeded 300,000 km.
3. The Applicant purchased a 1997 Chevrolet Cavalier at auction from Adesa Ottawa on June 15, 2000. The Tribunal finds that at the time of the auction there was a red light on behind the auctioneer indicating that the vehicle had suffered damage in an accident. The purchase and sale agreement also records that the vehicle was damaged in an accident and had suffered structural damage. The Applicant sold the vehicle on June 16, 2000 and the purchase and sale agreement does not record that the vehicle had been damaged in an accident. The Applicant explained that the vehicle was sold to a cousin who was present when the purchased at auction. This fact would not relieve the Applicant from his obligation to comply with the Act and regulations made under it.
4. On or about September 1, 2000, the Applicant purchased a 1991 Honda Accord from an acquaintance. While the vehicle was registered in the name of the Applicant’s wife, the Tribunal finds that the vehicle was in fact the property of the Applicant. The car was advertised in a magazine entitled

“Auto Trader”. The Applicant’s business phone number was set out in the advertisement as the contact number. The Applicant and his wife met with Mr. Zhen Zhu, and the vehicle was sold to Mr. Zhu on December 14, 2000. The Applicant’s purchase and sale agreement form was used and the agreement indicated an odometer reading of 168,277 km. The vehicle was not sold from the Applicant’s place of business but from his residence. Mr. Zhu was subsequently advised by a new car dealer that the odometer reading was not accurate, and the dealer provided prior repair notices for the vehicle which established that as of February 15, 2000 the vehicle already had an odometer reading 246,309 km. Mr. Zhu concluded that the odometer had been tampered with and obtained a refund from the Applicant. The Applicant explained that he checked with his acquaintance who denied that the odometer had been tampered with but offered to take the car back. Despite this offer, the Applicant chose to sell the vehicle to another third party without making any attempt to contact the dealer to confirm whether or not the odometer had been tampered with. The Tribunal finds that the Applicant did not bother to contact the dealer because he knew or, at the very least, suspected that the odometer had been tampered with when he sold the vehicle to Mr. Zhu.

5. Based on inspections by Mr. Lia, the Tribunal also finds that the Applicant displayed vehicles at locations other than his registered place of business, failed to post a sign at his place of business, and did not carry on business from his registered location as his landlord confirmed that he only came around approximately once a month to pick up his mail.

ISSUE:

The issue to be decided in these proceedings is whether the Registrar had sufficient grounds for revoking the Applicant’s registration.

LAW:

The relevant portions of the Act applicable to these proceedings are :

5(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....
.....

6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

The relevant portions of Regulation 801 as amended, made pursuant to the Act, are:

13.(4) It is a condition of registration as motor vehicle dealer that the motor vehicle dealer,

(a) operates from premises located in Ontario that are approved by the Registrar;

.....

(c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

.....

16.(2) Where a used motor vehicle is sold, the sales or purchase order shall show,

.....

(o) the distance travelled by the vehicle at the time of sale; and

.....

19.(1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.

19.(2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of that motor vehicle the

reading in miles or kilometers that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected.

The decision of Vice-Chair, D. Israel, of the Commercial Registration Appeal Tribunal, in *Aria* (1998) CRAT released October 17, 1998, is of assistance. In that case, the Tribunal found that the dealer sold one vehicle knowing that it had been declared a total loss by the insurer, and another vehicle knowing that it had been in an accident and had been repaired subsequent to the accident. This information was not provided to the respective purchasers. At page 14, the Tribunal found:

These disclosures should have been made when *Aria* sold the vehicles, more particularly, in the case of the vehicle declared a total loss. Non disclosure of these material facts amounts to dishonesty and unethical business practice.

The Registrar bears the onus of proof that the past conduct of the Applicant affords reasonable grounds for belief that they will not carry on business according with law and with integrity and with honesty. The test to be applied by this Tribunal in reviewing the Registrar's notice of proposal is established by the Divisional Court in the case of Brenner 19 CRAT, S.C.O. Decisions and Orders (1971-1989), where Southy J. states:

The proper question at the re-hearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

APPLICATION OF LAW TO FACTS:

The Applicant's past conduct provides reasonable grounds for concern that he will not carry on business in accordance with the law and with integrity and honesty.

The Applicant sold two vehicles (1997 Chevrolet Cavalier and 1993 Mazda 626) knowing that they had suffered significant damage. While the Applicant states with regard to the Cavalier that, as the vehicle was sold to his cousin and his cousin was present when the vehicle was purchased at auction, the status of the vehicle was in the knowledge of the purchaser, the same cannot be said for the Mazda. This vehicle was sold to a third party unknown to the Applicant and this person was not in attendance when the vehicle was purchased. By failing to record on the purchase and sale agreement that the vehicle had originally been bought "on-salvage", the Applicant was not carrying on business with integrity and honesty.

Accepting that the odometer on the 1992 GMC Jimmy pick-up truck had to be removed with other components of the dash, the Applicant breached his obligation under section 19(2) of Regulation 801 to ensure that the new odometer had the correct reading. Further he failed to fulfill his obligation under section 16(2) of Regulation 801 to ensure that the purchase and sale agreement set out the distance travelled by the vehicle at the time of sale. The purchase and sale agreement should have recorded the true distance travelled of 314,369 km. and not 186,123 km., which was the reading on the used replacement odometer. The Tribunal does not accept that the words "true mileage unknown" were recorded on the purchase and sale agreement at the time of sale. Even if this were the case, this does not fulfill the Applicant's responsibility. The true mileage was known, the Applicant simply failed to record it.

The odometer on the 1991 Honda Accord had certainly been tampered with. It is not clear as to whether it was tampered with by the original owner from whom the Applicant acquired the vehicle, or by the Applicant. Mr. Zhu brought the Applicant's attention to the fact that the odometer had been tampered with. If the Applicant had any doubt, the honest thing to do would have been to check with the dealership where earlier repairs had been carried out to confirm the mileage. The Applicant failed to do so. Instead, the Applicant sold the vehicle to a third party with the odometer reflecting an inaccurate reading.

It is also noted that the Applicant did not have a sign at his registered place of business. He displayed vehicles at a location other than his registered place of business, and he contracted business at locations away from his registered place of business, all in contravention of the Act and regulations.

The series of transactions referred to above demonstrate that the Applicant had not carried on his business according to the law and with honesty and integrity. The Act and Regulations made pursuant to the same are designed to protect the public. The Registrar could have no confidence that members of the public purchasing vehicles from the Applicant would be made aware of all essential information regarding the motor vehicle they were purchasing from the Applicant including whether it had been involved in prior serious accident and the correct odometer, both of which are significant in determining the value of a vehicle.

Further, the fact that the Applicant frequently conducted business away from his registered place of business would make it very difficult for the Registrar to govern his activities, and demonstrated that he would likely not carry on business according to the laws set out in the Act and Regulations.

The Tribunal finds that the Registrar had reasonable grounds for proposing to revoke the registration of the Applicant.

DECISION:

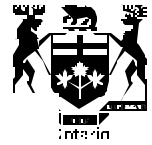
Pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated August 22, 2000, to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly, Vice-Chair,
Presiding

RELEASED: January 25, 2001

HAJI MEDHI o/a ULTIMATE AUTO SALE PARTS & SERVICE



HAJI MEDHI o/a ULTIMATE AUTO SALE PARTS & SERVICE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

ANTHONY BAK, Counsel, representing the Applicant
MITCHELL GOLDBLOOM, Counsel, representing the
Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING:

November 24, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a notice of proposal dated August 22, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of Haji Medhi o/a Ultimate Auto Sale Parts & Service (the "Applicant") as a motor vehicle dealer under the provisions of the Act. By Notice of Appeal dated September 5, 2000, the Applicant stated that he wished to appeal the proposal of the Registrar to the Licence Appeal Tribunal (the "Tribunal").

REGISTRAR'S POSITION

It is the Registrar's position that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. On or about April 5, 2000, the Applicant purchased a 1993 Honda Accord LX, V.I.N. JHMCB7647PC809755, with an odometer reading of 457,415 kilometers which the Applicant subsequently sold with an odometer reading of 137,000 kilometers stating that the true kilometers were unknown when the Applicant knew the distance travelled was at least 457,415 kilometers.

2. On or about May 20, 1999, the Applicant purchased a 1992 Saturn SL V.I.N. 1G8ZF5490NZ150330, with an odometer reading of 350,438 kilometers which the Applicant subsequently sold with an odometer reading of 187,000 kilometers stating that the true mileage was unknown when the Applicant knew the distance travelled was at least 305,438 kilometers.
3. On or about November 17, 1999, the Applicant purchased a 1991 Nissan NX 200, V.I.N. JN1GB36S1MU001484, with an odometer reading of 259,750 kilometers which the Applicant subsequently sold with the distance travelled indicated as 169,000 kilometers. The Applicant represented the mileage to the warranty company as being 169,000 kilometers.
4. On or about May 20, 1999, the Applicant purchased a 1991 Plymouth Laser RS, V.I.N. 4P3BS44U8MEO971O7, with an odometer reading of 275,577 kilometers which the Applicant subsequently sold with the distance travelled indicated as 176,370 kilometers. The Applicant represented the mileage to the warranty company as being 176,370 kilometers.
5. The Applicant failed to complete bills of sale in accordance with the Act, Regulation 801, Section 16.
6. The Applicant failed to submit and register warranties to the warranty company in a timely manner.
7. The Applicant failed to maintain a garage register.
8. The Applicant failed to register vehicles in his name within six (6) days as required by the *Highway Traffic Act*.

THE EVIDENCE:

Amanda Lee Dempsey, was called to give evidence in support of the position of the Registrar and identified herself as a manager of inspections for the Ontario Motor Vehicle Industry Council ("OMVIC"). Ms. Dempsey referred to the Director's Certificate appearing at Tab 3 of the Book of Disclosure which was made Exhibit 3 in these proceedings which indicates that the Applicant was registered under the Act from December 16, 1994 until present.

Ms. Dempsey testified that as a result of an inspection conducted at the Applicant's premises at 855 Alness Street, Unit 25, Toronto, Ontario, on May 5, 2000, documentation was found with respect to certain vehicles as follows.

A sales contract (Tab 4, Exhibit 3) shows that the Applicant purchased a 1993 Honda Accord LX, V.I.N. JHMCB7647PC809755, from Simard & Freres Auto Ltee through a Montreal dealers auction on March 14, 2000, for \$4,000.00 which vehicle was stated in the sales contract to have 457,415 kilometers. Also appearing at Tab 5, is a copy of the Toronto Auto Auctions form whereby the Applicant sold the said Honda Accord LX for \$5,800.00 on April 20, 2000 which document contains the statement: "TRUE KMS UNKNOWN" however, the document also shows an odometer disclosure of 137,000 kilometers.

Ms. Dempsey introduced a bill of sale dated November 17, 1999 (Tab 6, Exhibit 3) from Manheim's Oshawa Dealers Exchange whereby the Applicant purchased a 1991 Nissan NX 200, V.I.N. JN1GB36S1MU001484, from Markview Auto Sales Ltd. located in Scarborough for \$1,550.00 which bill of sale has an odometer disclosure of 259,750 kilometers. Page 2 of Tab 6 contains a copy of a bill of sale dated December 6, 1999, whereby the Applicant sold a Nissan NX 200 with the same serial number to Luis A. Arruda of Toronto for \$1,500.00 with a trade-in of a 1989 Chrysler with a value of \$1,000.00. The bill of sale for the 1991 Nissan NX 200 shows 169,000 kilometers under "DISTANCE TRAVELLED" and contains a notation that the odometer had been changed and shows 259,087 kilometers. Also contained at Tab 6 is a copy of a limited powertrain warranty application for Carrier Warranty Corp. ("CWC") in the name of Luis A. Arruda for the Nissan NX 200 which shows a mileage reading of 169,000 kilometers.

Ms. Dempsey referred to the Toronto Auto Auctions bill of sale dated May 20, 1991, (Page 3, Tab 5, Exhibit 3) pursuant to which the Applicant purchased a 1992 Saturn SL, V.I.N. 1G8ZF5490NZ150330, for \$1,400.00 with a odometer disclosure of 350,438 kilometers. By bill of sale dated April 17, 2000 (Page 2, Tab 5, Exhibit 3), the Applicant sold the said vehicle to Rathod Bhaveshkumar for \$1,700.00. The bill of sale indicates that the distance travelled was 187,000 kilometers. Also at Tab 5 is a copy of OMVIC's Consumer Questionnaire with the name of the purchaser of the 1992 Saturn, telephone number and the date of a phone call, June 29, 2000 at 10:55 a.m. Counsel for the Applicant objected to this document as the maker of the document was not before the Tribunal. Ms. Dempsey testified that the document was prepared by Elizabeth Browning who was is an inspector with OMVIC. In response to the objection, the Tribunal ruled that the document be admitted and that the objection of counsel for the Applicant went to the weight to be placed upon the evidence. Ms. Dempsey testified that the notations with respect to a call being made to the consumer for a copy of the bill of sale were made by Ms. Dempsey and that the follow-up call of September 15, 2000 was made by Elizabeth Browning. It was Ms. Dempsey's evidence that the bill of sale was never faxed to OMVIC by the consumer as requested.

Ms. Dempsey testified that the notation on the document in the enquiry history appearing at Page 6, Tab 7, Exhibit 3, refers to notification given to Ms. Dempsey that a complaint had been made in the east end area which was next to the area for which Ms. Dempsey was responsible. The notation reported that the complaint was with respect to the Applicant from a consumer regarding an odometer being rolled-back for the vehicle identified on the enquiry printout, being a 1991 Plymouth Laser registered in the name of Tony Orrico with V.I.N. 4P3BS44U8MEO971O7.

Ms. Dempsey testified that this information resulted in her attendance at the Applicant's place of business. At the time of the first inspection, certain of the documentation requested was not available, but was available on the second attendance on June 2, 2000. The documentation included a bill of sale dated May 20, 1999 (Page 4, Tab 7, Exhibit 3) from Toronto Auto Auctions whereby the Applicant purchased from East End Auto Sales the 1991 Plymouth Laser with the corresponding vehicle identification number for \$1,500.00 with an odometer disclosure of 275,577 kilometers. The same vehicle was sold pursuant to a bill of sale dated September 13, 1999 (Page 3, Tab 7, Exhibit 3), to Tony Orrico for \$3,000.00 and shows a distance travelled of 176,370 kilometers.

There is a notation on the copy of the bill of sale appearing at Tab 7, which suggests that the car was sold with a warranty and that the odometer had been changed. This document is signed in the place provided for the purchaser's signature.

Page 5, Tab 7 is a copy of a limited powertrain warranty application with CWC, in the name of the purchaser, with a description showing the vehicle identification number for the Plymouth Laser, and indicating a mileage of 176,000 kilometers.

At page 1, Tab 7 is an OMVIC Consumer Questionnaire form which shows that telephone calls were made to Tony Orrico on three separate occasions with messages left for him to return the calls. The last was made on September 20, 2000. On that day, Mr. Orrico did call Elizabeth Browning back and, according to the notes on the Consumer Questionnaire, he said there had been a misunderstanding with respect to the odometer problem and that the odometer had been changed and that he had just forgotten. The notes indicate that Mr. Orrico said that he understood there were more kilometers on the vehicle than 184,000, which was what he recalled as being the mileage on the vehicle.

Ms. Dempsey referred the Tribunal to the bill of sale appearing at the first page at Tab 8 and identified the five (5) different ways in which the bill of sale was incomplete:

1. the absence of a safety standards certificate number;
2. no indication as to whether the vehicle is under warranty;

3. the name of the dealer is incomplete and does not disclose its address;
4. there is no signature of the vendor in the box titled "vendor's acceptance"; and
5. the salesperson's registration number was omitted.

Ms. Dempsey presented a copy of another bill of sale appearing at Page 3 of Tab 8 which had not been properly completed in much the same fashion as the previous bill of sale; however, this bill of sale did not have the initials of the purchaser and had no entry for the certified distance travelled of the trade-in vehicle and did not have the purchaser's signature.

The bill of sale appearing at Page 5, Tab 8, Exhibit 3, is another of the Applicant's bills of sale which has not been properly completed. The bills of sale appearing at Pages 12, 16, 17 and 18 are further examples of what Ms. Dempsey testified to be improperly completed bills of sale.

With respect to the bill of sale dated February 19, 2000, appearing at Page 18, Tab 8, Exhibit 3, Ms. Dempsey noted that this bill of sale indicated that the vehicle was sold "as is" without a warranty; however, the Applicant's files with respect to this transaction contained a CWC limited powertrain warranty application (Page 20) made out in the name of the purchaser of the vehicle dated February 26, 2000. At the May 5, 2000 inspection, this document had not been submitted to CWC even though it was by then three (3) months into the six month warranty period.

Ms. Dempsey testified that a bill of sale of the Applicant dated January 4, 2000 at Page 21 was another example where a vehicle was sold with a CWC warranty for six months but the actual warranty document, appearing at Page 23 of Tab 8 also dated January 4, 2000, had not been submitted to CWC at the time of the inspection on May 5, 2000.

The bill of sale appearing at Page 24, Tab 8 is a further example of an incomplete form of bill of sale issued by the Applicant.

Ms. Dempsey testified that the document appearing at Page 26, Tab 8, Exhibit 3, is an OMVIC Customer Questionnaire completed by Elizabeth Browning as a result of her telephone conversation on July 25, 2000 with Wayne Hemans relating to his dealings with the Applicant. The consumer stated that he had purchased a Honda Accord from the Applicant but had not been told that the vehicle had been in an accident. The substance of the consumer's complaint was that he did not have a key to lock the vehicle and when he spoke to the Applicant about this problem, the Applicant told the consumer that it was the customer's responsibility. The consumer ultimately discovered from Honda that

this vehicle's VIN was not in their records and that the vehicle may have been in an accident, and that is why there are no records of the vehicle in Honda's system. The consumer stated that he was never given a bill of sale for the vehicle.

Ms. Dempsey testified that the bill of sale appearing at Page 1, Tab 9, Exhibit 3, is a bill of sale dated March 31, 2000 for a 1988 Honda Prelude for which an application was made to CWC for a limited powertrain warranty dated April 5, 2000 but was still in the files of the Applicant at the time of the May 5 inspection.

According to the testimony of Ms. Dempsey, the bill of sale appearing at Page 4, Tab 9, Exhibit 3, dated February 15, 2000 discloses that the Applicant sold a 1989 Mazda 626 LX for which a limited powertrain warranty application was made to CWC dated February 15, 2000 but was not submitted by the Applicant to CWC and was still in the Applicant's files at the time of the inspection.

Ms. Dempsey stated that the bill of sale appearing at Page 8, Tab 9, Exhibit 3, dated April 5, 2000 is for the sale, by the Applicant, of a 1992 Pontiac Grand AM SE which bill of sale states that the car was sold "as is" with no warranty; however, there is contained in the Applicant's file an application for a limited powertrain warranty to CWC (Page 10, Tab 9, Exhibit 3) in the name of the purchaser dated April 5, 2000.

The document appearing at Page 11, Tab 9, Exhibit 3, is a bill of sale by the Applicant of a 1990 VW Jetta dated November 27, 1999 for which a limited powertrain warranty application was made to CWC appearing at Page 13, Tab 9, Exhibit 3 in the name of the purchaser of the VW Jetta dated December 4, 1999 which also had not been submitted to CWC.

Ms. Dempsey stated that the document appearing at Page 14, Tab 9, Exhibit 3, was the Applicant's bill of sale dated October 31, 1999, for a 1990 Toyota Cressida, VIN JT2MX83F910056995, which was purchased by George Koliniotis. The bill of sale indicates a distance travelled of 130,701 kilometers and contains the notation: "T.M.U." The documentation appearing at Page 15, Tab 9 is a copy of the bill of sale of Toronto Auto Auctions whereby the Applicant purchased the said Toyota Cressida from Pickard Lane Leasing Ltd. which bill of sale contains an odometer disclosure of 202,277 with a notation: "TRUE KLMS." There is also noted on this document the words: "SPEEDO CHG 72,000 RDS 130,277." Page 16 of Tab 9, Exhibit 3, is a limited powertrain warranty application for CWC in the name of the purchaser of the Toyota Cressida dated November 1, 1999 which discloses no mileage.

Counsel for the Applicant objected to Ms. Dempsey's testimony on the basis that the meaning of the insertion: "SPEEDO CHG" is unclear. Ms. Dempsey testified that the point was that the odometer disclosure was not disclosed on the bill of

sale to the purchaser and that the limited powertrain warranty application had not been submitted as of the May 5 inspection.

Ms. Dempsey testified that Pages 1 through 3, Tab 10, Exhibit 3, were notes made with respect to her inspection on May 5, 2000. Those notes indicate that, although there was some confusion as to the date of the inspector's appointment, the Applicant was at the premises on May 5, 2000 and he advised that the bank statements for the business were at home.

With respect to the 1991 Plymouth Laser purchased by Tony Orrico which was referred to previously and which documents appear at Tab 7, the Applicant indicated that he did not have the records at the office nor did he have a garage register. Ms. Dempsey testified that when enquiry history searches were done for the Applicant, which searches appear at Pages 9 through 17, Tab 10, Exhibit 3, six (6) transactions had documentation missing and there were vehicles on the lot for which the Applicant did not have bills of sale showing his acquisition. Pages 4 and 5 at Tab 10, Exhibit 3, are the inspection findings which state that as a result of the inspection conducted, the following had been revealed:

1. failure to maintain a garage register;
2. failure to complete bills of sale;
3. the need to store books and records at the registered premises;
4. the need to register all vehicles into the name of the customer within six (6) days of the sale and that any vehicles purchased by the Applicant must be registered in the Applicant's name;
5. all warranty contracts must be submitted to the warranty company;
6. any vehicles on the Applicant's lot are to be identified and must be registered in the Applicant's name; and
7. Ms. Dempsey still needed to see the rest of the Applicant's bills of sale for that year and also the bills of sale to match the warranty contracts in the Applicant's book.

Ms. Dempsey testified that her notes indicate that on June 2, 2000, she reattended at 855 Arness address and met with the Applicant who advised her that he had sent all of the warranty contracts to the warranty company.

When asked by Ms. Dempsey about the 1992 Saturn SL referred to at Page 2, Tab 5, Exhibit 3, the Applicant explained that he had someone take out the old odometer and put in a replacement but that he did not get a receipt and had paid cash for the odometer change. It was Ms. Dempsey's evidence that at the June

2, 2000 attendance, the Applicant was still missing some of the paperwork for the deals for which warranty contracts had been issued and that the Applicant had advised that he had looked for them but did not find them all. Ms. Dempsey took away the paperwork for 17 transactions.

Ms. Dempsey stated that Page 7, Tab 10, Exhibit 3, is a copy of the inspection finding report issued by her on June 2, 2000. The report states that the Applicant was still missing the paperwork to match the warranty contracts that she had been given by the Applicant on May 5, 2000 and that she still needed to see the paperwork regarding the 11 transactions listed in the report.

On cross-examination, Ms. Dempsey testified that she had been the manager of inspections since December 1999 and had been an inspector since September 1997 and part of that time she had been self-employed in a cafeteria and catering business. In her present position, she acted as a supervisor and had seven inspectors and one assistant reporting her.

When asked with respect to the licensing procedure, Ms. Dempsey testified that an applicant submits an application and there is a training course to be taken if a person has never registered or if the application is six months or more after the expiry of a previous registration. The course offers basic information in running a dealership, completing bills of sale and lien provisions. Ms. Dempsey testified that the course was a home study course with most questions being answered by selecting one of two choices. The course became part of the registration process in November 1999. It was Ms. Dempsey's evidence that it had not been necessary for the Applicant to take the course as no course was offered when the Applicant registered.

Counsel for the Applicant referred Ms. Dempsey to Tab 4 and asked if the Registrar had inquired as to who prepared the Toronto Auto Auction form or what inquiries were made to verify the correctness of the information contained on the document. Ms. Dempsey responded that she had not checked the accuracy of the document but that the document was taken from the records of the Applicant. Ms. Dempsey acknowledged that they had never checked with the Toronto Auto Auctions about the document and that the Registrar had no knowledge of what information the Applicant provided to the auction.

Counsel referred Ms. Dempsey to her notes contained at Page 9, Tab 10, Exhibit 3, wherein it was noted that the Applicant had advised that he had the odometer changed in Montreal but had not received a receipt. Ms. Dempsey was then asked about other repairs to the vehicle referred to at Tab 4 and the witness responded that she did not recall asking about other repairs and was not told of additional repairs.

Ms. Dempsey confirmed that Item 4 of the Registrar's proposal referred to the documentation appearing at Tab 5, Exhibit 3. Referring to the bill of sale at Page 2, Tab 5, Exhibit 3, Ms. Dempsey acknowledged that the bill of sale contained reference to the dash having been changed and appeared to be signed by the purchaser.

Ms. Dempsey was referred to Page 1 of Tab 5 being the Consumer Questionnaire form of OMVIC and confirmed that on the form there was no place to ask a consumer regarding any discussions which may have occurred with respect to the odometer. Ms. Dempsey confirmed that there was no suggestion that the consumer's copy of the bill of sale differed from that which was produced by the Applicant.

Ms. Dempsey confirmed that Item 5 of the Registrar's proposal refers to the documentation appearing at Tab 6, Exhibit 3 and acknowledged that the bill of sale appearing at Page 3, Tab 6, would not have been prepared by the Applicant and that no one from OMVIC had spoken to anyone at the auction regarding the contents of that document. Ms. Dempsey's attention was then directed to Page 2 at the same tab which is the bill of sale dated December 6, 1999, wherein it was noted that the odometer had been changed and gave a reading which coincided with that on the bill of sale from the auction in Oshawa. Ms. Dempsey agreed with the suggestion that there was no evidence that the consumer did not know what the mileage was for this vehicle.

Ms. Dempsey acknowledged that the material at Tab 7, Exhibit 3, was tendered in support of Item 6 of the Registrar's proposal with respect to the 1991 Plymouth Laser automobile. The witness acknowledged that no steps had been taken to verify the accuracy of the information provided on the Toronto Auto Auctions form appearing at Page 4 of Tab 7. Ms. Dempsey also acknowledged that the difference between the odometer disclosure on the auction form and that shown on the bill of sale to Tony Orrico appearing at Page 3 of Tab 7 was approximately 400 kilometers greater than on the auction form.

Ms. Dempsey acknowledged that the limited powertrain warranty application appearing at Page 5 of Tab 7 did indicate under "TYPE & TERM OF COVERAGE" that it was six month unlimited kilometers and that it was signed by the purchaser, Tony Orrico. Ms. Dempsey confirmed that it was in response to the note appearing on the enquiry history at Page 6 of Tab 7 that gave rise to the inspection of the Applicant.

Ms. Dempsey acknowledged that there is no statutory form for a bill of sale to be used by motor vehicle dealers but that the form used must contain the information required in accordance with Regulation 801 of the Act.

Ms. Dempsey's attention was then drawn to Page 3 of Tab 8 being a bill of sale from the Applicant to Darlene Pauline Zerafa dated April 29, 2000 for a 1988 Nissan Pathfinder, and she acknowledged that the purchaser need not initial the distance travelled entry on the bill of sale and therefore failure to do so does not mean that the bill of sale is statutorily incomplete. Reference was made to the fact that it was a statutory requirement that where a vehicle is taken as a trade-in, the sales or purchase order must show the recorded odometer reading at the time of purchase or trade-in, but this was not done on the bill of sale from the Applicant to the purchaser Zerafa.

With respect to the warranty application form appearing at Page 11 of Tab 8, Ms. Dempsey acknowledged that the Act did not legislate a time period by which a registered dealer must send in the application. The witness confirmed that the Registrar was not aware of anyone who did not receive a warranty from the Applicant.

Ms. Dempsey's attention was then directed to the Toronto Auto Auctions form at Page 25 of Tab 8, Exhibit 3, which contains the words: "THEFT RECOVERY" and confirmed that this term was not defined. Further, the witness acknowledged that although there was a requirement for disclosure if the vehicle was a police car or taxicab, there was no requirement in Regulation 801 or in the Act to disclose that a vehicle was a theft recovery. Ms. Dempsey testified that the fact that a vehicle had been stolen would be a material disclosure and should have been made by the Applicant to the purchaser of the motor vehicle.

After counsel for the Applicant reviewed the seven items on the inspection findings report appearing at Page 4 of Tab 10, he suggested that these were matters of technical non-compliance and asked if Ms. Dempsey had recommended to the Applicant that he should take the course and Ms. Dempsey stated that she had not.

The Applicant gave evidence on his own behalf and testified that he was 36 years old, married with two children ages two and four. The Applicant came from Turkey in 1987 and his mother-tongue was Farsi (Persian) and at the time of his arrival the only English that he knew was the word "hello." The Applicant stated that his early employment had included working in a car wash and delivering pizzas. When asked about his application for registration, the Applicant indicated that all that was required was a police report but there were no examinations and he was not given a copy of any statutes. The Applicant stated that he had no previous problems with OMVIC.

The Applicant testified that the Notice of Appeal appearing at Tab 2 of Exhibit 3 was completed by his wife and although a pre-hearing was requested, none was held. Counsel for the Registrar objected to questions with respect to the pre-hearing as being irrelevant which objection was sustained. The Applicant acknowledged having met with the inspector in May and June 2000.

The Applicant's attention was directed to Page 2 at Tab 4 which is the Toronto Auto Auctions form for the 1993 Honda Accord, and the Applicant acknowledged that he had told the auction that the true kilometers for the vehicle were unknown. The Applicant testified that he had put new tires and rims on the vehicle. The Applicant stated that no one had called him to ask if he knew the odometer reading.

The Applicant stated that after purchasing the vehicle in Montreal from the auction, he tried to drive the vehicle to Toronto but certain of the gauges were not functioning and he had to have them changed before he drove the vehicle back to Toronto.

The Applicant stated that he told Ms. Dempsey that it was because he put new tires and rims on the vehicle at a value of \$600.00, put a new alternator on the vehicle at a cost of \$120.00 and had a new dash board put in to the vehicle for \$150.00 that he was able to sell the vehicle that he had purchased for \$4,000.00 for \$5,800.00.

The Applicant indicated that the notation on the bill of sale at Page 2, Tab 5, Exhibit 3, indicating that the dash had been changed was the Applicant's handwriting. The Applicant acknowledged that he knew the odometer reading but had not put the number into the bill of sale.

With respect to the bill of sale appearing at Page 2 of Tab 6, the Applicant testified that the odometer had been changed and that he had inserted the kilometer reading from the new odometer in the limited powertrain warranty application appearing at Page 4 of Tab 6 so that the warranty application would be consistent with the bill of sale.

It was the Applicant's evidence that a purchaser did not pay for the warranty but that it was included in the price of the car, and it was his evidence that his arrangement with CWC was that they would pick up the warranty applications from his premises. The Applicant stated that CWC never complained about the dating of the contracts and no customer had ever complained.

With respect to the bill of sale appearing at Page 3, Tab 7, Exhibit 3, being the sale to Tony Orrico, the Applicant stated that the two odometer readings were recorded because he had to change the complete dash board on this vehicle as it was cheaper to replace the entire dash board in order to obtain a new odometer rather than to have changed just the instrument alone. It was the Applicant's evidence that the bill of sale with the notation indicating that the odometer had been changed was signed by the purchaser. Further, the Applicant stated that the warranty appearing at Page 5 of Tab 7 was an unlimited warranty.

The Applicant stated that he had never tried to cheat anyone by changing an odometer.

With respect to the various bills of sale appearing at Tab 8 of Exhibit 3, the Applicant acknowledged that they were not filled out completely and stated that no one had told him how to properly fill out the form, and he had only learned what information to put in the form by word of mouth from other dealers. The Applicant agreed that information was missing from the forms. He stated that he never intended to mislead anyone by omitting information. It was the Applicant's evidence that he did know that the bill of sale must contain the name and address of the consumer and the type of vehicle being purchased.

The Applicant admitted that there had been a mix-up with respect to the date of the appointment with the inspector but that he had indeed shown up on May 5, 2000, after being contacted by Ms. Dempsey.

The Applicant testified that he had never had the various matters enumerated in the inspection findings report appearing at Page 5, Tab 10, Exhibit 3 explained to him before his first meeting with the inspector. No one had ever discussed the training course being offered by OMVIC which he had only heard about from other dealers. The Applicant stated that he would be willing to take the course and believed that he would gain benefit from it.

The Applicant testified that he had never previously been investigated with respect to operation of the dealership and had never been before this Tribunal.

On cross-examination, the Applicant testified that when he purchased the 1993 Honda Accord LX referred to at Tab 4, Exhibit 3, he discovered that the odometer was "jumping around." He acknowledged that at that time it showed 457,415 kilometers. The Applicant drove to Montreal and after attending the auction, met a friend who suggested a place where the Applicant could get the odometer fixed before driving the vehicle back to Toronto. The Applicant left the car in Montreal and went back to Toronto and returned to Montreal approximately two days later with a friend who drove.

The Applicant stated that he did not call Adesa, the auction in Montreal, with respect to the odometer problem. After the Applicant picked up the 1993 Honda Accord LX after having the odometer fixed, the alternator light came on and the Applicant thought that perhaps the mechanic who had worked on the odometer had not done his job properly, however, in the end the Applicant had the alternator fixed and paid cash for the work.

When questioned about the tires and rims, the Applicant testified that the tires and rims had been taken off another car which he already owned, and he had estimated the value to be between \$500.00 and \$600.00. The Applicant

acknowledged that in fact he had only paid out \$270.00 in total with respect to the vehicle which he sold 15 days later at the Toronto Auto Auction.

The Applicant acknowledged that he did not tell the auction the real number of kilometers on the vehicle but had indicated that the true kilometers were unknown.

The Applicant testified that with respect to the 1992 Saturn SL referred to at Tab 5, Exhibit 3, the odometer was working when he bought the vehicle in May 1999 but that the vehicle sat on his lot for approximately one year and at some point, the gauge stopped working. The Applicant stated that he had a fellow named Rob come and change the odometer and paid him in cash and had no receipts and paid no P.S.T. or G.S.T.

The Applicant stated that Rob was someone he contacted by pager whenever he needed electrical work done to a vehicle.

The Applicant testified that the letters: "T.M.U." were inserted in the bill of sale for the Saturn at the time of the sale but admitted that he did not insert the odometer reading as shown on the Toronto Auto Auction's bill of sale. The Applicant testified that he did mention the difference in kilometers to the purchaser and could not explain why he did not record the previous odometer reading on the bill of sale. The Applicant stated that he never asked to have the odometer reset and could not explain why he wrote the previous odometer reading on some bills of sale and not on others.

The Applicant testified that he never charged anyone for the warranties that he obtained from CWC and suggested that the warranty company gave him a discount. When questioned regarding the warranty appearing at Page 2, Tab 9, Exhibit 3, the Applicant stated that he sent one cheque for the warranties which he calculated by adding up the various warranties that he was paying for at one time. It was his recollection that a six month warranty cost approximately \$98.00 to \$99.00. The Applicant stated that he sent in a cheque with all the warranties, but he could not remember the amount of the cheque.

The Applicant testified that the cost of a powertrain warranty did not change as a result of the mileage disclosed.

When asked if he knew the meaning of the words "misleading" and "void" appearing in the lower right-hand corner of the CWC application form, the Applicant stated that he did not know what those words meant.

With respect to the bill of sale at Page 18, Tab 8, Exhibit 3, the Applicant testified that the customer had been told by others that the warranty company was no good and the customer decided that she did not want the warranty, and the Applicant wrote up a new bill of sale. On further reflection, the Applicant

suggested that perhaps what had happened was that after the deal, the customer asked for the warranty which the Applicant paid himself at a cost of approximately \$100.00.

The Applicant was then asked about the statement appearing on the bill of sale at Page 8, Tab 9, Exhibit 3, which states that the vehicle was being sold “as is” with no warranty when at Page 10, Tab 9, there is a application for a limited powertrain warranty with CWC. The Applicant stated that an “as is” sale means that the Applicant does not warrant the vehicle but those words do not mean that the customer is not receiving a third party warranty. The Applicant stated that reference to “as is” meant that there was no safety certificate and if the customer was taking the vehicle off the lot, he needed to obtain a temporary permit. The Applicant stated that he learned about the ten day permit requirement from the Ministry of Transportation.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. In the transaction involving the 1993 Honda Accord LX, the Applicant sold the vehicle without disclosing to the purchaser the true distance travelled by the vehicle although that information was known to him.
2. In the transaction involving the 1992 Saturn SL, the Applicant sold the vehicle without disclosing to the purchaser the true distance travelled by the vehicle although that information was known to the him.
3. The Applicant failed to complete bills of sale in the manner required by section 16 of Regulation 801 under the Act.
4. The Applicant has, on numerous occasions, breached subsection 19(2) of Regulation 801 which requires the recording of work done with respect to odometers.
5. The Applicant failed to maintain the proper records as required by Regulation 801.
6. The Applicant failed to register vehicles in his name as required by the *Highway Traffic Act*, section 60.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to revoke the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) and 6(2) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

6.(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant should be revoked.

The question to be determined is whether the past conduct of the Applicant provides the Registrar with reasonable grounds for the belief that the Applicant will not carry on business as required by section 5(1)(b) of the Act. It is the Registrar's belief which is at issue in these proceedings not that of the Tribunal.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

In the leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in this case, Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

“The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051, the Court held:

“It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.”

APPLICATION OF LAW TO FACTS:

It is the Registrar’s position that there is ample evidence before the Tribunal to find that the manner in which the Applicant is carrying on business provides reasonable grounds for the belief that the Applicant will not carrying on business in accordance with law and with integrity and honesty.

The Applicant argues that this is not a case of odometer tampering and that Items 7 through 10 of the Registrar's proposal to revoke the Applicant's registration are matters of technical non-compliance. It is the Applicant's position that the revocation of the Applicant's registration is a most serious sanction unwarranted by the actions of the Applicant who is a "first-time offender."

The Applicant argues that no consumer was taken advantage of as a result of the actions of the Applicant and that there is no evidence that any consumer suffered with respect to the failure to submit warranty applications which, in any event, is not a matter over which OMVIC has responsibility.

Although any single act of the Applicant, as presented to the Tribunal during the course of this hearing, may not provide the necessary grounds for the Registrar to revoke the registration of the Applicant, when taken together it is clear that the Applicant has carried on business in a manner that demonstrates a disregard for the statutory requirements of the industry. His actions and omissions far exceed mere sloppiness. The Tribunal does not accept that the activities of the Applicant can be characterized as technical non-compliance.

The *Motor Vehicle Dealer Act* is a consumer protection statute and the requirements under the Act and its Regulations are in place to further that protection. The requirements placed upon a motor vehicle dealer are fundamental to the efforts to carry out the intention and objective of the Act.

In applying the evidence placed before this Tribunal to the relevant legal principles, the Tribunal finds that the past conduct of the Applicant affords reasonable grounds for the Registrar to believe that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated August 22, 2000, to revoke the registration of Haji Medhi o/a Ultimate Auto Sale Parts & Service as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: January 31, 2001

HUCKVALE

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
RICHARD AND MARGARET HUCKVALE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

RICHARD AND MARGARET HUCKVALE

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 4-5, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, February 15, 2001, and to continue February 16, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 4, 2001

MADORE



PREHEARING

LEO E. MADORE AND MARYANN MADORE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

LEO MADORE, Appearing on his own behalf and on behalf
of Maryann Madore,
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program,
LLOYD ALTER, Agent, representing 20 Niagara Street Ltd.

DATE OF

PRE-HEARING: January 3, 2001

Toronto

ORDER

FOLLOWING attendances on January 3, 2001 at a prehearing before Tribunal of Leo E. Madore, on his own behalf and on behalf of Maryann Madore (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Lloyd Alter, Agent on behalf of 20 Niagara Street Ltd. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, February 5, 2001 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on February 6 and 7, 2001 at 9:30 a.m. at the Tribunal's above Chambers;

1. The Parties present at the prehearing recorded that there had been no resolution of the sole issue for determination in this matter.

2. The Parties to the hearing are the Applicants, the Program and the Added Party.
3. The issue to be dealt with at the hearing is contained in the Program's decision letter of August 31, 2000 under claim # 1 more fully referred to on pages 1 and 2 of that decision letter.
4. The Parties were not able to indicate at this stage whom they propose to call to testify at the hearing nor were they able to indicate how long they believe the hearing will last.
5. All Parties to the hearing shall comply with Rule 6.3 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: January 5, 2001

MAIOLO

CATERINA MAIOLO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BEVERLEY J. READE, Vice-Chair, Presiding

APPEARANCES:

PAUL J. OSIER, Counsel, representing the Applicant
ANDREA YORK, Counsel, representing the Ontario New
Home Warranty Program,
BRENT T. HURST, Counsel, representing 929763 Ontario
Ltd., Added Party

DATES OF
HEARING:

January 25 & 26, 2001

Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, Caterina Maiolo (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated August 28, 2000;

WHEREAS, the Applicant filed an appeal with the Tribunal, requesting a hearing;

WHEREAS, the hearing was to be heard on January 25 and 26, 2001 at the Tribunal's Chambers;

AND WHEREAS, the hearing commenced on January 25, 2001 and on the second day of hearing on January 26, 2001, the hearing was adjourned on consent of all parties in order to hear further evidence;

This Tribunal Orders that:

- 1) The hearing in this matter is adjourned on consent of all parties to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Wednesday, February 21, 2001.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair,
Presiding

RELEASED: January 26, 2001

BEIKO

SANDRA BEIKO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: JOHANNE N. MORISSETTE, Vice-Chair

APPEARANCES:

SANDRA BEIKO, appearing on her own behalf (the
"Applicant")
MARK FRIEDMAN, Counsel, representing the Ontario New
Home Warranty Program (the "Program")
GEORGE GEORGARAS AND JOHN MAC DOUGALL,
Agents, representing the Added Party, Uniform Urban
Developments Ltd.

DATE OF
HEARING:

January 15, 2001

OTTAWA

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by Sandra Beiko (the "Applicant") from a written decision dated August 29, 2000 of the Ontario New Home Warranty Program (the "Program") under the *Ontario New Home Warranties Plan Act* (the "Act").

FACTS:

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

The Applicant took possession of her home on October 28, 1998 and notified the Program in writing by letter dated October 19, 1998, of various complaints, most of which were adequately repaired by the builder before conciliation, save and except the item stated therein as "hardwood floors separating (repairs done

unacceptable)". The Applicant further claims that the marring of the hardwood floors around the kitchen table is also an item under warranty and, she further claims a refund of the conciliation fee of \$50.00.

ISSUES:

The issues to be decided in these proceedings are as follows:

- 1) Is the separating of the hardwood floor a claim that qualifies as a warranty within section 13(1) of the Act?
- 2) Is the marring of the hardwood floor, a claim that qualifies as a warranty within section 13(1) of the Act?
- 3) Is the Applicant entitled to a refund of the conciliation fee?

LAW:

Section 13(1) of the Act prescribes that:

"Every vendor of a home warrants to the owner,

(b) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iv) is constructed in accordance with the Ontario Building Code;

.....

Section 13(2) of the Act prescribes that:

(2) A warranty under subsection (1) does not apply in respect of,

.....

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

.....

Section 13(4) of the Act prescribes that:

A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under conditions as are prescribed.

APPLICATION OF LAW TO FACTS:

Is the separation of the hardwood floors a warrant able item? This was a complaint made within the one year prescription. The evidence from both the builder and Mr. Rochon of the Program, identifies the separation as what is seen as normal depending on the time of year and the level of humidity in the home. Mr. Rochon testified that upon his first visit to the home, as requested by the builder, on May 3, 2000, he observed the separation of the floor boards. He further observed the fact that the ducts in the living room were closed, and he concluded that could possibly cause a lack of ventilation and drop of humidity that could cause the separation. At that initial visit, there was no mention by the Applicant of the issue of "marring" around the kitchen table, to Mr. Rochon. The next day, May 4, 2000, the Applicant wrote in a new letter to the Program advising them of the marring issue with respect to the hardwood floors.

After that initial meeting, the builder wrote to the ONHWP on June 13, 2000, advising the Program that "all issues were resolved and or accepted except for the issue of the area of marred hardwood floors in the kitchen". There was no evidence from the Applicant or anyone else that the Applicant did not, at that time, agree with that statement.

Mr. Rochon attended the conciliation on July 12, 2000, where the only complaint he had to attend to was the marring around the kitchen table. As a result, his decision letter dealt with only that issue.

Mr. Rochon testified that the Applicant did not ask him, nor did she mention that she was still not satisfied with the separation of the hardwood floors. On cross-examination, the Applicant testified that she did not remember her conversations with Mr. Rochon and did not remember what was at issue during the conciliation process. Mr. Rochon also testified that on July 12, 2000 he observed that the separations that he had observed on his May 3, visit were no longer present. Mr. Rochon added further, that it was very likely that the shrinkage of the separation was consistent with the time of year as there being more humidity in the home and therefore the wood would expand and the separation would be less visible.

The Tribunal finds that there is insufficient evidence to corroborate a claim of poor workmanship on the part of the builder regarding the separation of the floor boards. The evidence of Mr. Rochon with respect to his observations between

May and July clearly shows that there was shrinkage of the wood which is therefore excluded by section 13(2)(d) of the Act.

Regarding the marring of the hardwood floor in the kitchen, was this item part of the initial complaint of the Applicant, so as to allow it under the one year warranty?

The Applicant states that her initial complaint was a blanket complaint and therefore the marring was covered within the one year warranty. The Tribunal finds that even if the blanket complaint would include the marring, there is a lack of convincing evidence that this marring was due to the poor workmanship of the builder. The Applicant has the onus of establishing that the marring was caused by poor workmanship of the builder. The evidence is more in line with the fact that the marring was caused by normal wear and tear and therefore excluded.

DECISION:

Pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claims.

LICENCE APPEAL TRIBUNAL

JOHANNE N. MORISSETTE, Vice- Chair

Released: January 22, 2001

AGE OF TRAVEL INC.

AGE OF TRAVEL INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

NO ONE APPEARING for the Applicant
TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
HEARING: January 10, 2001 Toronto

ORDER

WHEREAS, a Notice of Proposal was issued by the Registrar under the *Travel Industry Act* (the "Registrar"), dated September 12, 2000, to Revoke the Registration of Age of Travel Inc. (the "Applicant");

AND WHEREAS, the Applicant appealed the Notice of Proposal to the Tribunal;

AND WHEREAS, the Applicant's appeal was set down for hearing before the Tribunal, on January 10, 2001, at 9:30 a.m. at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS, Counsel for the Registrar, was present at the hearing on January 10, 2001, and no one appeared for the Applicant, although Mr. Mike Kocet, Agent for the Applicant had signed a Waiver and Consent, consisting of Terms and Conditions agreed to in Schedule "A", prior to the hearing;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: January 10, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

AGE OF TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Age of Travel Inc. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 2498948) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **April 18, 1986**.

2. The Registrant is subject to the prescribed terms and conditions of registration as are set out in sections 8 to 35 of Regulation 806/93 made under the Act (hereinafter "the Regulation").

WORKING CAPITAL – THE GROUNDS FOR THE PROPOSAL

3. Subsection 25(1) of the Regulation states that a registrant shall maintain a minimum working capital of \$5,000.00 if the registrant had sales in Ontario of less than \$1.5 million during the previous fiscal year.
4. The Registrant's gross sales reported in the financial statements for its fiscal year-ended **January 31, 2000** were \$50,844.00, thus requiring the Registrant to have a minimum working capital of \$5,000.00.
5. The Travel Industry Council of Ontario's ("TICO") review of the Registrant's financial statements for the year-ended January 31, 2000 revealed a working capital deficiency of \$1,799.00 or a total working capital shortfall of \$6,799.00.
6. By letter dated **May 19, 2000**, the Registrant was advised by TICO of the working capital shortfall and asked to address the shortfall and provide information on what steps had been taken to address the shortfall by **June 2, 2000**.
7. On **June 1, 2000**, TICO received evidence of a partial injection of funds to address the working capital shortfall for \$4,995.00 from the Registrant's owner, Mr. Mike Kocet.
8. On **July 4, 2000**, TICO conducted an inspection of the Registrant, which revealed that Mr. Kocet's **June 1st** injection of \$4,995.00 had been removed and that the Registrant was still in non-compliance of the Regulation.
9. By letter dated **July 13, 2000**, the Registrant was advised that working capital must be maintained at all times and was told to inject funds to correct the working capital shortfall by **July 27, 2000**.
10. On **September 12, 2000**, the Registrar issued a Proposal to Revoke the Registrant's Registration on the grounds that the Registrant was in contravention of the Act and Regulation for failing to maintain the minimum working capital as required by section 25 of the Regulation.
11. The Registrant's working capital deficiency has not been corrected.
12. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated **September 12, 2000**;
- (ii) the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall correct any and all working capital deficiencies and provide proof of such correction, to the satisfaction of the Registrar, by **April 30, 2001**. At all times thereafter, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (b) The Registrant shall file complete financial statements as required pursuant to section 24 of the Regulation, for the fiscal year ended **January 31, 2001**, no later than **April 30, 2001**;
 - (c) The Registrant shall file complete financial statements as required pursuant to section 24 of the Regulation, for the fiscal year ended **January 31, 2002**, no later than **April 30, 2002**;
 - (d) The Registrant shall file complete financial statements as required pursuant to section 24 of the Regulation, for the fiscal year ended **January 31, 2003**, no later than **April 30, 2003**;
 - (e) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (f) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time on or before the legislated due date;
 - (g) If any of the Registrant's future financial statements reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and

produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.

- (h) By **March 10, 2001**, the Registrant shall establish a trust account to protect customer funds in accordance with section 36 of the Regulation and, thereafter, the Registrant shall maintain a proper trust account and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
- (i) The Registrant shall submit a monthly trust account reconciliation to the Registrar on or before the last business day of each month for the preceding month, beginning on **May 1, 2001**, for the month of **March, 2001**, for so long as the Registrar shall so require; and
- (j) If the above-noted trust account reconciliations as filed according to (ii)(g) are incomplete or reveal a customer deposit deficiency, the Registrant will have **ten (10) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with conditions (ii) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- (iv) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of January, 2001

Mr. Mike Kocet
Age of Travel Inc.
Industry Act

I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel*

MERLE'S AUTO REPAIRS AND MERRILL THOMAS GORDON

MERLE'S AUTO REPAIRS AND MERRILL THOMAS GORDON

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990 Chapter H.8 as amended

AND IN THE MATTER OF an Application by Merrill Thomas Gordon and Merle's Auto Repairs dated January 10, 2001 for a hearing before the Licence Appeal Tribunal pursuant to Section 95 of the *Highway Traffic Act* appealing the Notice of the Director of Vehicle Inspection Standards dated July 7, 2000;

AND IN THE MATTER OF Motor Vehicle Inspection Station Licence Number 23-33915 in the name of Merle's Auto Repairs;

AND IN THE MATTER OF the registration of Motor Vehicle Inspection Mechanic, Merrill Thomas Gordon holding Trade Certificate Number 310S-038323 and 310T-038323.

PANEL MEMBERS: Alan Holbrook, Presiding Member
Clarke Wallace, Member

APPEARANCES: Patrick Moore,
Counsel for the Director of Vehicle Inspection Standards
Merrill Thomas Gordon did not attend,
Applicant unrepresented

DATE OF HEARING: January 10, 2001

Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the licensee Merle's Auto Repairs and the registrant Merrill Thomas Gordon (the "Applicant") respecting a proposal by the Director of Vehicle Inspection Standards under the *Highway Traffic Act* ("HTA") to revoke:

- a) Motor Vehicle Inspection Station Licence No. 23-33915 issued to Merle's Auto Repairs, and
- b) The registration of Motor Vehicle Inspection Mechanic, Merrill Thomas Gordon who holds a Trade Certificate No. 310S-038323 and 310T-038323.

EXHIBITS:

By the Respondent:

Exhibit # 1 Proposal to Revoke MVIS and Mechanics Registrations dated July 7, 2000.

Exhibit # 3 Adjournment Order dated November 22, 2000.

Exhibit # 5 Registrar's Hearing Record (Green Book).

Exhibit # 6 Supplementary Registrar's Hearing Record (Blue Book).

By the Applicant:

Exhibit # 2 Notice of Appeal dated August 23, 2000.

Exhibit # 4 Letter from Applicant dated January 9, 2001.

PRELIMINARY MATTERS:

Mr. Moore asked that the letter from the Applicant dated January 9, 2001 and the Respondent's Supplementary Hearing Record (Blue Book) be entered as exhibits at this time. The Tribunal accepted them and marked as Exhibits # 4 and # 6 respectively.

Exhibit # 4 was discussed. In Exhibit # 4, Mr. Gordon explains that he will be unable to attend this hearing and indicates no intention of sending a representative. Mr. Gordon also states he is aware the hearing will proceed in his absence. The hearing proceeded.

FACTS:

The Director's Grounds for Revocation:

By Notice dated July 7, 2000, the Director of Vehicle Inspection Standards (the "Director") revoked pursuant to subsection 91(8)(a) and (e) and section 93(a) and (c) of the *Highway Traffic Act* R.S.O. 1990, Chap. H8 as amended:

- (a) Motor Vehicle Inspection Station Licence No. 23-33915 issued to Merle's Auto Repairs, and;
- (b) the registration of Motor Vehicle Inspection Mechanic, Merrill Thomas Gordon who holds a Trade Certificate No. 038323.

on the grounds that the licensee and registrant have made false statements and failed to comply with the HTA and regulations in the issuance of safety standards certificate as follows:

1. Certificate number # 6632431 issued February 1997, concerning a 1984 Dodge.
2. Certificate number # 6732478 issued March 1997, concerning a 1984 Oldsmobile.
3. Certificate number # 9362401 issued March 24, 1999, concerning a 1986 Oldsmobile.
4. Annual Inspection Sticker F116-361 issued December 1, 1999 1986 GMC van.
5. Certificate number # 858583 issued on or about April 22, 2000, 1982 GMC.
6. Certificate number # 858582 issued on or about April 22, 2000, 1983 Pontiac.
7. Certificate number # 858599 issued on or about April 22, 2000, 1984 Buick.
8. Certificate number # 858607 issued on or about April 28, 2000, 1982 Honda.
9. Certificate number # 858604 issued on or about April 28, 2000, 1987 Pontiac.
10. Certificate number # 119445 issued on or about July 26, 2000, 1985 Plymouth.

The Director's witnesses were: Ministry of Transportation Enforcement Officers:

Larry Gremaldi, Mark Horton, and Donald Rutherford whose evidence follows.

Officer Gremaldi testified that he is a licenced mechanic with experience in the private sector as a mechanic and as an owner of an Motor Vehicle Inspection Station (MVIS) prior to becoming an officer with the Ministry of Transportation. He explained the spreadsheet at Tab 4 of Exhibit #5 from the Ministry database, listing information on the MVIS record of the Applicant including convictions and warning letters. Officer Gremaldi explained the application form at tab 5, and the Applicant's operation as a 2 bay garage with Mr. Gordon as the only licenced mechanic. Officer Gremaldi testified that they will investigate an MVIS where the number of safety certificates (SSCs) seems excessive, after receiving complaints from customers or on the basis of "rumours they hear in the field".

Officer Gremaldi testified that in 1997, following a complaint, the Ministry investigated and did a field inspection on the 1984 Dodge SSC # 6632431 detailed at Tab 7 of Exhibit 5. The inspection resulted in the removal of the number plates from the vehicle after the vehicle was found to be unfit. No charges were laid as the Applicant and the owner of the vehicle reached a settlement on their own.

Officer Gremaldi testified that in 1997, following a complaint, the Ministry investigated and did a field inspection on the 1984 Oldsmobile SSC # 6732478 detailed at Tab 8 of Exhibit 5. The inspection resulted in charges being laid against the Applicant.

After numerous complaints, in 2000 an SSC audit was carried out and two vehicles, a 1982 Honda SSC #858607 and 1987 Pontiac SSC #858604 were field inspected. The results of the field inspections are set out in tabs 14 and 15 of Exhibit 5 and resulted in charges and convictions against the Applicant.

After the suspension notice was issued in July of 2000, Officer Gremaldi assisted another officer in September, 2000 with an the investigation regarding a 1985 Plymouth SSC # 1197445, (Tab 16 of Exhibit 5) and charges were laid against the Applicant as a result.

Officer Mark Horton testified that that he is a licenced mechanic with experience in the private sector prior to becoming an Officer with the Ministry of Transportation. Officer Horton stated the Ministry had received many complaints by phone and from the police in 1998 or 1999, resulting in an audit of Merle's Auto Repairs. As detailed in Tab 9 of Exhibit 5, a field inspection was done on an 1986 Oldsmobile SSC #9362401 resulting in the removal of the plates and the vehicle was declared unfit. Charges were laid against the Applicant.

Officer Horton testified that a 1986 cube van was stopped. The Annual Safety Sticker was not displayed and subsequent investigation revealed it was never properly affixed to the vehicle as required by the HTA. Tab 10 of Exhibit 5 sets

out details regarding Annual Inspection Sticker F116361 and that no work order was found for the van. Charges were not laid, but a written warning was issued to the Applicant.

As a result of the audit, Officer Horton field inspected an 1986 GMC Suburban SSC # 858583 (Tab 11 Exhibit 5). Major defects were found. The owner was advised by Mr. Horton that the vehicle was unfit for the road. The plates would have been removed, but the vehicle was on private property. Charges were laid against the Applicant.

Tab 12 of Exhibit 5 details a field inspection by Officer Horton of a 1983 Pontiac SSC # 858582. Major defects were found. The owner was advised by Mr. Horton that the vehicle was unfit for the road. The plates would have been removed, but the vehicle was on private property. Charges were laid against the Applicant.

Tab 13 of Exhibit 5 details Officer Horton's field inspection of a 1984 Buick SSC # 858599. Major defects were found. The owner was advised by Officer Horton that the vehicle was unfit for the road. The plates would have been removed, but the vehicle was on private property. Charges were laid against the applicant. No work orders could be found for this vehicle by Mr. Gordon.

In two return visits to retrieve missing work orders, only 2 of 5 were ever produced by Mr. Gordon.

Officer Donald Rutherford testified he has been a licenced mechanic since 1973. Tab 16 of Exhibit 5 details his field inspection, as the result of a complaint on a 1985 Plymouth. The vehicle was found to be unfit. The plates were removed and charges were laid against the Applicant.

The Applicant called no witnesses.

The Tribunal finds proven on the evidence that the MVIS, Merle's Auto Repair, and Mr. Merrill Thomas Gordon issued SSCs without regard for the mechanical fitness of the vehicles as laid out in schedule 611 of the HTA. Consistently the defects found by officers doing field inspections were serious. They found severe corrosion of frame, steering, and brake components, parking brakes not working, windshield wipers and washers not functioning. These are critical defects that existed at the time the SSCs were issued by the Merle's Auto Repair through Mr. Gordon.

ISSUES:

The issues in this case may be summarized as follows:

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station licence be carried out?

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Mechanic licence be carried out?

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chap H.8 as amended, provides as follows:

Motor Vehicle Inspection Station Licence:

- 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- 91(2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence

Revocation of a Licence

91(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (b) any inspection authorized by the licence is incompetently performed;
- (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
- (d) there is a breach of condition of the licence;

- (e) the licensee does not comply with this Act or the regulations;
- (f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or
- (g) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3)(a)

Motor Vehicle Inspection Mechanic:

- 92(1) No person shall sign a vehicle inspection record as mechanic or certify in a safety standards certificate that a vehicle complies with the standards of equipment and performance prescribed by the regulations unless the person is registered by the Director as a motor vehicle inspection mechanic in a motor vehicle inspection station and the Director may so register any person for whom application is made under subsection (2).
- (2) Where a licensee or an applicant for a motor vehicle inspection station applies for the registration as a motor vehicle inspection mechanic in the motor vehicle inspection station of the licensee or in the proposed motor vehicle inspection station of the applicant for a licence, as the case may be, of any person who meets the requirements of this Act and the regulations, the person is entitled to be registered as a motor vehicle inspection mechanic in the motor vehicle inspection station.

93 The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this Act or the regulation.

Appeal before the Licence Appeal Tribunal:

- 95(1) Where the Director proposes,
- (a) to refuse to issue or renew a licence;
 - (b) to refuse to make a registration; or

- (c) to revoke a licence or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

(2) A notice under subsection (1) shall inform the person who is the applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the Tribunal if the person mails or delivers, within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the Tribunal requiring a hearing by the Tribunal and the person may so require the hearing.

(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal and to take the action that the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director.

APPLICATION OF THE LAW TO THE FACTS:

Under the HTA, the relevant sections dealing with revocation state:

91 (8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (e) the licensee does not comply with this Act or the regulations;

93. The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) *any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or*
- (b) the registrant does not comply with this act or the regulations.

As to the revocation of the motor vehicle inspection licence, the evidence has established that the MVIS, Merle's Auto Repairs, issued safety standards certificates containing false statements and the licensee did not fully comply with the *Highway Traffic Act*, specifically subsection 91(8)(a) and (e).

As to the revocation of the registration of the motor vehicle inspection mechanic, the evidence has established that Mr. Merrill Thomas Gordon made false statements in safety standards certificates and issued safety standard certificates for vehicles that did not conform to standards required by the *Highway Traffic Act*.

DECISION:

Pursuant to the authority vested in it under subsection 95(4) of the *Highway Traffic Act*, the Tribunal confirms the Order of the Director to revoke the MVIS Licence of Merrill Thomas Gordon and Merle's Auto Repair, and to revoke the registration of Merrill Thomas Gordon as a Motor Vehicle Inspection Mechanic.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

Clarke Wallace, Member

RELEASED: January 18, 2001

LEONARD SHERWOOD AND CPG AUTOMOTIVE

LEONARD SHERWOOD AND CPG AUTOMOTIVE

IN THE MATTER OF the *Highway Traffic Act*, R.S.O. 1990 Chapter H.8 as amended

AND IN THE MATTER OF an Application by LEONARD SHERWOOD and CPG AUTOMOTIVE dated 21 August 2000 for a hearing before the Licence Appeal Tribunal pursuant to Section 95 of the *Highway Traffic Act* appealing the Notice of the Director of Vehicle Inspection Standards dated 12 June 2000;

AND IN THE MATTER OF Motor Vehicle Inspection Station Licence Number 32-41767 in the name of CPG Automotive;

AND IN THE MATTER OF the registration of Motor Vehicle Inspection Mechanic, Leonard Sherwood holding Trade Certificate Number 310S-903483.

PANEL MEMBERS: HUGH R. HANSON, Presiding Member
 CHARLES J. SANDIFORD, Member

APPEARANCES: PATRICK MOORE
 Counsel for the Director of Vehicle Inspection Standards

DATE OF HEARING: 3 January 2001

Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the licensee CPG Automotive and the registrant Leonard Sherwood (the "Applicant") respecting a proposal by the Director of Vehicle Inspection Standard to revoke:

- a) Motor Vehicle Inspection Station Licence No. 32-41767 issued to CPG Automotive and
- b) the registration of Motor Vehicle Inspection Mechanic, Leonard Sherwood who holds a Trade Certificate No. 310S-903483.

EXHIBITS:

By the Respondent:

Exhibit # 4: Respondent's Appeal Book.

Exhibit # 5: 12 photos re tab 6 of Respondent's Appeal Book.

Exhibit # 6: 3 photos re tab 7 of Respondent's Appeal Book.

Exhibit # 7: 5 photos re tab 8 of Respondent's Appeal Book.

Exhibit # 8: 3 photos re tab 9 of Respondent's Appeal Book.

Exhibit # 9: 4 photos re tab 11 of Respondent's Appeal Book.

Exhibit # 10: Application for Inspection.

PRELIMINARY MATTERS:

The hearing was called for 9:30 am on 3 January 2001. The Tribunal opened the hearing at that time but recessed until 10:05 a.m. to await the appearance of the Applicant or his representative. At 10:05 a.m. the hearing resumed. Neither the Applicant nor anyone representing him appeared before the hearing was concluded.

FACTS:

The Director's Grounds for Revocation:

By Notice dated 12 June 2000 the Director of Vehicle Inspection Standards proposed to revoke pursuant to subsection 91(8)(a) and (e) and section 93(a) and (c) of the *Highway Traffic Act* R.S.O. 1990, Chap. H8 as amended (HTA):

- (a) Motor Vehicle Inspection Station Licence No. 32-41767 issued to CPG Automotive, and;
- (b) the registration of Motor Vehicle Inspection Mechanic, Leonard Sherwood, who holds a Trade Certificate No. 310S903483

on the grounds that the licensee and registrant have made false statements and failed to comply with the act and regulations in the issuance of safety standards certificate as follows:

1. Certificate number 8748694 issued on or about 21 January 1999 concerning a 1988 Chevrolet.
2. Certificate number 9330573 issued on or about 5 March 1999 concerning a 1986 Ford.
3. Certificate Number 9330568 dated on or about 2 March 1999 concerning a 1977 Jeep.
4. Certificate Number 9330569 dated on or about 2 March 1999 concerning a 1982 Dodge.
5. Certificate Number 9330580 dated on or about 8 March 1999 concerning a 1972 Ford.
6. Certificate Number 9330579 dated on or about 8 March 1999 concerning a 1982 Ford.
7. Certificate Number 9298659 dated on or about 31 March 1999 concerning a 1985 Dodge.
8. Certificate Number 9471082 dated on or about 29 April 1999 concerning a 1985 Dodge.

The Director's witnesses were Gerald Dienisch and Gordon Waldron, both Motor Vehicle Inspectors of the Ontario Ministry of Transport. Their evidence, largely supported by inspections reports made out at the time of inspections, was found to be entirely credible. The evidence was as follows:

As a result of complaints received, the Inspectors conducted an in depth audit of the Safety Standards Certificates books of the Applicant on 25 March 1999. Following this audit, inspections were made of eleven vehicles that had been issued safety certificates by the Applicant. These inspections showed that there were numerous instances of faulty recording of odometer readings on the certificates. They showed, too, that many of the vehicles had severe defects that could not have arisen in the interval between the issue of the certificates and the subsequent Ministry inspections. In addition, the Applicant was unable to produce the work orders that had purportedly been issued in connection with the certifications.

As a result of these findings, the Ministry issued summonses on six charges under HTA 90(3)(a), and one charge under HTA 11(2). On 5 January 2000 the Court in Sarnia heard these charges. The Applicant pled guilty and was convicted on all counts, resulting in four fines of \$500 (with Victim Surcharge) and three suspended sentences.

There was testimony that the Applicant had three convictions under the HTA in 1989, and that in the past he had been licensed to operate in the Peterborough area but was unable to be found when Inspectors there sought him. There was also evidence that CPG Automotive was not registered with the Companies Branch of the Ministry of Consumer and Commercial Relations.

The Tribunal finds the above facts, which were unchallenged, to be proven on the evidence.

ISSUES:

The issues in this case may be summarized as follows:

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station licence be carried out?

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Mechanic licence be carried out?

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chap H.8 as amended, provides as follows:

Motor Vehicle Inspection Station Licence:

- 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- 91(2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence

Revocation of a Licence

91(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (b) any inspection authorized by the licence is incompetently performed;
- (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
- (d) there is a breach of condition of the licence;
- (e) the licensee does not comply with this Act or the regulations;
- (f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or

- (g) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3)(a).

Motor Vehicle Inspection Mechanic:

- 92(1) No person shall sign a vehicle inspection record as mechanic or certify in a safety standards certificate that a vehicle complies with the standards of equipment and performance prescribed by the regulations unless the person is registered by the Director as a motor vehicle inspection mechanic in a motor vehicle inspection station and the Director may so register any person for whom application is made under subsection (2).
- (2) Where a licensee or an applicant for a motor vehicle inspection station applies for the registration as a motor vehicle inspection mechanic in the motor vehicle inspection station of the licensee or in the proposed motor vehicle inspection station of the applicant for a licence, as the case may be, of any person who meets the requirements of this Act and the regulations, the person is entitled to be registered as a motor vehicle inspection mechanic in the motor vehicle inspection station.

93 The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this Act or the regulation.

Appeal before the Licence Appeal Tribunal:

95(1) Where the Director proposes,

- (a) to refuse to issue or renew a licence;
- (b) to refuse to make a registration; or
- (c) to revoke a licence or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (h) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

(2) A notice under subsection (1) shall inform the person who is the applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the Tribunal if the person mails or delivers, within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the Tribunal requiring a hearing by the Tribunal and the person may so require the hearing.

(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal and to take the action that the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director.

APPLICATION OF THE LAW TO THE FACTS:

Under the HTA, the relevant sections dealing with revocation state:

91 (8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (e) the licensee does not comply with this Act or the regulations;

93. The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (c) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be

furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;

(b) *any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or*

(d) the registrant does not comply with this Act or the regulations.

As to the revocation of the motor vehicle inspection licence, in this case the evidence has established that false statements were repeatedly made in safety standards certificates issued by the licensee. The licensee has clearly failed to comply with the Act.

As to the revocation of the registration of the motor vehicle inspection mechanic, in this case the evidence has established that the Applicant has made numerous false statements in safety standards certificates, has performed inspections incompetently, and has not complied with the Act.

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to confirm the proposal of the Director to revoke the MVIS License of Leonard Sherwood and CPG Automotive, and to revoke the registration of Leonard Sherwood as a Motor Vehicle Inspection Mechanic.

LICENCE APPEAL TRIBUNAL

Hugh R. Hanson
Presiding Member

Charles J. Sandiford
Member

RELEASED: January 17, 2001

1241757 ONTARIO LTD. O/A MARLIN TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1241757 ONTARIO LTD. O/A MARLIN TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: September 20, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

1241757 ONTARIO LTD. O/A MARLIN TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 10, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, January 24, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 8, 2001

1221786 ONTARIO INC. O/A ISLAND TRAVEL

1221786 ONTARIO INC. O/A ISLAND TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

CLIO INNES, Agent representing the Applicant
TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
HEARING:

January 3, 2001

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Travel Industry Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated October 5, 2000 proposed to revoke the registration of 1221786 Ontario Inc o/a Island Travel ("Island Travel") under the Act.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of Island Travel. The grounds relied upon by the Registrar for the Proposal are set out below:

1. Pursuant to the provisions of section 24(1) of Ontario Regulation 806/93 the registrant failed to file the financial statements as required for the fiscal year ending March 31, 2000 by June 30, 2000 as required. A final request was sent extending the deadline to August 21, 2000 and the registrant failed to file the required financial statements by that date;

The Registrar under the Act issued a Notice of Further and Other Particulars dated December 15, 2000 after the registrant filed the financial statements on October 26, 2000, when it was found that the registrant did not have sufficient working capital. The Notice of Further and Other Particulars states:

1. Pursuant to the provisions of section 25 (1) of Ontario Regulation 806/93 the registrant is required to maintain a minimum working capital of \$5,000.00 as the company has sales in Ontario of less than \$1.5 million during the previous year. The registrant had a working capital deficiency of \$8,425.00, and did not have the required \$5,000.00 minimum as required, resulting in a total shortfall of \$13,425.00. This deficiency has not been corrected to date.

THE LAW:

Section 3 of the *Travel Industry Act* (the "Act"), states as follows,

- (1) No person shall act or hold himself, herself or itself out as being available to act as a travel agent unless the person is registered as a travel agent by the Registrar.
- (2) No person shall act or hold himself, herself or itself out as being available to act as a travel wholesaler unless the person is registered as a travel wholesaler by the Registrar.

Section 4 of the *Travel Industry Act* (the "Act"), states as follows;

- 4(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,
 - (a) having regard to his, her or it's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his, her or its business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that he, she or it will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) is incorporated without share capital, or
 - (ii) having regard to it's financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carry on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

Section 5 of the Act states as follows;

(1) Subject to section 6, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 4.

(2) Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he, she or it were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 6 of the Act states as follows;

.....

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing, and on the application of the Registrar at the hearing, made by order direct the Registrar to carry out his or her proposal or refrain from carrying out his or her proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) the Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the

Respondent. The Applicant had a very serious criminal record which he had disclosed in his application, but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated himself. The court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it thought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

591578 Ontario Inc. o/a Hansa Travel v Registrar Travel Industry Act (September 17, 1997) Commercial Registration Appeal Tribunal

In this matter the travel agency had failed to maintain the minimum working capital requirement due to a downturn in economy. There was evidence that some financial relief would be available and the business might improve; however, the Tribunal found that the decision by the Registrar was reasonable when it was made, and was found to be reasonable by the Tribunal.

CIAO Travel & Tour Inc. o/a CIAO Travel & Tour v Registrar, Travel Industry Act (August 25, 1998) Commercial Registration Appeal Tribunal

In this matter the travel agency had a history of filing necessary forms late, filing forms which were insufficient, and of not maintaining a sufficient amount of working capital. The Tribunal found that in the circumstances the Registrar had not made an error in deciding that the past conduct of the Registrant and its officers provided reasonable grounds to believe that it would not carry on business in accordance with law.

London South Transportation Center Inc. o/a Diamond Tours Canada v Registrar, Travel Industry Act (February 11, 1999) Commercial Registration Appeal Tribunal

In this matter the travel agency had contravened the Act, the terms and conditions of registration, and an order of the Tribunal. Sufficient working capital was not maintained, there were problems with the trust accounting, and the financial statements were not provided within the proper time limits. Even though the company had the assistance of direct intervention by the Registrar and prior appearances at the Tribunal, they did not appear to understand the importance of compliance with the Act and Regulations to ensure the protection of the public. The deficit in the trust account and the failure to maintain the required working capital were found to pose a substantial risk to the public. In a regulated industry, certain requirements must be met to maintain registration. This guarantees the consumer a measure of protection against business failures, and provides the companies with the benefit of working within an industry which has enhanced public credibility due to the fact it is regulated. The failure of the registrant to follow the requirements of the Act and the Regulations gave the Registrar sufficient grounds to revoke the registration.

ISSUES:

The legal issue in this case is whether the Registrar had sufficient grounds for revoking the registration of the Registrant on the basis of the Registrant's past conduct was failure to comply with the requirements of the Act and the regulations respecting the filing of financial statements and maintaining working capital requirements.

EVIDENCE FOR THE REGISTRAR

Ms. Mary-Ann Harrison testified that she is a chartered accountant and holds a position of Controller for the Travel Industry Council. She oversees the review of financial statements and is involved with prosecutions. The original shareholders identified in the Application for Registration were Antonio Wong and Clio Innes who were both listed as officers and directors of Island Travel. By letter dated May 21, 1999 (Exhibit 4, Tab 17) Clio Innes indicated that she was withdrawing as a shareholder and part owner. In a later letter dated July 6, 1999 (Exhibit 4, Tab 22), she confirmed that she would be the managing supervisor of the Company. On July 9, 1999 Antonio Wong sent a fax to the Travel Industry Council of Ontario (Exhibit 4, Tab 25) in which he signed the Terms and Conditions of Registration form. Among these terms is the requirement under section 24 of the Act to file financial statements which have been reviewed by a licensed public accountant at fiscal year end or more frequently, depending on sales volume.

There is a further requirement under section 25 of the Act to keep a minimum working capital depending on the sales volume of the company. In this case, the minimum working capital required is \$5000.00. A first letter (Exhibit 4, Tab 27)

dated March 9, 2000 was sent to Island Travel advising that the year end was approaching and that the financial statements would have to be filed on or before June 30, 2000 together with a "Review Engagement" or "Auditor's Opinion" signed by a Public Accountant licensed by The Public Accountants Council of Ontario. A second reminder letter dated July 13, 2000 (Exhibit 4, Tab 28) was sent requiring the filing by July 28, 2000. Ms. Innes responded to this letter on behalf of the registrant by a fax dated July 26, 2000 (Exhibit 4, Tab 29) in which she requested an extension to August 31, 2000 although no reason for the request was given. A final letter was sent by Ms. Harrison on August 4, 2000 (Exhibit 4, Tab 30) setting a date for filing of August 21, 2000 after which, action would be taken to revoke the registration of the company. Ms. Innes replied by fax on August 18, 2000 (Exhibit 4, Tab 31) explaining that Mr. Wong was out of the country, and was trying to get back to deal with the matter. Attached to the faxed letter, was a rough copy of a balance sheet for Island Travel. This document was not prepared by an accountant.

The Notice of Proposal was then issued on October 5, 2000. An appeal (Exhibit 2) was filed indicating that Mr. Wong was out of the country, and on October 26, 2000 financial statements (Exhibit 4, Tab 38) were filed. These statements showed a working capital deficit of \$8,425.00. As there was supposed to be a minimum of \$5000.00, the result was a total shortfall of \$13,425.00. Ms. Innes was notified of this non compliance in a letter dated October 27, 2000 (Exhibit 4, Tab 41).

EVIDENCE FOR THE APPLICANT

Ms. Clio Innes testified on behalf of the Applicant, and stated that she was the manager of the company. She was involved in the initial setup of the company but was not a director or officer. Mr. Wong was out of the country much of the time, and came back to Toronto near the end of March, 2000. After a period in hospital, he left the country again.

Ms. Innes gave the books to the bookkeeper Joanne Boyce who did not complete the work until August 18, 2000. The books were supposed to be given to an accountant to meet the filing requirements, but a bookkeeper did not get the books to an accountant, and Mr. Wong did not advise Ms. Innes of who the accountant for the corporation was. Finally, Joanne Boyce directed Ms. Innes to an experienced accountant, Mr. Larry Cappe after the receipt of the Notice of Proposal. Mr. Cappe found that there was an error in the financial records and discovered that Mr. Wong had not filed his income tax since 1996.

Throughout this time, Mr. Wong was in the Philippines and communication was difficult as Mr. Wong was not responding to requests made by telephone, fax or e-mail. In order to get the records released by the accountant, Ms. Innes had to pay the cost herself. After October 23, 2000 she picked up the financial

statements and the income tax material. A copy of the financial statements was sent by her to the Travel Industry Council of Ontario ("T.I.C.O.") by fax on October 25, 2000.

In response, T.I.C.O. advised her that there was a shortfall in the working capital, and money would have to be injected into the corporation. She did not have the money herself, as she was not a partner in the business.

Ms. Innes testified that in April, 2000 she had advised Mr. Wong that it was necessary for the corporation to maintain the working capital requirement, but she was told by him that he would not do it until he was required to do so. On or about October 27, 2000 she telephoned Mr. Wong, who was in the Philippines, that he needed to deposit some money into the company to correct a shortfall, but he did not do so. She offered to put some of her money into the company for this purpose if he would give her shares, but he simply advised her that partners share the losses and profits although he did not make her a formal partner in the company. In her opinion, she had made Mr. Wong aware of his obligations and responsibilities, but he was not responsive.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that after the registration of the company, the owner (Mr. Wong) left his manager Ms. Innes to operate the business with little support or direction. There was little or no effort on his part to ensure that the company financial records were kept up to date, filings were made on time, and the required level of working capital was maintained. It is not clear how much time he spent out of the country, but it is clear that his absences were detrimental to the functioning of the company. When the financial statements were finally produced as required, it was apparent that the company was seriously underfunded, and was in a deficit position in its working capital, so that it was well below the required level of \$5000.00. Although Mr. Wong was advised of this problem in April 2000, he has made no efforts to rectify the situation to date. Mr. Wong was also still out of Canada on the date of hearing before this Tribunal.

APPLICATION OF LAW TO FACTS:

Under section 5 of the Act, the Registrar may revoke registration for any reason that would disentitle an Applicant to registration under section 4, and section 4, among other things, requires a reasonable expectation of financial responsibility in the conduct of business and that business be conducted in accordance with the law.

The owner of the company in this case has paid no attention to the requirements of filing his financial statements within the required time and on the evidence has

specifically refused to maintain the necessary minimum working capital. Although the manager of the company has made efforts to keep the business going, she is getting little cooperation from the owner Mr. Wong. Since Mr. Wong has refused to keep the necessary level of working capital, this Tribunal finds that there is strong evidence that the company cannot reasonably be expected to be financially responsible in the conduct of the business. The lack of cooperation in the preparation of the financial statements required by the regulations, demonstrates that the company will not carry on business in accordance with the law. Mr. Wong signed the Terms and Conditions of Registration on July 9, 1999 (Exhibit 4, Tab 25) and was specifically made aware of the filing requirements and minimum working capital requirements. Despite this and the efforts of his manager, he has failed to comply with the requirements, and there is no evidence that the situation will improve.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not be financially responsible in the conduct of the business or would not carry on business with integrity, honesty, and in accordance with the law. On the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 6(4) of the *Travel Industry Act*, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair, Presiding

Released: January 16, 2001

BOLEJSZO

PREHEARING

TADEUSZ AND STANISLAWA BOLEJSZO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

TADEUSZ AND STANISLAWA BOLEJSZO, appearing on
their own behalf
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program,
GARO BOSTAJIAN, Agent, representing 1136363 Ontario
Ltd.

DATE OF

PRE-HEARING: January 3, 2001

Toronto

ORDER

FOLLOWING attendances on January 3, 2001 at a prehearing before Tribunal of Tadeusz and Stanislaw Bolejszo, (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Garo Bostajian, Agent on behalf of 1136364 Ontario Ltd. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, February 6, 2001 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on February 7, 2001 at 9:30 a.m. at the Tribunal's above Chambers;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.

2. The only issue to be dealt with at the hearing is the issue of the settlement of the floor in the area of the rear bedroom of Applicants' home and the gaps between the flooring and the baseboards in that room. The garage floor shall not be an issue at the hearing of this matter.
3. The Applicants have disclosed the report of Angus MacKenzie P. Eng. and have accordingly complied with Rule 6.4 of the Tribunal's rules in making such disclosure.
4. The Applicants intend to rely upon Angus MacKenzie's report at the hearing of this matter as well as relying on his evidence.
5. The Added Party shall have its professional engineer inspect the home of the Applicants who, pursuant to such inspection, shall furnish a report based on his findings respecting the rear bedroom floor or slab. The Added Party shall provide such report to all other parties in compliance with the disclosure rules contained in the Rules of Practice of this Tribunal.
6. The parties present at the prehearing recorded that there had been no resolution of the issue in this matter.
7. The Applicants indicated that they both intend to testify at the hearing and that Angus MacKenzie P. Eng. will also testify at the hearing as an expert witness on their behalf.
8. The hearing due to commence in this matter on February 6 and 7, 2001 is by consent of all parties adjourned to Monday, June 4, 2001 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario, and to continue if necessary on June 5 and 6, 2001 at 9:30 a.m. at the Tribunal's Chambers.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: January 5, 2001

ACE TRAVEL AGENCY

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
ACE TRAVEL AGENCY

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: October 10, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Decision

ACE TRAVEL AGENCY

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 22, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Monday, February 19, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 19, 2001

Simpson

CLAIRE CYNTHIA EDWARDS-SIMPSON

APPEAL FROM A DECISION OF THE TRAVEL INDUSTRY
COUNCIL OF ONTARIO UNDER THE *TRAVEL INDUSTRY
ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

CLAIRE CYNTHIA EDWARDS-SIMPSON, appearing on her
own behalf

TREVOR BRANION, Counsel representing the Travel
Industry Council of Ontario

DATE OF
HEARING:

January 3, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Travel Industry Council of Ontario by its decision letter dated October 10, 2000, refused the claim of Ms. Claire Cynthia Edwards-Simpson (the "Applicant") for reimbursement from the Travel Industry Compensation Fund. They stated that the claim was received beyond the filing deadline set out in Regulation 806/93 under the *Travel Industry Act* (the "Act").

Ms. Simpson, filed a Notice of Appeal on October 27, 2000, to the Licence Appeal Tribunal.

ISSUES:

Should the claim be dismissed because it was filed beyond the limitation period?

Alternatively, should the claim be dismissed because the payment was non-refundable, the travel services were available and the customer failed to act.

EVIDENCE:

TESTIMONY FOR THE APPLICANT

Ms. Simpson testified that on March 16, 1999, she booked travel services with Sunkiss Travel Agency (the "Registrant") with a departure date of April 29, 1999. The total cost paid by her was \$509.00. She did not buy travel insurance, and the payment was 100% non-refundable (Exhibit 3, Tab 5). She did not receive a ticket, and cancelled her trip as her employer was in failing health, and her sense of duty kept her from leaving until after the elderly woman had passed away. The agency advised her that if she cancelled, they could not refund her money but would agree to provide her with a ticket at a future date. If the price went up she would pay the difference, and if the price went down she would not receive a refund for the difference. They had done this for her before when she had cancelled trips.

In January 2000, Ms. Simpson telephoned the agency to arrange a trip for February, but the calls were answered by a message machine and not returned. When she went to the agency's location she found that they were closed. In February she left the country to attend the funeral of her nephew, and when she returned she made inquiries about how to get her money back. She was advised to contact the Travel Industry Council of Ontario ("TICO"). On June 20, 2000 she was sent a copy of the Customer Claim Form, and on July 26, 2000 it was filed with the Travel Industry Compensation Fund (the "Fund"). When the form was sent to her there was a notation on it that it her claim was beyond the March 29, 2000 deadline. By a letter dated October 10, 2000, the claimant was informed that her claim was denied as it was not within the required six months deadline and on the basis that there was a non-refundable reservation, and a cancellation by her.

Mr. Anselm Pennie testified on behalf of the Applicant that he was the representative of Sunkiss Travel Agency who had dealt with Ms. Simpson. He confirmed that the reservation was 100% non-refundable but explained that if the customer cancelled before they received their ticket, his employer allowed the customers to travel later as described by Ms Simpson. He agreed that this was a gesture of good will by the company and that as far as he knew, the company was under no obligation to do this.

TESTIMONY OF THE RESPONDENT

Ms. Laurie Ferlan is the Claims Coordinator for the Fund and testified that Sunkiss Travel Agency closed on September 28, 1999. The Tribunal accepts this date as the latest date that could be considered the date of the event giving rise to the claim.

On June 20, 2000 Ms. Ferlan received a telephone call from Ms. Simpson. Ms. Ferlan advised Ms. Simpson that the deadline for filing a claim was March 29, 2000, but sent the Appeal form as requested. After an exchange of correspondence, a letter was sent October 10, 2000 (Exhibit 1) denying the claim on the grounds that it was out of time and was not eligible as the reservation was 100% non-refundable. She also explained that if the travel agent had agreed to provide travel services despite the fact the reservation was uninsured and cancelled, the Fund was not permitted by the Regulations to provide compensation.

THE LAW:

Section 50(1) of Regulation 806/93 under the *Travel Industry Act* states that:

Section 50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- a) the customer made payment for the travel services directly to or through a registered travel agent;
- b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- c) the customer has not been reimbursed by,
 - i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - ii) any other person who has received the customer's money, or
 - iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

.....

Section 50(2) A reimbursement under Section (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided.

Section 53. A customer or a registrant shall make a claim for reimbursement in writing to the board of directors within six months after the event that gave rise to the claim for reimbursement.

Section 54(1) The claimant shall provide such evidence to the board of directors as it may require to prove the claim.

CASELAW:

Kenneth Sadovnick (C.R.A.T.) January 24, 1995

The Applicant in this matter had purchased 2 non-refundable return tickets to Port of Spain, and bought cancellation insurance in the event he found employment and could not travel. He was required to appear in Court and cancelled his trip. His claim was denied as the travel service was available but he was unable to travel. The Tribunal held that the Ontario Travel Agency Compensation Fund is not a program of insurance to protect travellers against any losses and sets strict requirements which must be met for a claim to be successful. The appeal was denied.

Victoria Molina (C.R.A.T.) October 13, 1995

This claim was denied as it was found to be out of time and there was no proof that payment was made to a registered travel agent. The Applicant in this case attempted to file the claim, but she could not prove when the first attempts were made, and the claim form was received after the deadline. The Tribunal found that the time limit was not a guideline, but was a mandatory date for filing, and the appeal was denied.

Labib Al-Salamony (C.R.A.T.) March 26, 1999

The Applicant in this matter purchased a ticket to travel but was ill and had to cancel. The ticket was 100% non-refundable, and he did not buy cancellation insurance. He testified that the agent told him that if he cancelled he would only lose \$100.00 and would have an open ended travel arrangement. His appeal was denied as the deadline for filing his claim was found to be mandatory, and also he had cancelled the trip, and the services had been available to be used. Even if the agent had extended a "good will gesture" to him, this was not covered by the Compensation Fund.

ANALYSIS:

The Applicant in this matter cancelled her trip due to the most noble motives as she wished to provide care to her employer who was terminally ill, and eventually died. The Applicant had previous experience with the travel agency allowing her to travel after a cancellation; however, in this case, the company ceased operation. The Applicant was not aware of the applicable laws and did not obtain a Customer Claim Form until the prescribed deadline had passed. In this case, even if the form had been filed in time the reservation was 100% non-refundable

and would not have been eligible for compensation in any event. It is a very unfortunate circumstance as the Applicant acted out of the best motives in cancelling her trip and now is not able to fit within the terms of the Act or the prescribed time limit to receive compensation.

The Tribunal accepts the submission of counsel for the Travel Industry Council of Ontario that this claim is excluded due to the limitation period as set out in Section 53 of the Regulation 806/93. Accepting the proposition that the latest date for the event that gave rise to this claim is the business failure of the Sunkiss Travel Agency, then the Applicant would have had to file her claim by no later than March 29, 2000. This claim was not filed until July 26, 2000.

The Tribunal further accepts the submission that this section is a mandatory section, the word "shall" makes it mandatory and precludes the Tribunal from exercising any discretion to permit an extension of time frame for filing the claim.

Therefore, the Tribunal must deny the claim by the Applicant.

ORDER:

Accordingly, pursuant to the authority vested in it by the provisions of the *Travel Industry Act* and Regulations made thereunder, the Tribunal directs the Travel Industry Council of Ontario to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair, Presiding

Released: January 17, 2001

BRIAN H. CLEMENTS o/a EASTONS CORNER AUTO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BRIAN H. CLEMENTS o/a EASTONS CORNER AUTO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: October 10, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

BRIAN H. CLEMENTS o/a EASTONS CORNERS AUTO

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Brian H. Clements o/a Eastons Corners Auto, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 18, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Brian Clements
o/a Eastons Corners Auto
1803 Country Rd. 16
RR 3
Jasper, ON K0E 1G0

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Brian Clements o/a Eastons Corners Auto hereby consent to the following terms and conditions to his registration as a motor vehicle dealer and in accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Dealer shall forthwith enter into a repayment plan with the Ministry of Finance for the repayment of all monies currently outstanding, and the dealer shall provide proof to the registrar that a repayment plan has been entered into between the Dealer and the Ministry of Finance. The Dealer shall provide the Registrar with proof of a repayment agreement within 60 days of the date of this order.
2. The Dealer agrees to comply with all of its obligation pursuant to the Retail Sales Tax Act and shall ensure that all monies collected and all remittances and returns are remitted/filed with the Ministry of Finance when due.
3. The dealer acknowledges that these Terms and Conditions do not prevent the Registrar from taking any legal action against it, which may include, but is not limited to a provincial offences prosecution, administrative action or proposal.

4. The Dealer agrees to comply with the Code of Ethics and the Standards of Business Practice.
5. The Dealer agrees not to invite the public to deal at a place other than its approved location.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location of the Registered premise in the form required by the Registrar.
7. The Dealer shall maintain a sign and office as required by the Motor Vehicle Dealers Act.
8. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
9. The Dealer will ensure that all vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
10. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
11. The Dealer agrees to register in its name, all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
12. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
13. The Dealer acknowledges that if he breaches any of the Terms and Conditions herein the Registrar is directed to and shall carry out the Proposal.
14. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
15. The Dealer hereby withdraws his appeal to the Licence Appeal Tribunal.

16. The Dealer hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 200 .

Brian Clementso/a Eastons Corners Auto

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar MVDA

McWaters

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

RONALD M. McWATERS

IN THE MATTER of an APPEAL of AN ORDER TO
IMPOUND A MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of
Motor Vehicles made pursuant to section 55.1 of the
Highway Traffic Act of an Order to Impound a motor vehicle
for a period of 45 days dated September 24, 2000

AND IN THE MATTER of a requirement for a hearing
respecting the said ORDER

RONALD M. McWATERS

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Ronald M. McWaters (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of that Act, dated September 24, 2000 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and

Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated September 24, 2000 to impound the Ronald M. McWaters motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 23, 2001

SIMMONS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NOEL A. SIMMONS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 26, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

NOEL A. SIMMONS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Noel A. Simmons, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 26, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Noel A. Simmons
7 – 1301 Weston Road
Toronto, ON
M6M 4R4

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Noel Alphonso Simmons (hereinafter referred to as "the Applicant"), and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the Act to another dealer without the prior written consent of the Registrar.
4. The Applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant will not be the final signatory on any bills of sale.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant agrees that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Applicant agrees that he will not be involved with the buying and selling of motor vehicles without the benefit of registration.
9. The Applicant acknowledges and understands that his registration will not be used to sell motor vehicles where the Applicant knows or ought to know that the sale of those motor vehicles will facilitate an illegal or unethical practice.

10. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.

Noel A. Simmons (initials)

11. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to his financial circumstances and his honesty and integrity.
12. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
13. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
14. The Applicant will provide a copy of this order to his employer forthwith.
15. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
16. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
17. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto this ____ day of January, 2001.

Noel Simmons

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

JANS

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
JOHN AND MONICA JANS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

JOHN AND MONICA JANS

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 1-2, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, April 11, 2001, and to continue April 12, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 18, 2001

MASOUD POURAZIZ o/a STOP 55 AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MASOUD POURAZIZ o/a STOP 55 AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 26, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

MASOUD POURAZIZ o/a STOP 55 AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Masoud Pouraziz o/a Stop 55 Auto Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 29, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: Masoud Pouraziz
O/a Stop 55 Auto Sales
1-127 Raleigh Ave
Scarborough, ON M1K 1A1

Masoud Pouraziz
O/a Stop 55 Auto Sales
302-60 Pavan Laneway
North York, ON M3C 1A1

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Masoud Pouraziz o/a Stop 55 Auto Sales (hereafter the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to his registration as a motor vehicle Applicant:

1. The Applicant acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicant.
2. The Applicant further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of the Applicant. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicant.
3. The Applicant agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Applicant further agrees to store its books and records at the location approved

- by the Registrar and to allow representatives of the Registrar's office access to the books and records.
4. The Applicant will ensure that all advertisements placed by or on behalf of the Applicant will identify his registered name and the address of the location approved by the Registrar.
 5. The Applicant agrees that his registration shall be restricted to wholesale transactions.
 6. The Applicant agrees to operate exclusively from the location approved by the Registrar. The Applicant agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar.
 7. The Applicant agrees to display a sign that is visible to the public, stating the dealership name.
 8. The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
 9. The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
 10. The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
 11. The Applicant agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
 12. The Applicant agrees that he is under a positive obligation to disclose in writing, all material facts about the vehicles they sell to its customers, including other dealers. Material facts include, but are not limited to, salvage, previous salvage, rebuilt, accidented and repaired, theft recovery, previous taxi cab, previous police car, unibody damage, previous daily rental, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed. The Applicant agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Applicant and/or Salesperson has sold, the Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
 13. The Applicant agrees to comply with the OMVIC Code of Ethics and Standards of Business Practice.

14. The Applicant acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
15. The Applicant acknowledge that the Registrar may take further administrative action, including a proposal to revoke their registrations, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
16. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Applicant and Salesperson agree and acknowledge that should the Applicant breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 200____.

(Signature) Masoud Pouraziz
o/a Stop 55 Auto Sales

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

POLSINELLI

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
VINCENZO POLSINELLI

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: November 7, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Decision

VINCENZO POLSINELLI

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on February 22, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Thursday, April 5, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 8, 2001

NORTHERN INTERNATIONAL TRAVEL

1338904 ONTARIO INC. O/A NORTHERN INTERNATIONAL TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1338904 ONTARIO INC. O/A NORTHERN INTERNATIONAL
TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 31, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

1338904 ONTARIO INC. O/A NORTHERN
INTERNATIONAL TRAVEL

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1338904 Ontario Inc. o/a Northern International Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 22, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

**1338904 ONTARIO INC. O/A NORTHERN
INTERNATIONAL TRAVEL**

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

13.1338904 Ontario Inc. o/a Northern International Travel (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 4661955) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **March 11, 1999**.

14. On **February 3, 1999**, prior to the Registrant's registration, Ms Viola Kaloutsi, on the Registrant's behalf, agreed to comply with the prescribed terms and conditions of registration as are set out in sections 7 to 35 of Regulation 806/93 made under the Act (hereinafter "the Regulation"). Among the terms and conditions to which Ms Kaloutsi agreed was the requirement to maintain a minimum working capital level that is dependant on the Registrant's sales according to section 25 of the Regulation.

WORKING CAPITAL – THE GROUNDS FOR THE PROPOSAL

15. Subsection 25(1) of the Regulation states that a registrant shall maintain a minimum working capital of \$5,000.00 if the registrant had sales in Ontario of less than \$1.5 million during the previous fiscal year.
16. The Registrant's gross sales reported in the financial statements for its fiscal year-ended **November 30, 1999** were \$136,178.00, thus requiring the Registrant to have a minimum working capital of \$5,000.00.
17. The Travel Industry Council of Ontario's ("TICO") review of the Registrant's financial statements for the year-ended **November 30, 1999** revealed a working capital deficiency of \$33,786.00 or a total working capital shortfall of \$38,786.00.
18. By letter dated **June 8, 2000**, the Registrant was advised by TICO of the working capital shortfall and asked to address the shortfall and provide information on what steps had been taken to address the shortfall by **June 30, 2000**.
19. By letter dated **August 1, 2000**, the Registrant was given a final due date of **August 11, 2000** to address the working capital shortfall of \$38,786.00.
20. On **August 10, 2000**, the Registrant faxed TICO copies of bank balances to address the working capital shortfall, which were unacceptable.
21. On **August 11, 2000**, TICO notified the Registrant that the **August 10th** copies of its bank statements were unacceptable. The Registrant advised that it would contact its accountant with further details of shareholder injections.
22. On **August 31, 2000**, the Registrant's accountant telephoned TICO and advised that acceptable evidence that shareholder advances had been made to correct the working capital shortfall would be forwarded to TICO.
23. On **October 4, 2000**, TICO received a telephone call that the accountant was in Greece and would require a few more days in order to provide evidence to satisfy the working capital shortfall.

24. By **October 31, 2000**, the working capital shortfall was not corrected. So, on that date, the Registrar issued a Proposal to Revoke the Registrant's registration based on the Registrant's failure to comply with the working capital requirements under subsection 25(1) of the Regulation.
25. To date, the Registrant's working capital deficiency has not been corrected.
26. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (v) the Registrar refrain from carrying out the Proposal to Revoke Registration dated **October 31, 2000**;
- (vi) the Registrant's registration is to be subject to the following terms and conditions:
 - (k) The Registrant shall file complete financial statements for its fiscal year ended **November 30, 2000** and correct any and all working capital deficiencies and provide proof of such correction, to the satisfaction of the Registrar, by **February 1, 2001**. At all times thereafter, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (l) The Registrant shall file complete financial statements as required pursuant to section 24 of the Regulation, for the fiscal year ended **November 30, 2001**, no later than **February 28, 2002**;
 - (m) The Registrant shall file complete financial statements as required pursuant to section 24 of the Regulation, for the fiscal year ended **November 30, 2002**, no later than **February 28, 2003**;
 - (n) If any of the Registrant's financial statements for its future fiscal years reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.

- (vii) Should the Registrant fail to comply with conditions (ii) (a) to (d) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- (viii) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of January, 2001

Ms Viola Kaloutsi
1338904 Ontario Inc. o/a Northern International Travel
Travel Industry Act
I have authority to bind the corporation

Mr. Michael Pepper
Registrar,

ABC AUTO SALES AND SERVICE AND EBRAHIM JAVADY TORABI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ABC AUTO SALES AND SERVICE AND EBRAHIM JAVADY
TORABI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: November 7, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

ABC AUTO SALES AND SERVICE AND
EBRAHIM JAVADY TORABI

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by ABC Auto Sales and Service and Ebrahim Javady Torabi, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 26, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: ABC Auto Sales & Service
1-3560 St. Clair Ave. East
Scarborough, ON M1K 1M2

Ebrahim Javady Torabi
182 Hillview Drive
Richmond Hill, ON L4C 1T2

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, ABC Auto Sales & Service, a partnership (hereafter the "Dealer"), Ebrahim Javady Torabi (hereafter the 'Salesperson'), and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle dealer and Salesperson:

1. The Dealer agrees if he is charged in the future, to immediately notify the Registrar in writing.
2. The Dealer agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
3. The Dealer agrees to make full disclosure on all applications submitted to the Registrar's office.
4. The Dealer agrees not to transfer his registration under the *Motor Vehicle Dealers Act*.
5. The Dealer agrees that Mehrdad Arabi shall have no interest whatsoever, either directly or indirectly in the dealership.
6. The Dealer acknowledges that he is the sole officer and director of 1454066 Ontario Inc. and is the sole shareholder. The Dealer further acknowledges that

should another party acquire shares in the corporation or should another individual become an officer and/or director of the corporation, the Dealer shall immediately advise the Registrar in writing and will submit an individual application to the Registrar for any new officer, director or shareholder.

7. The Dealer agrees that Mehrdad Arabi does not have nor will the dealer allow Arabi to acquire any interest whatsoever, either directly or indirectly in 1454066 Ontario Ltd.
8. The Dealer agrees that Mehrdad Arabi will not be involved in any way with Dealer.
9. The Dealer agrees not to conduct any business with Mehrdad Arabi, and in particular will not buy, lease or sell any vehicles either directly or indirectly with Mehrdad Arabi.
10. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
11. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
12. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Dealer further agrees to store his books and records at the location approved by the Registrar.
13. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify his registered name and the address of the location approved by the Registrar.
14. The Dealer agrees not to invite the public to deal at a place other than his approved location.
15. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar.
16. The Dealer agrees to display at the registered premises a sign that is visible to the public, stating the dealership name.

17. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
18. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
19. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
20. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
21. The Dealer agrees that he is under a positive obligation to disclose in writing, all material facts about the vehicles he sells to his customers. Material facts include, but are not limited to, salvage, previous salvage, rebuilt, accidented and repaired, theft recovery, previous taxi cab, previous police car, unibody damage, previous daily rental, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
22. The Dealer agrees to comply with the OMVIC Code of Ethics and Standards of Business Practice.
23. The Dealer will comply with all of his requirements pursuant to the Retail Sales Tax Act.
24. The Dealer acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
25. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
26. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

27. The Salesperson agrees to be bound by and comply with all of the Terms and Conditions set out herein, and further agrees that should he breach any of the Terms and Conditions, his registration shall be revoked.
28. The Dealer and Salesperson agree and acknowledge that should either the Dealer or salesperson breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Dealer's and Salesperson's registrations.
29. The Dealer and Salesperson hereby withdraws their appeals to the Licence Appeal Tribunal.
30. The Dealer hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of January, 2001.

(Signature) ABC Auto Sales & Service.
I have authority to bind the Dealer

(Signature) Ebrahim Javady Torabi

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

EVANIUK

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
OLEKSANDR EVANIUK O/A ALEX EVANIUK

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REFUSE REGISTRATION
- Proposal dated: November 6, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

OLEKSANDR EVANIUK O/A ALEX EVANIUK

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on April 17-18, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, April 24, 2001, and to continue April 25, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 29, 2001

PADOVANI TRAVEL AGENCY

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
PADOVANI TRAVEL AGENCY LIMITED O/A PADOVANI TRAVEL
AGENCY LIMITED
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 6, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

PADOVANI TRAVEL AGENCY LIMITED O/A
PADOVANI TRAVEL AGENCY LIMITED

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Padovani Travel Agency Limited o/a Padovani Travel Agency Limited, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 23, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

PADOVANI TRAVEL AGENCY LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

27. Padovani Travel Agency Ltd. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered, under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 4484945) since **January 13, 1997** and as a travel wholesaler (registration number 4561973) since **December 18, 1997**.

28. On **October 30, 1996**, prior to the Registrant's registration, Mr. Michael Giambattista, on the Registrant's behalf, agreed to comply with the prescribed terms and conditions of registration as are set out in sections 7 to 35 of Regulation 806/93 made under the Act (hereinafter "the Regulation"). Among the terms and conditions to which Mr. Giambattista agreed was the requirement to file financial statements in accordance with

section 24 of the Regulation and the requirement to maintain a minimum working capital level that is dependant on the Registrant's sales according to section 25 of the Regulation.

COMPLIANCE HISTORY – PREVIOUS PROPOSAL

29. By letter dated **June 23, 1999**, the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for its fiscal year ended **July 31, 1999** by **October 31, 1999**.
30. On **November 2, 1999**, TICO sent a second request to the Registrant for the financial statements for its year ended **July 31, 1999**, which were due on or before **October 31, 1999**.
31. On **November 18, 1999**, TICO sent a final request for the Registrant's **July 31, 1999** financial statements and gave the Registrant a filing deadline of **December 2, 1999**, failing which a proposal to revoke the Registrant's registration would be issued.
32. By **December 17, 1999**, the Registrant had failed to provide its **July 31, 1999** financial statements. On that date, the Registrar, *Travel Industry Act* issued a proposal to revoke the Registrant's registration.
33. On **December 30, 1999**, TICO received the Registrant's financial statements for its year ended **July 31, 1999**.
34. On **June 2, 2000**, the Registrar withdrew the **December 17, 1999** proposal with the proviso that any subsequent proposal may not be withdrawn, even if there is compliance after the proposal has been issued.

FORM 1 FILING – GROUNDS FOR THE CURRENT PROPOSAL

35. By letter dated **September 26, 2000**, TICO advised the Registrant that it had failed to file its Form 1 for the period ended **July 31, 2000**, which was due on or before **September 15, 2000**. The Registrant was requested to submit the required filing by **October 10, 2000**.
36. On **October 10, 2000**, TICO provided the Registrant with a deadline to submit the required filing by **October 24, 2000**, failing which a proposal to revoke the Registrant's registration would be issued.
37. By **November 6, 2000**, the Registrant failed to submit its filing. On that date, the Registrar issued a proposal to revoke the Registrant's registration.
38. On **November 10, 2000**, the Registrant submitted its Form 1 filing.

39. On **November 28, 2000**, the Registrant appealed the Registrar's **November 6, 2000** proposal to revoke the Registrant's registration.

EVENTS AFTER THE ISSUANCE OF THE PROPOSAL

40. On **November 1, 2000**, the Registrant submitted its financial statements for its year ended **July 31, 2000**. TICO's review of these statements revealed a working capital shortfall of \$190,479.00 due to shareholder drawings during the year.
41. By letter dated **November 28, 2000**, TICO advised the Registrant of the working capital shortfall and required the Registrant to provide evidence that the working capital shortfall had been corrected by shareholder advances or otherwise by **December 12, 2000**.
42. After speaking to the Registrant's accountant on **December 1, 2000**, TICO granted the Registrar until **December 18, 2000** to correct the working capital shortfall.
43. On **January 11, 2001**, the Registrant addressed its working capital shortfall by providing a Letter of Credit in the amount of \$191,000.00.
44. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (ix) the Registrar refrain from carrying out the Proposal to Revoke Registration dated **November 6, 2000**;
- (x) the Registrant's registration is to be subject to the following terms and conditions:
 - (o) The Registrant shall at all times satisfy the minimum working capital requirements of section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (p) The Registrant shall file complete financial statements as required by section 24 of the Regulation, for the fiscal year ended **July 31, 2001**, no later than **October 31, 2001**;

- (q) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for the fiscal year ended **July 31, 2002**, no later than **October 31, 2002**;
- (r) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for the fiscal year ended **July 31, 2003**, no later than **October 31, 2003**;
- (s) If any of the Registrant's financial statements for its future fiscal years reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.
- (t) The Registrant shall complete its Form 1 filing for its fiscal half year ending **January 31, 2001** and make all applicable payments to TICO by **March 15, 2001**, as required by section 47 of the Regulation;
- (u) The Registrant shall complete its Form 1 filing for its fiscal year ending **July 31, 2001** and make all applicable payments to TICO by **September 15, 2001**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
- (v) The Registrant shall complete its Form 1 filing for its fiscal half year ending **January 31, 2002** and make all applicable payments to TICO by **March 15, 2002**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
- (w) The Registrant shall complete its Form 1 filing for its fiscal year ending **July 31, 2002** and make all applicable payments to TICO by **September 15, 2002**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time; and
- (x) The Registrant shall complete its Form 1 filing for its fiscal half year ending **January 31, 2003** and make all applicable payments to TICO by **March 15, 2003**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.
- (xi) Should the Registrant fail to comply with conditions (ii) (a) to (j) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.

- (xii) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of January, 2001

Mr. Michael Giambattista
Padovani Travel Agency Ltd.
Travel Industry Act
I have authority to bind the corporation

Mr. Michael Pepper
Registrar,

TIECO MANUFACTURING

TIECO MANUFACTURING

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: Nives Montano
Presiding member

APPEARANCES: Kim Grosskurth
Representative for the Registrar of Motor
Vehicles

David Williams
Representative for the Applicant

DATE OF HEARING: December 28, 2000 Toronto

DECISION RELEASED: January 2, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing was held on December 28, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	TIECO Manufacturing (the "Applicant")
Motor Vehicle:	1989 Dodge Cargo Van, plate # AFVJ 128 (the "vehicle")
Date of Appeal:	December 8, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on December 28, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"As the owner/operator of TIECO Manufacturing I would like to ask that the van specified in these documents be released from impoundment because of the following reasons.

The employee that was driving the vehicle (J Huntley) has been in our employ 1987 and is mainly utilized as a maintenance person for our shop and offices.

We were aware that John was required to attend court proceedings regarding a charge that would put his drivers licence at risk. Mr. Huntley attended court on at least 2 different occasions and we questioned him as to the outcome of each court appearance. We understood that the last court appearance was to be the deciding factor for his case. When Mr. Huntley returned from his last court appearance our General Manager (Kirk Williams) approached him and inquired as to what had happened at court. John told Kirk Williams (General Manager) that he didn't lose his licence and asked if he wanted to see it, Kirk felt that this was not necessary, as he had no reason to disbelieve Mr. Huntley. Mr. Williams's statement is provided with these documents.

In addition to Mr. William's statement you will find a statement from our Shop Foreman, Mr. Bruce Jasper. He also asked Mr. Huntley about the result of his court appearance and was shown the drivers licence, and he also felt that as he had the actual drivers licence that it was indeed valid.

When Mr. Huntley was stopped and subsequently charged with driving while under suspension, he also presented his licence to the officers that stopped him. It was at this time that Mr. Huntley was told by the officer that he was driving while having a suspended drivers licence. When he called Mr. Huntley to our office to ask what the situation was he was very confused about the charge and to find out that he didn't have

valid licence. Mr. Huntley has been a loyal and trustworthy employee for his time with us and we did believe him when he showed us his licence and we also believe him that he had no idea that he was doing anything wrong.

We feel that we made every effort to ascertain that the person driving our vehicle was a licenced driver and we also felt that Mr. Huntley should have had to surrender his licence to authorities when suspension was given, and that he was in possession of it was proof enough it was valid.

We use this vehicle for the day to day running of our business and feel that it is unfair for us to be deprived of its use, as well as burdened with the financial responsibility of clearing up the charges relating to the towing and impoundment of it.”

David Williams
Owner

The following is a summary of the David Williams' affirmed testimony. He is the owner of Tieco Manufacturing (the "Applicant").

The Applicant has been in the marine business since 1958. The company manufactures floating docks, barges and structures for distribution in Ontario and throughout the United States. It employs approximately 30 to 50 employees and owns 4 vehicles.

Mr. Huntley has been employed with the Applicant for approximately 10 years as a janitor. He is also the driver of the impounded vehicle.

David Williams and 2 other employees, the General Manager and Shop Foreman, were aware that Mr. Huntley had to appear in court on at least 2 occasions regarding impaired driving charges. When Mr. Huntley returned from his final court appearance, both the General Manager and the Shop Foreman inquired into the status of his driver's licence. Mr. Huntley advised the Shop Foreman that the court did not take away his privilege to drive and proceeded to show him his driver's licence. Sworn statements by the General Manager and the Shop Foreman have been entered as Exhibit #4.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit #3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John L. Huntley;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in excess of .08, under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 29, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Mr. Huntley’s driver’s licence at the time in respect of which the order was made was not then under suspension.

Mr. Williams testified that the Applicant is the owner of the vehicle that has been impounded and at the time of impoundment Mr. Huntley was driving the vehicle.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

In the course of the hearing, the impoundment itself became a concern of the Tribunal.

Subsections 55.1(2) and (3) of the Act state:

- (2) Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42, even if it is under suspension at the same time for any other reason, the officer shall,
 - (a) notify the Registrar of the fact or cause the Registrar to be notified; and
 - (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Mr. Williams testified that an OPP officer stopped the vehicle on Friday, December 1, 2000 at approximately 11:15 a.m. on a side road between Lansdowne and another small town in rural Ontario. The officer who appears to have filled out the Notice to Registrar was Office McIvor (Badge No. 9706) of the Gananoque OPP (part of Exhibit #3 and Exhibit #4).

However, the Order to Impound (Exhibit #1) was not issued until Wednesday, December 6, 2000.

When asked by the Tribunal, Mr. Williams advised that he did not see the vehicle being towed away. He did not know where the vehicle was for those 6 days nor does he know where it is at the present time.

When this matter was raised with the representative for the Registrar, she was unable to confirm the cause for the 6 lapsed days of delayed impoundment. She indicated that she would call the investigating officer once she returned to her office to ascertain the details. The representative did not request an adjournment to obtain evidence confirming that the impound order was issued, as required by subsection 55.1(3) "Upon notification" by the police officer that the vehicle was detained. The lapse of six days between the detention of the vehicle and the issuance of the impoundment order raises this concern.

Therefore, the Tribunal has no documentary or oral evidence that the impoundment occurred as required by section 55.1(3) of the HTA, "Upon notification under subsection (2)". Instead, the evidence of a six day delay between the detention of the vehicle and the issuance of the impoundment order supports the conclusion that the impoundment did not occur upon notification.

The jurisdiction of the Tribunal with respect to a hearing is set out as follows:

50.2(5) The Tribunal may confirm or set aside the Order to Impound."

On the evidence, the impoundment does not appear to be in compliance with subsection 55.1(3) of the HTA. Accordingly, the Tribunal is unable to confirm the impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: January 2, 2001

1308580 ONTARIO CORPORATION O/A MARLIN TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1308580 ONTARIO CORPORATION O/A MARLIN TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 23, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

1308580 ONTARIO CORPORATION O/A
MARLIN TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1308580 Ontario Corporation o/a Marlin Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 22, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

**1308580 ONTARIO CORPORATION O/A MARLIN
TRAVEL**

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1308580 Ontario Corporation o/a Marlin Travel (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **December 14, 1999**. The Registrant's business fiscal year end is **June 30th**.
2. Prior to registration, on **November 20, 1999**, the Registrant agreed to comply with the terms and conditions for all registrants under the Act and Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation"). Among the terms and conditions of registration to which the Registrant agreed was the requirement, under section 24 of the Regulation, to file

financial statements reviewed by a licenced public accountant at fiscal year end or more frequently depending on the Registrant's sales volume and the requirement, under section 25 of the Regulation, to maintain minimum working capital.

FAILURE TO FILE FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

3. By letter dated **May 31, 2000** the Travel Industry Council of Ontario ("TICO") requested that the Registrant provide the financial statements for its year-ended **June 30, 2000** by **September 30, 2000**.
4. On **October 19, 2000** TICO issued a "reminder" letter informing the Registrant that its financial statements had not been received by the **September 30th** due date and requiring the Registrant to file its financial statements on or before **October 31, 2000**.
5. On **November 3, 2000**, the Registrar sent a third request to the Registrant, which provided the Registrant with a **November 17, 2000** deadline to submit its financial statements, failing which, a proposal to revoke its registration would be issued.
6. By **November 23, 2000**, the Registrant had failed to submit its financial statements for the year-ended **June 30, 2000**. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.

WORKING CAPITAL SHORTFALL

7. Subsection 25(1) of the Regulation states that a registrant shall maintain a minimum working capital of \$5,000.00 if the registrant had sales in Ontario of less than \$1.5 million during the previous fiscal year.
8. The Registrant submitted its financial statements for the year-ended **June 30, 2000**, which were due by **September 30, 2000**, on **January 19, 2001**. TICO's review of the statements revealed a working capital deficiency of \$17,613.00 or a total working capital shortfall of \$22,613.00.
9. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (xiii) the Registrar refrain from carrying out the Proposal to Revoke Registration dated **November 23, 2000**;
- (xiv) the Registrant's registration is to be subject to the following conditions:
 - (y) The Registrant shall correct any and all working capital deficiencies and provide proof of such correction, to the satisfaction of the Registrar, by **February 28, 2001**. At all times thereafter, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of the Regulation or such subsequent provision as may be in force from time to time, and which it has acknowledged in its Terms and Conditions of Registration;
 - (z) The Registrant shall file complete financial statements for the fiscal year ended **June 30, 2001** no later than **September 30, 2001**;
 - (aa) The Registrant shall file complete financial statements for the fiscal year ended **June 30, 2002** no later than **September 30, 2002**;
 - (bb) In the future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time on or before the legislated due date;
 - (cc) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
- (xv) Should the Registrant fail to comply with any of the above conditions (ii) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- (xvi) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of January, 2001

Mr. Dimithri Pieris

1308580 Ontario Corporation o/a Marlin Travel
I have authority to bind the corporation

Mr. Michael Pepper

Registrar, *Travel Industry Act*

THRIFTY CANADA, LTD.

THRIFTY CANADA, LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor
Vehicles

MIKE HARRISON, Agent for Applicant
unrepresented

DATE OF HEARING: January 4, 2001

DECISION RELEASED: January 5, 2001 Toronto

REASONS FOR DECISION

A hearing was held on January 4, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Thrifty Canada, Ltd. (the "Applicant")
Motor Vehicle:	2000 GCK Jeep, plate # 084464277 (the "vehicle")
Date of Appeal:	December 15, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on January 4, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states (Exhibit #2):

"Thrifty Canada, Ltd. (TCL) is a franchisor and Performance Vehicle Rental Inc. (Performance) is a franchisee of TCL. TCL leases the vehicle impounded to Performance for daily rental purposes under the Thrifty brand. Performance rented the impounded vehicle to Ms. M.P. Jeanette Curnew on November 24, 2000. Ms. Curnew's Driver's License number is C9389-50176-65421 with an expiry date of 4/21/03. Performance undertook all reasonable due diligence available to it, to ensure that Ms. Curnew had a valid drivers license at the time of rental. On or about December 07, 2000 Performance was notified that the vehicle rented by Ms. Curnew had been impounded. Neither Performance or TCL could have or should have known that Mr. B. Curnew had a suspended license or would be in control of the impounded vehicle."

Mike Harrison is the Director, Franchise Operations for Thrifty Canada, Ltd. (the "Applicant"). Performance Vehicle Rental Inc. ("Performance") leases its vehicles from the Applicant who then, in turn, rents these vehicles to customers. The minimum rental period is 1 day to a maximum rental period of 30 days. Performance has approximately 100 fleet vehicles, of which 70 to 80 are rented out each week.

Performance rented the impounded vehicle to Ms. M.P. Jeanette Curnew on November 24, 2000 and said vehicle was to be returned to Performance on December 2, 2000. The vehicle was not returned to Performance and on December 6, 2000, the Hamilton/Wentworth police stopped Mr. William Curnew, the driver of the impounded vehicle, and the vehicle was impounded.

In Mr. Harrison's sworn testimony, he indicated that the standard operating policy for the Applicant including its approximate 30 franchisees is that the customer has a valid driver's licence and credit card. Once the rental agreement has been signed, the customer's signature on the rental agreement is compared to the customer's signature on his/her driver's licence. It is at this point that the customer's driver's licence is more thoroughly examined. The customer must have a credit card, for security deposit purposes, and its signature is also compared.

Mr. Harrison also testified that the Applicant and its franchisees could not afford to obtain driver's abstracts on each individual customer, as the rental car business has a very competitive market and this cost could not be streamlined to each customer. He is of the view that this process would also impose financial harm to the franchisees. The Applicant and franchisees do not want to be the collectors of towing, impoundment fees and lost revenue since this is a difficult

and, in most cases, fruitless process. Mr. Harrison has suggested that this should be an area where both the Ministry and government should assist this type of industry.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits #3 and #4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by William Curnew;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 26, 2004.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the William Curnew's driver's licence at the time in respect of which the order was made was not then under suspension.

Mr. Harrison testified that the Applicant is the owner of the vehicle that was leased to Performance which was ultimately impounded and at the time of impoundment the vehicle was being driven by William Curnew whose driver's licence was then under suspension.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

Mr. Harrison indicated that terms and conditions are located on the back of the rental agreement but steps had been taken for the following wording to be clearly visible and prominent on the front of the rental agreement just above renter's signature line:

"THE LESSEE OR THE SIGNATORY TO THIS CONTRACT CERTIFIES THAT HE OR SHE HOLDS A VALID DRIVER'S LICENSE FOR THE OPERATION OF THE VEHICLE(S) REFERRED TO IN THE CONTRACT AND AGREES TO ENSURE THAT ANY PERSON WHO OPERATES THE VEHICLE(S) IN QUESTION HOLDS A VALID DRIVER'S LICENSE OF THE PROPERTY CLASS".

With reference to the above clause, the Applicant and its franchisees are attempting to remove themselves from liability in the event the customer renting the vehicle and/or any other driver do not have a valid driver's licence. This is

not a means of exercising due diligence. Ms. Curnew signed the rental agreement and was responsible for the care and control of the impounded vehicle. She should now be responsible for the charges incurred due to the impoundment.

In his testimony, Mr. Harrison indicated that the Applicant and franchisees rely on the honesty and integrity of their customers in providing a valid driver's licence. Merely viewing a driver's licence does not in itself ensure its validity.

Neither the Applicant nor Performance took any measures at any time prior to the execution of the above-mentioned rental agreement to ensure that Ms. Curnew had a valid driver's licence. Furthermore, there was no evidence heard that would confirm the Applicant and Performance's actions are anything but passive in nature.

The evidence before the Tribunal is that the Applicant has not demonstrated that it made any attempts to satisfy the due diligence requirements of Section 50.2(3)(c) the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano,
Presiding Member

RELEASED: January 5, 2001

WONG

TOMMY WONG

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

TOMMY WONG, Applicant

KENNY YU, Agent for Applicant

DATE OF HEARING: January 4, 2001

DECISION RELEASED: January 9, 2001 Toronto

REASONS FOR DECISION

A hearing was held on January 4, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Tommy Wong (the "Applicant")
Motor Vehicle:	1990 Dodge Caravan, plate # AAPZ 841 (the "vehicle")
Date of Appeal:	December 15, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 4, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals which were entered into evidence as exhibit #3.

All documents were submitted into evidence with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- (1) Because my vehicle is sold to someone else as you are leaving Ontario to go back to Quebec.
- (2) I have financial hardships and want my vehicle released as soon as possible.

The Applicant stated that in May of 1999 he was charged with an alcohol related driving offence and his licence was subsequently suspended. At some time after this, he moved back to live in Montreal. In November of 2000 he drove his vehicle back into Ontario for the purpose of selling it to a buyer in Toronto for which he had already received a deposit for the purchase of the vehicle. While driving the vehicle from Montreal, the Applicant was stopped by police, who found his licence to be then under suspension, and his vehicle was impounded.

The Applicant and his family have managed to maintain their daily activities through the use of public transit, both in Toronto and in Montreal, as well as obtaining rides from friends. The Applicant claims that the loss of the vehicle, and the delay in selling it, has deprived him of the financial resources he needs to travel back home to Montreal, and to purchase another vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Tommy Wong;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 30, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name

appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making

arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant has claimed that the impoundment has affected his financial situation, and his ability to sell this vehicle. However, section 22(3)(d) of Regulation 632/98 precludes the Tribunal from considering the impact of any loss as a result of the impoundment that may be upon the person who was driving the vehicle at the time of the impoundment while their driver's licence was then under suspension. Here, the Applicant was the driver of the vehicle at the time of the impoundment. Therefore, the Tribunal may not consider the impacts of the loss that may be experienced by the Applicant. Furthermore, there was no evidence heard at this hearing that would indicate that the Applicant's family, or any other person normally transported by this vehicle, has experienced an exceptional hardship as a result of the impoundment.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. The Tribunal finds that the Applicant's statement that an alternative is simply not possible due to his financial limitations, and therefore was not inquired into, is insufficient in meeting the onus under this section of the Regulation. The Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: January 9, 2001

COLE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LUCAS D. COLE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 7, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

LUCAS D. COLE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Lucas D. Cole, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 11, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Lucas D. Cole
208 St. Vincent Street
Barrie, ON L4M 3Z6

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Lucas D. Cole (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Power Procedures Act, do hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, his registration is automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
6. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

10. The Applicant will provide a copy of this order to his employer forthwith.

Lucas D. Cole (initials)

11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of January 2001.

Lucas D. Cole (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

YADRAM

ROZANNA YADRAM

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

ROZANNA YADRAM, Applicant
unrepresented

DATE OF HEARING: January 19, 2001

DECISION RELEASED: January 24, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing was held on January 19, 2001, at Toronto, Ontario, by teleconference to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Rozanna Yadram (the "Applicant")
Motor Vehicle:	2000 Oldsmobile Silhouette, plate # AHYA 539 (the "vehicle")
Date of Appeal:	December 27, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 19, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals which were entered into evidence as exhibit #3.

All documents were submitted into evidence with the consent of both parties.

The Respondent informed the Tribunal that the Registrar had not received the Owners Position In Appeal, which was written on the reverse side of the Notice of Appeal. The Tribunal provided the Respondent with a copy which was then reviewed.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- (1) I am appealing that consideration be given for the release of my vehicle due to the hardship I'm experiencing getting my children to school, my mother to the doctor's and myself to work. I had no idea that the driver's licence was under suspension. I'm extremely stressed out about the fact that the vehicle would be impounded for 45 days. I have attached documents, and look forward to a hearing as soon as possible.
- (2) I have requested telephone conference because sometimes it's difficult for me to take time off work. But if this cannot be arranged the oral hearing is preferred.

Rozanna
Yadram

The Applicant testified that she was being driven home by Hemraj Odho following a Christmas party, as she was not feeling well enough to drive herself. They were stopped by police at a spot check, and it was determined that Mr. Odho's driver's licence was then under suspension for a Criminal Code conviction. The Applicant stated that she was unaware of the status of Mr. Odho's driver's licence until the impoundment, even though she had known him for a long period of time.

The Applicant further testified that she is a single mother, and relies upon her vehicle to transport her two children to school. She must also drive her mother to various medical appointments on a weekly basis. The Applicant stated that she and her family have had to endure the inconvenience of not having their vehicle. The Applicant owns an older vehicle that was initially used as an alternative to the impounded vehicle, however it later became inoperative due to a costly transmission failure. The Applicant had then to endure the financial hardship associated with the renting of an alternative vehicle, which she continues to drive.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Hemraj Odho;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 14, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;

- (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. In fact the forthright testimony of the Applicant was that after her vehicle had been impounded, she had made use of another vehicle that she already owned. Following the breakdown of her initial alternative vehicle that she had owned, the Applicant further stated that she had procured a rental vehicle and maintained its use through out the remainder on the impoundment period up to the date of this hearing. According to the Applicant, he has an alternative vehicle available to her. The Tribunal may not consider inconvenience (see subsections 22(2)(a) of Regulation 574). The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation).

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: January 24, 2001

ABDO, JEANNETTE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JEANNETTE ABDO O/A JEANNETTE'S AUTO SALE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 13, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

JEANNETTE ABDO O/A JEANNETTE'S AUTO SALE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jeannette Abdo o/a Jeannette's Auto Sale, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 23, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

FROM: Jeanette Abdo
O/A Jeanette's Auto Sale
3596 St. Clair Ave. East
Toronto, ON M1K 1M2

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Jeanette Abdo o/a Jeanette's Auto Sale (hereafter the "Dealer") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer acknowledges and understands that she will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by Section 16 of Regulation 801. The Dealer further agrees to store books and records at the location approved by the Registrar.
4. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify her registered name and the address of the location approved by the Registrar.
5. The Dealer agrees not to invite the public to deal at a place other than his approved location.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in employment location in the form required by the Registrar.
7. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.

8. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
9. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Dealer agrees that she is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Dealer agrees that she is under a positive obligation to ensure that all salespeople also disclose all material facts about vehicles sold to consumers. The Dealer agrees to make reasonable efforts to research the history of all her vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
12. The Dealer acknowledges and understands that her registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
13. The Dealer will comply with all aspects of the Retail Sales Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
14. The Dealer will pay all amounts owing to the Minister of Finance in respect of all future audit assessments when due.
15. The Dealer acknowledges that Albert Abdo will in no way, either directly or indirectly be involved with the business and will have no interest whatsoever in the dealership.
16. The Dealer agrees she will not be involved with the buying and selling of motor vehicles without the benefit of registration.
17. The Dealer hereby acknowledges that in the event of a breach of any of the terms and conditions set out herein, the Registrar is directed to, and shall revoke the registration of the Dealer.
18. The Dealer understands that her registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.
19. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.

20. The Dealer acknowledges that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
21. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the terms, and conditions set out herein.
22. The Dealer hereby withdraws the appeal to the Licence Appeal Tribunal.
23. The Dealer acknowledges that she has read, understand and will comply with the above terms and conditions of Registration.
24. The Dealer acknowledges that she has obtained or has had the opportunity to obtain independent legal advice with respect to her consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of January 2001.

(Signature) Jeanette Abdo

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

FERGUSON-BAINS

DONNA FERGUSON-BAINS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: CLAIRE ROWETT,
Representative for the Registrar of Motor Vehicles

DONNA FERGUSON-BAINS, Applicant
unrepresented

DATE OF HEARING: January 19, 2001

DECISION RELEASED: January 24, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on January 19, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Donna Ferguson-Bains (the "Applicant")
Motor Vehicle:	1997 Ford Escort, plate # ABXH 601 (the "vehicle")
Date of Appeal:	December 29, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on January 19, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Donna Ferguson-Bains
8152 Silver Street
Caistor Centre, Ont
L0R 1E0

File for Appeal

December 22 2000

Appeal Tribunal:

I am writing a desperate pleas for a reconsideration into the impoundment of the motor vehicle that is in my name. This incident occurred on December 20 2000 when my husband drove himself to work while under suspension. We are in the process of a serious marriage breakdown and the vehicle is a critical life line for myself and the children, ages 4 years and 6 weeks. We live in a rural area of the Niagara region and do not have a local taxi or transit service in place. We cannot drink our own water so obtaining water from Smithville 11km away is essential. The nearest grocery store is 11 km away the nearest hospital is West Lincoln Memorial in Grimsby that is 24 km away. Our family doctor is located in Burlington, approx. 48 km away. I no longer have the support of my family as they have returned to Nova Scotia to live. I fear that not having my vehicle will jeopardize the health and well being of the children and myself. As said before my son is only 6 weeks old and daughter is 4. Our home is ready for market sale in January and I have secured with the crown that I will contact the police if my husband fails to demonstrate respect for the court order given to him. I have been able to rent a car but I cannot financially afford to rent for more than 2 weeks as I am presently on maternity leave and my income is reduced.

I have suffered both emotionally and financially and my daughter has sensed the turmoil in the home. I use the impounded vehicle to transport my children to appointments and extra activities like skating and swimming, but because of the mileage restrictions on the rented vehicle I have been unable to bring her to these programs. In the New Year my husband will look for other living arrangements closer to his work. In the mean time I have been transporting him as I have done in the past. I cannot afford to keep up the home on what I make on maternity so until it is sold I will transport my husband when necessary

I am presently seeking employment opportunities in the province of Nova Scotia and will require the vehicle to go there for interviews, and to look for a place to reside when my home is sold.

I am in desperate need for reconsideration, and a release of the vehicle in order provide some sort of stability for my children and to reduce the stress on myself and on them.

Thank you for your time
Sincerely;
Donna Ferguson-Bains

FINANCIAL STATUS:

Donna Feguson Bains

8152 Silver Street
Caistor Centre Ontario
L0R 1E0

With my letter of Appeal I have included copies of my Financial situation
I have the responsibility of Paying for Child Care When my daughter was in
preschool before

Maternity leave. Receipt not enclosed.

Visa Value monthly payment \$140.00
Visa Classic monthly payment \$140.00
Home insurance monthly payment

\$51.00

Car insurance monthly payment \$97.00
The brick monthly payment \$125.00
Telephone bill monthly \$122.00
Hydro bill monthly \$50.00
Gas bill monthly varies \$40.00-\$55.00

I also pay the following

I also purchase the groceries for my children and myself and purchase clothing
and now the
baby needs as well. I also pay for what gas I use in the vehicle. My husband
pays the rest. I

also have a 16 year old step son, and although I do not financially support him I
do give him money at times. And then there is Christmas.. My mother has
helped with the purchasing of gifts for the children this year. Like I said in my
attached letter Our home is ready to go on sale in January, My intentions are to
move back to Nova Scotia and seek employment there once the home is sold.

Sincerely
Donna Ferguson-Bains

" "

Dec 22, 2000

In addition to her written submission, Mrs. Ferguson-Bains advised that her
husband took the car at approximately 1:00 a.m. to go to his place of
employment at Tim Horton's in Milton. Mrs. Ferguson-Bains was not aware that
he had left the house until she received a call at approximately 4:00 a.m. from his
employer.

Mrs. Ferguson-Bains advised that she is presently arranging to list the family
home for sale and that she intends moving to Nova Scotia. Her husband will
reside in Milton.

Mr. and Mrs. Bains live in a remote area south of Smithville. There is no Public
Transportation in the area. Consequently, Mrs. Ferguson-Bains has had to rent
a car. She uses it to take her husband to and from work, to take the children to
the Doctor, and to perform other errands. She drives more than 300 kilometres
per day. Although she continues to drive her husband to and from work, he has
not helped her to pay for the gas, nor has he contributed to the cost of the renting
the car.

Since she is presently on maternity leave, Mrs. Ferguson-Bains is finding these additional expenses extremely onerous; especially since she had already been experiencing financial difficulties.

When questioned by the Representative of the Ministry about a 1990 Hyundai, a Van, and a 1985 Ford Sedan, which were either registered in her name or her husband's, Mrs. Bains replied that the vehicles had been disposed of long ago. She did not understand how they could still be registered in the family name.

Mrs. Ferguson-Bains also advised that she had saved \$4,000.00, but unfortunately most of that had been used for Christmas gifts for her children, and to pay for the car rental. She had approximately \$1,000.00 set aside to be used for moving expenses.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Darshan Singh Bains;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 26, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to

impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Tribunal may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue of exceptional hardship, the evidence has established that although Mrs. Ferguson-Bains is experiencing financial hardship, she does not meet the criteria set out in Ontario Regulation 632/98 amending Reg. 574 Or R.R.O. 1990. Section 22(1). The Tribunal finds as follows.

The impoundment will not result in a threat or safety of any person ordinarily transported by the motor vehicle. Also, the evidence does not establish a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used. In this case 22(1)(b) is not relevant. Further, as to 22(1)(a) of the Regulation, Mrs. Ferguson-Bains has availed herself with alternative transportation, and in the event of an emergency she does have neighbors as well as access to 911.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNA

Malcolm Fealing,
Presiding Member

RELEASED: January 24, 2001

MEGA CITY CAR SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF

1432844 ONTARIO LTD. O/A MEGA CITY CAR SALES AND
CHARANJIT SINGH BEHNIWAL AND NAVTEJ SINGH KANG
AND PAVNEET GILL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: December 28, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

1432844 ONTARIO LTD. O/A MEGA CITY CAR SALES
AND CHARANJIT SINGH BEHNIWAL AND
NAVTEJ SINGH KANG AND PAVNEET GILL

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1432844 Ontario Ltd., o/a Mega City Car Sales and Charanjit Singh Behniwal and Navtej Singh Kang and Pavneet Gill, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 23, 2001

TO: The Registrar
Motor Vehicle Dealer and Salespersons Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: 1432844 Ontario Ltd. o/a Mega City Car Sales
1031 Wilson Avenue
North York ON M3K 1G7

AND FROM: Charajit Singh Behniwal
7321 Darcel Avenue
Mississauga ON L4T 2X4

AND FROM: Navtej Singh Kang
10 Havelock Drive
Brampton ON L6W 4A5

AND FROM: Pavneet Gill
1328 White Water Lane
Mississauga ON L5V 1L8

RE: 1432844 Ontario Ltd. o/a Mega City Car Sales, Charit Singh Behniwal, Navtej
Singh Kang and Pavneet Gill

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereinafter the "Act") the parties to the proceeding, 1432844 Ontario Ltd. O/A Mega City Car Sales (hereinafter referred to as "the Dealer"), Charajit Singh Behniwal, Navtej Singh Kang and Pavneet Gill (hereinafter collectively referred to as the "Applicants") and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle dealer and as salespersons:

1. The Dealer and Applicants acknowledge and understand that they will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer and Applicants further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective

purchaser or any form of negotiation concerning the purchase or sale of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.

3. The Dealer and Applicants agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer and Applicants further agree to provide free access to their books and records to any authorized representative of the Registrar.
4. The Dealer and Applicants agree that all books and records shall be kept at the Dealer's registered premise.
5. The Dealer and Applicants agree to maintain a sign at the Dealer's registered premise that will be visible to the public.
6. The Dealer and Applicants agree to operate exclusively from the location approved by the Registrar. The Dealer and Applicants agree to apply for the Registrar's approval, by way of prior written notice, of any change in employment location in the form required by the Registrar.
7. The Dealer and Applicants agree not to invite the public to deal at a place other than its approved location.
8. The Dealer and Applicants will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
9. The Dealer and Applicants will ensure that all advertisements placed by or on behalf of the Dealer will identify their registered name and the address of the location approved by the Registrar.
10. The Dealer and Applicants will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
11. The Dealer and Applicants will not purchase vehicles without ensuring that the vehicle is registered to the seller.
12. The Dealer and Applicants agree to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
13. The Dealer and Applicants agree that they are under a positive obligation to disclose all material facts about the vehicles they sell to their customers. The Dealer and Applicants agree to make reasonable efforts to research the history of all the Dealer's vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Applicants agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer and Applicants will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
14. The Dealer and Applicants acknowledge and understand that their registrations will not be used to buy or sell motor vehicles where the Dealer/Applicants know or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
15. The Dealer and Applicants will comply with all aspects of the Retail Sales Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.

16. The Dealer and Applicants agree they will not be involved with the buying and selling of motor vehicles without the benefit of registration.
17. The Dealer and Applicants agree, if any one of them is charged in the future, to immediately notify the Registrar.
18. The Dealer and Applicants agree that if any one of them is convicted under any law of an industry specific offence or if any one of them is convicted under the Criminal Code, all their registrations shall be revoked.
19. The Applicants agree to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
20. The Dealer and Applicants will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
21. The Dealer and Applicants hereby acknowledge that in the event of a breach of any of the terms and conditions set out herein, the Registrar is directed to, and shall revoke the registrations of the Dealer and Applicants.
22. The Dealer understands that its registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.
23. The Dealer and Applicants acknowledge that the Registrar may take further administrative action in the form of a proposal to revoke their registrations, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or their compliance with these terms and conditions.
24. The Dealer and Applicants acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
25. The Dealer and Applicants hereby consent to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
26. The Dealer and Applicants hereby withdraw their appeals to the Licence Appeal Tribunal.
27. The Dealer and Applicants hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2001.

1432844 Ontario Ltd. O/A Mega City Car Sales
I have the Authority to bind the corporation

Charajit Singh Behniwal

Navtej Singh Kang

Pavneet Gill

These terms and conditions are acceptable to the Registrar, MVDA.

Carl Compton
Registrar, Motor Vehicle Dealers Act

BRAR

RUPINDER BRAR

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FOR AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: KIM GROSSKURTH, Representative of Registrar of Motor Vehicles

RUPINDER BRAR, representing herself

DATE OF HEARING: January 29, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H. 8 as amended, Rupinder Brar (the "Applicant") appealed a decision of the Registrar of Motor Vehicles (the "Registrar") made under section 55.1 of the Act to impound a certain 1997 Chevrolet Blazer motor vehicle, plate number ABFK 693 (the "motor vehicle");

UPON MOTION, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing;

UPON READING the exhibits and hearing submissions of the representative of the Registrar as well as submissions by the Applicant, this Tribunal finds that the ground of exceptional hardship [section 50.2(3)(d)] upon which the Applicant relies in this appeal, does not apply by virtue of section 50.2(4) as a previous order to impound under section 55.1 was made with respect to the motor vehicle then owned by the Applicant;

NOW THEREFORE, this Tribunal orders that after considering the evidence and the submissions of the Applicant and the Representative of the Registrar, pursuant to Section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: January 29, 2001

VITSENTZATOS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
FOTI VITSENTZATOS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 28, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

FOTI VITSENTZATOS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Foti Vitsentzatos, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 19, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Foti Vitsentzatos
203 Sidney Street East
Trenton, ON K8V 2T2

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Foti Vitsentzatos (hereinafter referred to as "the Applicant") hereby consents to the following terms and conditions to his registration as a motor vehicle salesperson.

In accordance with section 4.1 of the Statutory Power Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant will not be the final signatory on any bills of sale.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant agrees that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of December, 2000.

Foti Vitsentzatos

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

POULIN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JACK POULIN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: December 4, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

JACK POULIN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jack Poulin, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: January 30, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

FROM: Jack Poulin
4208 Terrace Avenue
Niagra Falls, On, L2E 3H8

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Jack Poulin hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) The Applicant agrees if he is charged in the future, under any law, to immediately notify the Registrar, in writing of the charges or convictions. Upon any future convictions, the Applicant's registration will be automatically revoked.
- 2) The Applicant agrees he is charged in the future, under any law, to immediately notify his employer of the charges or convictions.
- 3) The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 5) The Applicant acknowledge that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) The Applicant acknowledges that the disclosure provided by him to the Registrar, is accurate in all respects and the Registrar is relying upon the veracity of his disclosure in entering into these terms and conditions.
- 7) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.
- 8) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.
- 9) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that

all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership

- 10) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- 11) The Applicant agrees not to be a partner, shareholder, officer or director of a motor vehicle dealership. The Applicant shall not loan money to or have a proprietary interest in any motor vehicle dealership.
- 12) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.
- 13) The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.
- 14) I hereby withdraw my appeal to the Licence Appeal Tribunal.
- 15) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

Witness

(Signature) Salesperson, Jack Poulin

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

388-RESP

ADLS - 0388

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION**

TRIBUNAL: Antoine Aouad, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF HEARING: January 9, 2001 Sudbury

DECISION

A hearing was held on January 9, 2001, at Sudbury, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 10, 2001

ADLS- 0388

**Appeal under section 50.1 of the
Highway Traffic Act, R.S.O. 1990,
Chap. H.8 as amended, from a
Decision of the Registrar of Motor
Vehicles pursuant to section 48.3(2)
of that Act;**

**TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 9, 2001

DECISION
RELEASED: January 10, 2001

Sudbury

REASONS FOR DECISION

A hearing was held on January 9, 2001, at Sudbury, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 10, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 6, 2000, and was received by the Tribunal on December 18, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“I was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

The Representative of the Ministry provided the Tribunal with certified copies of Ministry of Transportation documents on file.

The Applicant questioned the Ministry's Representative as to when and how the documents had been forwarded to him, as he had not received them.

The Representative of the Ministry sought to introduce the videotape of the Applicant's breathalyzer session into evidence. The Applicant objected due to the fact that he was “*under medication at the time*”, but agreed to allow a viewing of the video.

The Applicant submitted several documents which were entered as exhibits on consent save and except for a medical report from Physician # 1. The Ministry's Representative argued as to its inadmissibility as an exhibit since there was no previous disclosure.

Submissions of Written Material

By the Applicant:

- a)Exhibit # 1 Suspension Reminder Notice dated November 27, 2000 - issued by the Registrar of Motor Vehicles.

- b) Exhibit # 2 Notice of Appeal Form - received December 13, 2000.
- c) Exhibit # 3 Letter from the Applicant – dated December 15, 2000.
- d) Exhibit # 4 Official Prescription Receipt from Shoppers Drug Mart – dated November 5, 2000.
- e) Exhibit # 6 Resume of the Applicant – received January 9, 2001.
- f) Exhibit # 7 Internet Information titled Security and Military Police Squadron - received January 9, 2001.
- g) Exhibit # 8 Internet notes on Clonazepan – received January 9, 2001.
- h) Exhibit # 9 Information from CNN.com Health with the head lines Study Find Hay-Fever Medication... - received January 9, 2001.

By the Respondent:

- a) Exhibit # 5 Ministry of Transportation submissions – 16 pages – received January 3, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "Nov 23 00", as set out in the Suspension Reminder Notice. (Exhibit # 1)

The Notice of Appeal prepared by Physician # 1, the Applicant's psychiatrist for "9 years" states that the Applicant suffers from "*chronic and acute anxiety with episodes of panic attack. Needs tranquilizers...*" (Exhibit # 2)

In a hand written note, the Applicant claims that he "...was on medication that day from 8 am to 2300 ...tranquilizers..."

The Documents introduced at the hearing by the Applicant are as follows:

- A Resume of the Applicant
- B Internet information titled "Security and Military Police Squadron" from the Canadian Air Force
- C Internet notes on Clonazepam
- D Information from CNN.com health with the headlines "Study finds hay-fever medication worse than alcohol in impairing driver skills"

The Respondent provided the following Documents for the hearing:

Certified Copy of Notice to Registrar.
Certified Copy of Driving Record of the Applicant
Certified Copy of Vehicle Record as of Occurrence date

A Ministry of Transportation Driver's Record for the Applicant since 1981 shows several offenses.

At the hearing, the Applicant explained to the Tribunal the reason for the stress in his life, and more particularly for the day in question. According to the Applicant, he had spent a sleepless night in anticipation of his day in Court. Prior to being stopped the Applicant had been in Court from 9 AM to 4 PM, and was feeling an adrenaline high.

The Applicant testified that the combination of adrenaline and medication made him appear "...*drowsy and red eyed.*"

In cross-examination, the Applicant testified that he did not provide a breath sample because he was “*dragged by the ear*” before being given a second chance. The first time he was unable to blow long enough for the machine to record to the sample because he was “*...confused ...delusional and not aware of reality...*”

The Applicant informed the officers that he was on medication but did not advise them at the time that he was having any physical or emotional difficulties.

The Respondent called the three officers involved in the incident as witnesses.

Police Officer # 1 read from a “*Will Say/Statement*” detailing the events leading up to and surrounding the intoxilizer session. Police Officer # 1 notes “*...the accused ...went a on a long spiel about his health and his lung capacity and his inability to provide breath samples, ...he would attempt to do so ...he could get a medical doctor to issue a notice that he was incapable of doing so ...at approximately 23:05 hours the accused refused to provide suitable samples...*”

At no time did Police Officer # 1 observe the Applicant being afflicted with respiratory or any other physical difficulty.

Police Officer # 2 also reading from a “*Will Say/Statement*” described the Applicant’s behaviour prior and during the breathalyzer session. Police Officer #2 testified that the Applicant stated “*...I ain’t going to blow*”

At no time did Police Officer # 2 observe the Applicant being afflicted with respiratory or any other physical difficulty.

Police Officer # 3 testified that she is a qualified intoxilizer 5000 technician. Reading from a “*Will Say/Statement*”, Police Officer # 3 swore that “*...the accused momentarily touched his mouth to the breath tube, but did not provide any sample. He was ...asked numerous times if he would provide a sample of breath. He advised “no” he would not...*”

At no time did Police Officer # 3 observe the Applicant being afflicted with respiratory or any other physical difficulty.

APPLICATION OF THE LAW TO FACTS:

During the hearing the Applicant raised several issues not germane to this matter and the Tribunal will comment no further.

At issue is, how the medical condition of the Applicant relates to Section 50.1(2)(b) of the *Highway Traffic Act*, and is this medical reason caused him to fail or not comply with the breath demand. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Medical history in the Notice of Appeal relates the Applicant's history of "*chronic and acute anxiety...*" but does not explain how this condition would have prevented the Applicant from providing a suitable breath sample. (Exhibit # 2)

The Tribunal finds that neither of the reports submitted by Physician # 1, complies with the requirements of Sections 15 (1) and (2) of Regulation 574 which provides:

15(1)(c) "that the medical practitioner had prepared the report or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act."

15(2) "The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests."

The Notice of Appeal purportedly written by Physician # 1 is dated December 5, 2000. There is no indication that the Applicant sought medical assistance at the time of the incident, which occurred in November 23, 2000. (Exhibit # 3)

The Applicant offered no viable explanation as to his refusal to provide a breath sample, other than that he was "*...confused... delusional and not aware of reality...*"

The Tribunal must rely on the eyewitness testimony offered by the officers involved, who attest that they saw no visible signs of respiratory or any other physical difficulties.

The Tribunal finds that there is insufficient medical reasons to establish that the Applicants was unable to comply with the request to provide breath sample due to a medical condition.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 23, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: January 17, 2001

399-HEAR DEF

ADLS - 0399

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: January 25, 2001

Toronto

DECISION

A hearing was held on January 25, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: January 26, 2001

ADLS - 0399

**Appeal under section 50.1 of the
Highway Traffic Act, R.S.O. 1990,
Chap. H.8 as amended, from a
Decision of the Registrar of Motor
Vehicles pursuant to section 48.3(2)
of that Act;**

**TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: January 25, 2001

DECISION
RELEASED: January 26, 2001

Toronto

REASONS FOR DECISION

A hearing was held on January 25, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 26, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 20, 2000, and was received by the Tribunal on December 29, 2000, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with certified copies of Ministry of Transportation documents on file.

The Applicant submitted several documents which were entered as exhibits on consent.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar issued by the Minister of Transportation
 - dated November 5, 2000
- b) Exhibit # 2 Notice of Appeal Form received at the Tribunal December
 29, 2000
- c) Exhibit # 3 Letter from Applicant dated December 23, 2000 with pictures

- d) Exhibit # 5 Letter from Applicant re: driving experience dated January 23, 2001

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions – dated January 19, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended 'November 05 2000' as per Notice of Appeal. (Exhibit # 2)

Page 2 of Notice of Appeal, dated Dec 22 2000, was prepared by Physician # 1 the Applicant's physician for "1 year 11 months".

In the "Details and Diagnosis of patient's condition" and in "History of Condition" Physician # 1 writes: *"It is possible that with Mr. Austring's hearing deficit he did not understand the situation ...Variable confusion to be investigated..."* (Exhibit # 2)

In a letter dated 23 Dec/2000 the Applicant states the he is *"...almost 100% deaf, and in a noisy crowded area ...hear absolutely nothing..."*

In a letter "22 Dec/2000" the Applicant confirms that *"...At no time did I refuse to give a breath sample. Being 100% deaf I probably never heard or understood the question..."*

The Respondent provided the following Documents:

- Notice to the Registrar
- Driving Record of Reuben A. Austring,
- Vehicle record.

The Applicant's driving record since 1977 shows no convictions.

At the hearing, the Applicant explained to the Tribunal that he was under tremendous medical stress and very tired. He had taken several herbal remedies which he believes might have given the officers the impression he had been drinking.

The Applicant testified that he did not provide a breath sample because one was not demanded of him, and if in fact a breath sample was demanded, he did not hear, as he lost his hearing in 1994.

Throughout his testimony the Applicant vehemently complained about his treatment by the Toronto Police Officers.

The Respondent called as a witness Police Officer # 1 who is a 25-year veteran of the Police Force.

Police Officer #1 gave evidence of the incidents that led up to the breath demand being made.

It is Police Officer #1's testimony that he heard the Applicant refuse to accompany the breath technician to the breathalyzer testing room. The Applicant's refusal to leave the room where he had been placed led to his being charged with failing to provide a breath sample.

In closing, the Respondent argued that the Applicant has not provided medical evidence to prove that there that were medical reasons for his refusal to provide a breath sample.

APPLICATION OF THE LAW TO FACTS:

During the hearing the Applicant raised several issues not germane to this matter and not under this Tribunal's jurisdiction, and no further comment will be made with respect to those issues.

At issue is, how does the medical condition of the Applicant relate to Section 50.1(2)(b) of the *Highway Traffic Act*, and did this medical reason cause him to fail or not comply with the breath demand. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Applicant offered no viable explanation as to his refusal to provide a breath sample, other than that none was requested, and if it was, he did not hear it.

The Medical history in the Notice of Appeal written by Physician # 1 states that "*It is possible that with the Applicant's hearing deficit he did not understand the situation...*". The Tribunal accepts the fact that Applicant may be hearing impaired, nonetheless it must be noted that Police Officer # 1 testified that he was able to converse with the Applicant. Thus, the Tribunal finds that the Applicant's hearing deficit is not a medical reason for failure to provide a breath sample. (Exhibit # 2)

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. The Evidence is unequivocal, no breath test was obtained as the Applicant refused to accompany the breathalyzer technician to the testing room. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

On the evidence, the Tribunal finds insufficient medical reasons as to why the Applicant was unable to comply with the request to provide breath sample for the Applicant to establish the grounds of his appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 5, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: January 29, 2001

**HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.1**

IN THE MATTER of an application by
the Applicant to appeal the decision of
the Registrar of Motor Vehicles for a 90-
day Administrative Driver's Licence
Suspension pursuant to section 48.3(2)
of the *Highway Traffic Act*;

AND IN THE MATTER of

THE APPLICANT

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on
Thursday, February 1, 2001 at the Tribunal;

AND WHEREAS a letter dated January 29, 2001 was filed by the Applicant
requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Monday, February 12, 2001 at the
Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: January 31, 2001

420- ADJ

ADLS - 0420

**Appeal under section 50.1 of the
Highway Traffic Act, R.S.O. 1990,
Chap. H.8 as amended, from a
Decision of the Registrar of Motor
Vehicles pursuant to Section 48.3(2)
of that Act;**

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Agent for the Applicant

DATE OF HEARING: January 24, 2001 Toronto

ORDER

WHEREAS a hearing was scheduled to be heard on January 24, 2001 in Toronto in the above matter;

AND WHEREAS at the commencement of the hearing before the Tribunal both parties requested that the matter be adjourned to permit the Respondent to view documents submitted by the Applicant and to permit the attendance of a witness for the Respondent;

NOW THEREFORE, upon consent of both parties, the Tribunal Orders that this matter is adjourned to be heard on Tuesday, January 30, 2001, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

420 - RESP

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Agent for Applicant

DATE OF
HEARING: January 30, 2001

Toronto

DECISION

A hearing was held on January 30, 2001 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 31, 2001

ADLS - 0420

**Appeal under section 50.1 of the
Highway Traffic Act, R.S.O. 1990,
Chap. H.8 as amended, from a
Decision of the Registrar of Motor
Vehicles pursuant to section 48.3(2)
of that Act;**

**TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF
HEARING: January 30, 2001

DECISION
RELEASED: January 31, 2001

Toronto

REASONS FOR DECISION

A hearing was held on January 30, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 31, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated January 3, 2001, and was received by the Tribunal on January 5, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“I was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

At the commencement of the Hearing on January 24, 2001 an adjournment was granted to afford time to the Respondent to review the documents submitted by the Applicant and in order for the Respondent to subpoena a witness.

During the adjournment period further evidence was submitted by the both the Applicant and the Respondent. Said evidence is hereinafter described.

At the reconvened hearing on January 31, 2001, certified copies of the Ministry of Transportation documents on file were submitted by the Respondent.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar – dated January 1, 2001.
- b) Exhibit # 2 Notice of Appeal Form – received at the Tribunal January 5, 2001.

- c) Exhibit # 3 Applicant submissions: Letter from Physician # 1 – Blood test from Canadian Laboratories Limited – Pulmonary test from Scarborough Grace Hospital – received January 22, 2001.
- d) Exhibit # 6 Additional submissions by the Applicant “ American Medical Association” – received January 29, 2001.

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions – received January 18, 2001.
- b) Exhibit # 5 Additional submissions from Physician # 2 – received January 25, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

50.1 (1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "January 01/01" as per Notice of Appeal. (Exhibit # 2)

Page 2 of Notice of Appeal, unsigned and undated, refers to medical documentation attached. (Exhibit # 2)

Attached to the Notice of Appeal is a letter from the Applicant asking for an expedited hearing. The Applicant explains, in this letter: *"...after three tries, I was unable to blow long enough to obtain a result from the breathalyzer ...63 year old diabetic with accompanying problems, one of them affects my respiratory functions..."*

A handwritten note from Physician # 1 states that the Applicant *"...has been in ...care from 9. 5.1990 ...suffering from diabetes ...on medicine for this ...smoking for a number of years ...recently ...had difficulty breathing ...seen ...January 02 2000 ...referred pulmonary function ...attached ...in care with ...(endocrinologist) and... (urologist)..."*

Pulmonary function Test results attached.

The Respondent provided the following Documents:

Certified Copy of Notice to the Registrar, sealed January 8, 2001
Certified Copy of Driving Record of the Applicant, sealed January 38, 2001
Copy of Vehicle Search from Occurrence date, sealed January 8, 2001

The Applicant's driving record since 1976 shows no previous convictions.

In a report dated January 28, 2001, Physician # 2, MB,ChB,FRCP(UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a *"...consultant respiratologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C..."* .

After reviewing all the evidence presented to him Physician # 2 notes that the *"...Pulmonary function tests ...show a slight reduction in flow at low lung volume with a completely normal diffusing capacity ...the flow rate increases following Ventolin administration ...tests such as these would not prevent the subject from providing a technically satisfactory breath sample ...observed changes in the flow volume loop are slight."* (Exhibit # 4)

At the hearing the Applicant was represented by his son. During examination in chief the Applicant testified that has been given three attempts to provide a breath sample, but that each time the officer told him to stop.

The Applicant stated that he was not told the consequences of his failure to provide a breath sample, until after the third attempt, when he was informed by the officer that he was being charged. At this time the Applicant requested that the officer give him another opportunity, but the officer refused.

Under cross-examination the Applicant further testified that he thought he “...was *doing OK*” and that the officer did not advise him he was not blowing properly. This is the reason he did not tell the officer he was having medical problems, other than to state he was diabetic.

The Applicant attested that he now believes he may have been having a mild hypoglycemic episode at the time, but did not request medical assistance as he “...did not feel there was anything wrong...”

Still under oath, the Applicant stated that since he suffers from dry mouth because of the diabetes, it is possible this was reason why he was unable to seal the mouthpiece properly with his lips.

According to the Applicant, his physician has not prescribed an inhaler nor recommended that he see a respiratologist “...as that would take too long...”

The Respondent called, as a witness, Police Officer # 1, who has been with the Ontario Provincial Police, Toronto Detachment for 5 years.

Police Officer # 1 testified that he explained and demonstrated the procedure to the Applicant at the beginning of the session and then again when the machine registered “EO”. In each of the three tries, soon after the Applicant started blowing, the machine registered ‘EO” meaning that the Applicant had stopped blowing but had not provided an adequate sample for the machine to register a reading.

Police Officer # 1 further testified that at no time did he notice any signs that the Applicant was having difficulty breathing, or sweating or shaking. Nor did the Applicant request medical assistance.

In closing the Agent for the Applicant focused on the fact that his client had offered to try again, once informed by the officer he would be charged. The Agent contends that this is an indication that the Applicant was certain the test would indicate he had not been drinking, otherwise his request would not be logical.

The Agent also referred to the dry mouth as a possibility for his client not having been able to seal the mouthpiece adequately.

The Respondent re-iterated the evidence presented, emphasizing that there is insufficient medical evidence to suggest that the Applicant 's failure to provide a breath sample was due to a medical condition.

APPLICATION OF THE LAW TO FACTS:

At issue is, how the medical condition of the Applicant relates to Section 50.1(2)(b), and did this medical reason cause him to fail or not comply with the breath demand.

The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed all evidence submitted by both parties. The reasons proffered by the Applicant as to why he failed to provide a breath sample are plausible, and would be acceptable if substantiated by medical evidence.

Physician # 1 has been the Applicant's physician since "...9. 5.1990". She confirms in the handwritten report that the Applicant suffers "*...from diabetes ...on medicine for this...*" yet only "*...recently ...had difficulty breathing ...seen ...January 02 2000 ...referred pulmonary function...*". There is no previous history of respiratory impairment. (Exhibit # 2)

According to Physician # 2 the pulmonary function tests " ...show a slight reduction in flow at low lung volume with a completely normal diffusing capacity ...tests such as these would not prevent the subject from providing a technically satisfactory breath sample..." (Exhibit # 4)

The Tribunal concurs with Physician # 2. During the past ten years the Applicant has been in care, Physician # 1 has recommended the Applicant to an "endocrinologist" and a "urologist". The Tribunal notes that after reviewing the test results, Physician # 1 did not refer the Applicant to a respiratologist. It would appear to the Tribunal that the results were not severe enough to warrant follow up. This conclusion is also substantiated by the fact that no inhaler was prescribed.

The Tribunal must rely on the eyewitness testimony offered by the officer involved, who attests that there were no signs of respiratory distress during the breathalyzer session.

The Applicant claims his mouth was dry, but he did not inform the officer, nor ask for a drink of water. The Applicant also suggests he may have been having an hypoglycemic episode, that did not cause him to lose consciousness. Unfortunately, according to both the Applicant himself and Police Officer # 1

there were no visible signs of sweating and shaking as is commonly associated with such a diabetic reaction. At no time did the Applicant request medical assistance.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

The Tribunal finds that there is insufficient medical reasons as to why the Applicant was unable to comply with the request to provide breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 1, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: February 2, 2001

478-BRONCH

ADLS - 0478

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF
HEARING: January 23, 2001 Toronto

DECISION

A hearing was held on January 23, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: January 24, 2001

ADLS - 0478

**Appeal under section 50.1 of the
Highway Traffic Act, R.S.O. 1990,
Chap. H.8 as amended, from a
Decision of the Registrar of Motor
Vehicles pursuant to section 48.3(2)
of that Act;**

**TO APPEAL A 90-DAY
ADMINISTRATIVE DRIVER'S
LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF
HEARING: January 23, 2001

DECISION
RELEASED: January 24, 2001

Toronto

REASONS FOR DECISION

A hearing was held on January 23, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on January 24, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated December 1, 2000, and was received by the Tribunal on December 22, 2000, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant's agent, requested an adjournment on the grounds that the disclosure materials were not received by the Applicant within the prescribed time.

The Respondent confirmed that the documents had been forwarded by courier on the same day as they were sent to the Tribunal. No notification was received by the Ministry suggesting the documents had not been delivered. Further, nothing contained in the materials should be a "*surprise*" to the Applicant or his agent.

The Applicant's agent asked the Respondent the grounds for these proceedings. The Respondent confirmed that this was a hearing under the *Highway Traffic Act* not the *Criminal Code*.

As there still appeared to be confusion on the Applicant's Agent's part, the Tribunal adjourned for one hour to give an opportunity to the Agent to review the material and clarify the matter of grounds for the hearing with the Respondent.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar dated November 26, 2000 issued by the Registrar of Motor Vehicles.
- b) Exhibit # 2 Notice of Appeal Form received at the Tribunal December 22, 2000, filed by the Applicant
- c) Exhibit # 3 Medical Note from Physician # 1 – dated December 01, 2000

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions – 13 pages – received January 18, 2001

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the

case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15.(1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant's Driver's Licence was suspended on "November 26 2000" as per Suspension Reminder Notice (Exhibit # 1)

Page 2 of Notice of Appeal, dated Dec 1st 2000, was prepared by Physician # 1 the Applicant's physician for "15 years".

In the "Details and Diagnosis of patient's condition" and in "History of Condition:" Physician # 1 writes: " *Acute Bronchitis ...cough... since Nov 23rd 2000.*" (Exhibit # 2)

In the category "Type of Measurements..." Physician # 1 states "...*antibiotic & cough medicine...*" (Exhibit # 2)

A handwritten note from Physician # 1 confirms that the Applicant "*has been sick since Nov 23rd 2000 with intense cough and trachea irritation. This condition could affect his ability to perform breath test Nov 25th, 2000*". (Exhibit # 4)

The Respondent provided the following Documents:

- Certified Copy of Notice to the Registrar, January 3, 2001
- Certified Copy of Driving Record of the Applicant, sealed January 3, 2001
- Copy of Vehicle Search from Occurrence date, sealed January 3, 2001
- Sworn Affidavit of Police Officer # 1, Toronto Police Service. 11 Division, sworn January 5, 2001

The Applicant's driving record since 1984 shows one speeding conviction.

In an Affidavit sworn on January 5, 2001, Police Officer #1 attests: "...*member of Toronto Police Service ...for 1 year... On ...November 26, 2000 observed motor vehicle ...male driver...blood shot eyes ...speech slurred ...gave male the Breath Demand ...1:45am ...entered breath testing room with male ...male successfully provided a breath sample ...at 2:16am the male was requested to provide a second sample. at this time the male refused to give a suitable breath sample and on his last attempt he removed the mouth piece and threw it on the table and stated he was not going to do it anymore ...during this time ...observed nothing to suggest that he was suffering from any medical condition that could possibly affect the giving of a breath sample...*"

At the hearing the Applicant's agent, stated that he would not be allowing the Applicant to give evidence, and that he did not wish to make an opening statement.

The Respondent called, as a witness, Police Officer #2, who has been with the Toronto Police Services for 15 years, and a qualified breath technician since May 1998.

In his testimony, Police Officer #2 described what he believes appeared to be signs of impairment on the part of the Applicant as well as the Applicant's demeanor during the time the Applicant was detained.

Police Officer #2 testified that during the first breath test the Applicant was blowing *"...too hard..."* and had to be admonished to *"...blow softer..."*. At 1:57 AM the Applicant provide a breath sample which met the requirements.

Police Officer #2 further attested that during the second required breath test, the Applicant appeared to be puffing his cheeks but was not blowing into the machine. This conclusion was made as no condensation was observed as forming inside the mouthpiece. Also, there was no sound of air going into the mouthpiece. After several unsuccessful attempts the Applicant *"indicated verbally that he would not try any longer"*

In closing, Agent for the Applicant stated that his client cooperated in the beginning but *"...when he found out about his reading he became nervous and suspicious..."* The officers did not ask the Applicant if there was a medical reason as to why he could not provide a breath sample.

The Applicant has been taking medication which could impair his ability to provide a sample.

Agent for the Applicant referred to Physician # 1's notes which confirm that the Applicant's condition could prevent him from providing a breath sample.

The Respondent argued that there did not appear to be a medical problem during the first breath testing session. The fact that the Applicant was able to successfully provide a breath sample during the first test, and the fact that he was able to blow hard *"...casts serious doubts on the veracity of his ability to blow..."*

As for Physician # 1's reports, the Respondent contends that the operative word is *"could"*, as in the statement *"...This condition could affect his ability to perform breath test Nov 25th, 2000..."*

Further, the Respondent maintains that there are no chest results available such as *"chest x-rays or pulmonary function tests"* to verify a respiratory condition.

APPLICATION OF THE LAW TO FACTS:

At issue is, how does the medical condition of the Applicant relate to Section 50.1 (2)(b), and did this medical reason cause him to not comply with the breath demand.

The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed all evidence submitted by both parties. The Applicant gave no evidence and proffered no explanation as to why he failed to provide a breath sample when demanded to do so. The Applicant's agent suggests that after finding out about his reading the Applicant became "...*nervous and suspicious...*" The Tribunal can understand the Applicant being nervous but fails to comprehend why the Applicant would have become suspicious and how that would have affected his ability to provide a breath sample.

As for signs of physical distress such as respiratory difficulties, according to Police Officer # 2 there were no such signs. At no time did the Applicant request medical assistance.

The only evidence tendered by the Applicant, other than the information contained in the Notice of Appeal verifying that he is suffering from " *Acute Bronchitis ...cough...*" is a handwritten note confirming that he *'has been sick since Nov 23rd 2000 with intense cough and trachea irritation. This condition could affect his ability to perform breath test Nov 25th, 2000'*. (Exhibits # 2 & # 4 respectively)

The Tribunal concurs with the Respondent, the Applicant's bronchitis did not prevent him from successfully providing a breath sample during the first test. In fact, the Tribunal heard evidence from Police Officer # 2 that the Applicant was blowing "...*too hard...*" and was advised to "...*blow softer...*".

The Tribunal finds that there is insufficient medical reasons as to why the Applicants was unable to comply with the request to provide breath sample.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 26, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: January 29, 2001

CARMELO DE CICCIO CONSTRUCTION CO. LIMITED

CARMELO DE CICCIO CONSTRUCTION CO. LIMITED

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: MARJORIE L.HILEY, Vice-Chair

APPEARANCES:

JULIA COOK, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the
Registrar, Ontario New Home Warranty Program

DATE OF
HEARING:

November 10 and 20, 2000

via teleconference

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under section 7 of the *Licence Appeal Tribunal Act, 1999* to extend the time for the Applicant to file an appeal from a proposal of the Registrar of the Ontario New Home Warranty Program ("the Program") pursuant to section 9(2) of the *Ontario New Home Warranties Plan Act*.

The hearing of this matter proceeded on the consent of the parties as an electronic hearing. The Tribunal was provided with a Notice of Application for the Extension of time for appeal from the Applicant but no affidavit material. At the first hearing date of November 10, 2000, the Applicant did not have an agent. The Program provided the Tribunal with a motion record which included the affidavit of Roleeta Amo, and attached exhibits and caselaw. At the second hearing date of November 20, 2000, the Applicant had his agent represent him. The Applicant, by affirmation, provided the Tribunal with testimony on his reasons for bringing the application for an extension of time.

ISSUES:

Have the requirements for service of a notice under sections 9 and 20 of the *Ontario New Home Warranties Plan Act* been met in this case?

If the requirements are met and the Notice of Appeal was not filed with the Tribunal within the time prescribed by statute, is this an appropriate case for leave to be extended pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

If an extension is granted, should the Tribunal provide any directions upon such an extension?

EVIDENCE:

Testimony of Vince de Cicco:

Mr. de Cicco stated that there were no difficulties with the Program prior to April, 2000. Then he received a letter requesting more financial information. He did not have that information so he spoke to several representatives from the Program about the problem. He wanted to know what was going to be his security deposit amount for enrolling homes in the future. No one seemed to be able to give him this figure. He wanted an answer in writing. The Program was telling him that he was building too many houses.

Mr. de Cicco stated that there were problems in getting his security deposits on prior homes released by the Program. He was being told that the Program was backlogged one or two months on releasing these securities.

Mr. de Cicco testified that he spoke to an Adul from the Program. Adul told him to send the land tax assessment to the Program as soon as he obtained it. The Program owed him \$75,000.00 in past securities. He wanted his money, but they were saying it could be used as a security blanket or he could continue to pay his security deposits on newly enrolled homes and then the Program would release this money.

Mr. de Cicco stated that he got the Notice of Proposal around June 22, 2000. He tried calling numerous representatives at the Program, but no one returned his calls. He and his wife had already planned a short vacation so they went off on their vacation. While they were away his office was called by the Program representatives who then wanted to speak to him. He sent in his Notice of Appeal on July 24, 2000. No one from the Program helped him with this situation, but he got help from the Homebuilder's Association.

Under cross-examination Mr. de Cicco stated that he was told in writing in April, 1999 that his security deposit was \$5000.00 per house. From April, 1999 to April, 2000 he paid that security deposit. Then in April, 2000 his contract was up for renewal. Though he submitted some bank statements in April, 2000 he could not get documents on the value of his real estate. He did not have his land transfer tax assessment. He did send some documents on his RRSPs and bank

statements to the Program after April, 2000. He recalls sending a draft financial statement and then sending a finalized one after the Program's letter of May 23, 2000.

Mr. de Cicco agreed that he has not provided a tax bill or tax assessment or transfer of deed document for the real estate holdings of Rita and Carmelo de Cicco. Nor has he provided a tax bill or tax assessment or bank statements for Anna Maria Ielapi nor a tax bill or tax assessment document for himself.

Mr. de Cicco stated that he did not know how to deal with the Notice of Proposal. He did call the Program after July 6. As well, he spoke to Julia Cook of the Homebuilders Association. She told him to file his notice of appeal in fifteen days. He knew that when he spoke to Connie Versilo of the Program she just told him to get the appraisals in as soon as possible. He has spent five hundred dollars to get appraisals done of his property but has no documents yet.

Verbal Arguments:

By the Applicant:

Ms. Cook, agent for the Applicant, stated that Mr. de Cicco had filed his renewal on time. He did not have the finalized financial statement from his accountant at that time. She stated that Mr. de Cicco had every intention to provide the necessary information. He told the Program about his intentions and problem with documentation. He was surprised to receive the Notice of Proposal as letters had been passing between himself and the Program regarding the issues in question.

Ms. Cook stated that Mr. de Cicco had made every effort to get the necessary appraisals.

By the Program:

Counsel for the Program stated that the Manz case of the Licence Appeal Tribunal (LAT) released November 9, 2000 stood for the proposition that it is a matter of discretion for the Tribunal to extend the time. The Applicant needs to show reason why the Tribunal should exercise this discretion. The principles are: 1. Applicant has the intention to appeal; 2. It is excusable as to the reason why the notice of appeal was not served; 3. There is no overriding prejudice to the Respondent; and 4. There is a substantial point at issue and the Applicant has a reasonable chance of success.

Regarding the first point, counsel for the Program stated that the deadline for the appeal was either July 6 or 7, but the appeal letter was sent on July 24.

As to the second point, counsel for the Program stated the Applicant was two weeks late in appealing. He knew about the 15 day deadline and had read it in the Notice of Proposal. Even his agent, Ms. Cook, told him to do the appeal within the fifteen day deadline.

Regarding the third point, counsel for the Program stated that there is prejudice to the Program and to the building community and consumers. The Applicant has within that time frame started eleven more homes without any security being posted with the Program. The Program has no way of knowing if this builder is financially sound. The Applicant has failed to provide the information necessary for the Program to make that determination.

Counsel for the Program stated that the Applicant has no reasonable chance of success. He has failed to provide the required documentation within the last six months. He did not provide the information as stated in the letter of May 23, 2000. The Applicant stopped providing security for the newly enrolled homes although security deposit requirements remain in effect.

LEGISLATION:

Section 7 of the Ontario New Home Warranties Plan Act states:

7(1) An applicant is entitled to registration by the Registrar except where,

(a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;

.....

.....

Section 8(2) of the Act states:

Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 9(1) of the Act states:

Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

Section 20 of the *Ontario New Home Warranties Plan Act* states:

20. Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date.

Licence Appeal Tribunal Act, 1999 states:

Section 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Under the *Licence Appeal Tribunal Act, 1999*, the Tribunal has the authority to extend the time period required for an Applicant to submit their appeal on the Notice of Proposal filed by the Program. Previously, the Tribunal had this authority under the *Ministry of Consumer and Commercial Relations Act*.

The Tribunal must be satisfied that there are reasonable grounds provided by the Applicant in applying for an extension of time and for granting that extension of time. The principles used in applying this discretion is found in the CRAT case of Angela Bilodeau July 11, 1994.

At page 4 of that case the Tribunal states, "While no specific authorities were cited to me, both counsel agreed that the principles to be taken into account when considering such an application are those considered on a similar application in the Court of Record and are that the Applicant must show:

1. That she had an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if she did as soon as the true situation was apprehended.
3. That there is not some overriding prejudice to the Respondent in the allowing of the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success."

The Tribunal in the Manz case also held at page 3, "This Tribunal notes that the fundamental principle in deciding whether to allow an extension is to see that justice is done".

The Tribunal finds that the Notice of Proposal was sent to the Applicant in accordance with the requirements under the Act. Now the Tribunal must consider whether this is a case for granting an extension of time to appeal and, if so, on what terms and conditions.

The Tribunal finds that the Applicant had the intention to appeal within the time limit. He received the Notice of Proposal on June 22, 2000. He immediately called a number of employees of the Program whom he had dealt with prior to this Proposal. Due to it being the end of June these employees did not return his calls and he suspects that many of them were on holidays. He had made arrangements to have a short holiday himself and he went away for several days. He contacted the Homebuilder's Association and was told to file his appeal. It was filed on July 24, 2000. This Applicant stated that he did not know what to do about this matter as he had been in negotiations with the Program and thought he could send certain documentation in a liberal time frame.

The Tribunal finds that the Applicant should be excused for not serving the notice of appeal on time. He called the representatives of the Program, but for various reasons he failed to speak to them during the relevant time frame. He did respond promptly once he was told by the Homebuilder's Association to do so.

The Tribunal is concerned that this builder has continued to enroll homes without paying the required security deposit with the Program. He has only been registered with the Program for two years. This brief period raises a concern that the Applicant may not be able to fulfill his obligations for warranty repair to the homes that he has constructed or is now constructing. However, this concern can be addressed by placing conditions on the Applicant if he wishes to have the opportunity to appeal the Notice of Proposal.

There is a substantial point in issue. It is obvious that there are communication disputes between this builder and the Program. The Applicant stated that he sent the Program certain documentation and was told to send in other documentation when he received it. He did not realize that the Program was considering a Notice of Proposal against him. The Tribunal finds that he has a reasonable chance on this appeal.

The Tribunal is concerned that this Applicant does not understand his obligations under the *Ontario New Home Warranties Plan Act*. Although the Applicant feels that the Program has been slow in releasing his prior security deposits, the Applicant fails to understand that the legislation is there to protect the home buying public. The Program has considerable responsibilities under the Act and the Program must act to protect the home buying public. The Applicant needs to seek expert advice on his responsibilities under the legislation and under his contract with the Program. The Tribunal is of the opinion that justice would not be served by denying the Applicant his right to a hearing. There is an arguable case to present at the hearing.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders that the application to extend the time for filing of the Appeal by the Applicant is granted upon the following conditions:

1. On or before January 29, 2001, the Applicant pays to the Program a security deposit on those homes that were enrolled after June 15, 2000 and for which no security deposit has yet been paid, provided that any existing security deposits held by the Program but now repayable to the Applicant can be used by the Applicant for the payment of security deposits on these particular homes, and

2. The Applicant will not enroll any new homes prior to the hearing and decision of the Tribunal unless he immediately pays a security deposit of \$5000.00 per home to the Program.

Released: January 19, 2001

CONNOLLY

APPLICANTS - STEPHEN CONNOLLY
 ROBERTO DEFAZIO
 MARCO FAIAZZA
 EMILIO GERMANA
 LUIGI LAURICELLA
 MICHAEL LESCHUK
 BRUNO MUSA
 MARCO ROSSI
 FILIPE SERGIO
 VINCE TROPIANO
 MARIA VOLPE

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES
OF THE ONTARIO MOTOR VEHICLE DEALERS
COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair Presiding

APPEARANCES:
 J. DAVID HELSON, Counsel for the Applicants
 LARRY BANACK, Counsel representing the Ontario Motor
 Vehicle Dealers Compensation Fund
 PATRICK DiMONTE, Counsel for the Added Parties,
 EDWARD QUON and ASSIST FINANCING & LEASING
 INC.

DATES OF September 25, 26, 27, 2000 &
HEARING: December 14, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) from the decisions of the Ontario Motor Vehicle Dealers Compensation Fund ("the Fund") dated June 15, 1998, June 18, 1998 and June 24, 1998, wherein the Applicants' claims for

compensation was disallowed. As set out herein, the Tribunal found that there was no error in the denial of the claims. Accordingly, the Applicants are not entitled to succeed in the claims against the Fund for the reasons hereinafter set out.

WITNESSES FOR THE APPLICANTS

Evidence was given by Luigi Lauricella, Robert Defazio, Stephen Connolly, Detective Jerry Bargeman, Marvin Wayne Pickering, Audrey Johnman, Marco Faiazza, Filipe Sergio, Maria Volpe, Marco Rossi, Bruno Musa, Rosa Tropiano, Vince Tropiana, and Emilio Germana.

Luigi Lauricella testified that in February 1997 he was interested in purchasing a motor vehicle and heard about Ms. Patrice Kwiatkowski from a friend whose brother had purchased a vehicle from Patrice Kwiatkowski. He called Kwiatkowski who came to his house and explained that his friend had purchased the vehicle but could not get financing for it. She said that she knew someone at a bank, and was able to get repossessed vehicles. Later Ms. Kwiatkowski came to his home with a 1997 Acura for him to test drive. A few days later he signed a contract to purchase the vehicle and expected delivery on or about March 3, 1997. When the contract was written by Kwiatkowski, he saw at the top of the document the names "Assist Financing and Leasing Inc." and "Family Auto Wholesale" which both appeared to have been hand printed. There was no discussion of Assist Financing and Leasing Inc., and he assumed she was employed by them. The list price of the vehicle was shown as \$55,000.00 and the sale price was \$28,700.00. G.S.T. was to be charged but the contract stated that the transaction was Retail Sales Tax exempt. The sales commission of \$500.00 was to be paid. The total of \$31,209.00 was paid by a bank draft made payable to Patrice Kwiatkowski. Mr. Lauricella obtained the used car information package, and found that his friend's brother's name was shown as the prior owner with Assist Financing and Leasing Inc. as the present owner. Kwiatkowski explained to him that she needed the bank draft to be in her name so that she could obtain cash to buy the car for him. The car was not delivered, and she gave various excuses when he made inquiries. When he demanded his money back, he received two n.s.f cheques. Mr. Lauricella did not attempt to contact Assist Financing and Leasing Inc. He contacted the police when he did not receive the car or his money. In 1998, he attended at Provincial Court in Hamilton when Kwiatkowski pleaded guilty to fraud, and a restitution order was made. No money has been received as a result that order.

In cross-examination Mr. Lauricella testified that Kwiatkowski wrote two contracts, made a mistake on the first, and filled in the second. He did not notice any difference in the documents at the time. Although he believed the car to be a repossession, he did not find it unusual that it was being sold with the previous owner still being shown on the documentation. Although Kwiatkowski said that she worked for Assist Financing and Leasing Inc., she did not produce a

business card in that name. The correction to the company was from the hand written name on the contract and a Ms. Kwiatkowski's reference to the company. He had also heard the company's name from his friends who had dealt with Kwiatkowski. He had never spoken to Mr. Ed Quon and that name had never been mentioned. The witness agreed that if he went to a dealer to purchase a vehicle, he would expect to pay by cheque with the payee being the name of the dealer, and he did not know why this would be different except that his friends had received their vehicles. He did know that someone was losing money on this transaction, but he accepted Kwiatkowski's statements that the original purchaser had paid the rest. He had not noticed that parts of the contract were not filled in, and he did not question the fact that he got the personal receipt from Kwiatkowski rather than Assist Leasing and Financing Inc. When he received the two refund cheques, he did not notice that they were from Family Auto Sales rather than Family Auto Wholesale as on the contract, and did not question why they were not from Assist Leasing and Financing Inc. He was in court when Kwiatkowski was convicted, and he knew that the restitution order was made against Kwiatkowski, and not against either Edward Quon or Assist Leasing and Financing Inc.

Mr. Roberto Defazio testified that his father had purchased a car from a woman from "Assist Leasing". He spoke to that woman (Kwiatkowski) and she brought a car for him to test drive. When the writing of the contract was completed, he gave her a bank draft for \$24,589.00 payable to Family Auto Sales. She had explained to him that she was making a fleet purchase directly from Chrysler, and although he was skeptical, it sounded plausible to him. When he asked her about the company, she told him that it was her company, and that she could also obtain repossessed vehicles. Although he did not know the value of the vehicle, he knew that he was getting a very good deal. After the delivery date had passed, he contacted her, and found that she was in hospital. By June or July, he knew that something was wrong and called the police. Mr. Defazio had recorded the V.I.N. number from the vehicle he test drove, and traced it to a dealer's lot. He was advised that Kwiatkowski had bought vehicles from the dealer for full price, and she had taken the vehicle out to show it. During the transaction, the name Edward Quon was never mentioned, and he never met Mr. Quon. Any information that he received about Mr. Quon was subsequent to his dealings with Kwiatkowski had ended. In cross examination he agreed that on prior purchases of vehicles he had paid retail sales tax, and that this transaction "looked too good to be true" although he thought that she was still making money on the sale. She told him that she needed all of the money to buy the car for him as part of a fleet purchase. When he attempted to telephone her, he noticed that no company name was used when the phone was answered. Mr. Defazio knew of the restitution order in his favour, but had received nothing.

Stephen Connolly testified that in January 1997 he was interested in purchasing a new vehicle and knew two friends who had received cars from Kwiatkowski. When he met her, she explained to him that it was part of a fleet purchase and

she had to hold the vehicle for 15 days so that it could be sold as used, and thereby avoid Retail Sales Tax. He stated that Kwiatkowski wrote the contract and that the names on the top was Assist Financing and Leasing Inc. and Family Auto Wholesale. He gave her a bank draft for \$24,610.00 in the name of Family Auto Wholesale, and on the contract did see the R.I.N. number of Assist Financing and Leasing Inc. The witness had made a note of the V.I.N number of the vehicle, and traced it to a dealer who advised him that Kwiatkowski had purchased three or four vehicles from him for full value. Although he inquired to find if "Assist" was a registered dealer, he made no further inquiries. When he tried to get a vehicle or a refund from Kwiatkowski, she made numerous excuses and provided a refund cheque which was her personal cheque that was returned n.s.f. At no time during the transaction was there any contact with, or mention of Edward Quon. The witness knew that the address given for Kwiatkowski was a home address, but this did not concern him as he thought that brokers often operate from their homes. He confirmed that he received a business card from her, but the name Family Auto Sales rather than Assist Financing and Leasing Inc. appeared on the card. Mr. Connolly assumed that Family Auto was a division of Assist Financing and Leasing Inc. When he realized that there was a problem and the deal was too good to be true, he did the searches with the Ministry of Transportation. He stated that he also should have been suspicious when Kwiatkowski said that there was a Retail Sales Tax exemption. When Mr. Connolly telephoned her business phone number, he remembered that the call was not answered with a business name. He received a restitution order from the criminal court, but he did not received any money.

Detective Jerry Bargeman testified that he has been with the Hamilton Wentworth Regional Police for 20 years and was with the Metropolitan Toronto Police for five years. An initial police investigation led to a charge of theft against Kwiatkowski which ended in a guilty plea. She came to his attention again in April 1997 when she was selling cars fraudulently. At this time, Detective Bargeman spoke to a representative at O.M.V.I.C. who advised him that the dealer number being used by Kwiatkowski belonged to Assist Financing and Leasing Inc. When he went to the address provided, he met Mr. Pickering who was renting the space. Mr. Pickering told him that Mr. Quon warned Pickering not to deal with Kwiatkowski and that Quon complained that she was using his dealer's number. He spoke to Mr. Quon who told him that he had been contacted by an Acura dealership in Brantford who advised him that Kwiatkowski was using his dealer number as well as her own personal cheques. Mr. Quon told Detective Bargeman that he had telephoned the Ministry to report the problem. Mr. Quon also advised him that Kwiatkowski was living at 495 Highway 8, # 102, Stony Creek which was a condominium unit owned by Mr. Quon. When the officer spoke to Mr. Brouwer at the auto dealership, Acura on Brant, he was advised that the dealership had lost a lot of money dealing with Kwiatkowski and that she had used the dealer number for Assist Financing and Leasing Inc. and paid by personal cheques. The officer found that Kwiatkowski had obtained in total approximately \$500,000.00 through her frauds. At court, she agreed to a

statement of facts confirming that she was using the dealer's number without authorization. In December, 1998, Kwiatkowski entered pleas of guilty and was sentenced to a term of two years in custody. During the investigation of seized business records, the officer also found that Audrey Morris who had been employed by Mr. Quon had been defrauded of approximately \$18,000.00 by Kwiatkowski. The officer could not understand how Kwiatkowski could use Mr. Quon's dealer number without having a business relationship with him, however he could find no proof of any relationship. Attempts were made to trace the funds taken by Kwiatkowski but without success. In his dealings with Kwiatkowski, the officer found that she was very deceptive and, in his opinion, a pathological liar. She was very convincing, able to "size up" people to find their weak points, and in his opinion was one of the most convincing fraud artists he had dealt with in his career. He found that he could not trust anything she said.

Mr. Marvin Wayne Pickering testified that he has been in the Auto business since 1990 and in 1996 opened Just 4 U Auto Sales in space rented from Mr. Quon. When he opened his business, Brantford Auto Sales and Service was across the road and he believed this was owned by Mr. Quon. Mr. Pickering testified that he had never met Kwiatkowski, and stated that he knew that he had spoken to Mr. Quon shortly before speaking to the police, however he was unsure when he spoke the police. He did recall that the conversation with Mr. Quon involving a person using Mr. Quon's R.I.N. number. Mr. Pickering testified that the number is put on various documents, and is usually displayed in the dealer's office so that it is easy for anyone to see.

Audrey Johnman (formerly Audrey Morris) testified that she worked for Mr. Quon in his Hamilton office as an estate administrator. Kwiatkowski was already a client of Mr. Quon by the time the witness began to work there, and they became friends. Kwiatkowski was dealing with a lawyer in the building and would drop in for visits. Mr. Quon was only in the office one day per week, and she is unsure if Kwiatkowski had any dealings with him at all. The witness knew that Mr. Quon had started a car business, but did not discuss it with him. She also knew that Kwiatkowski was involved with cars, and thought that she was trying to earn money to supplement her income. In order to help her, the witness loaned her money when she claimed that she needed to buy beds so that she and her child did not have to sleep on the floor. Later, she loaned money to Kwiatkowski so that she could acquire a vehicle, and was unaware of the extent of her dealings with cars. Ms. Johnman did acquire a vehicle from Kwiatkowski as a partial settlement of her debt. Kwiatkowski was given access to Ms. Johnman's credit cards, and created a large debt. Ms. Johnman had no knowledge of any dealings between Kwiatkowski and Mr. Quon, and only heard that they had any involvement with each other in discussions with other people. In June, 1996, the witness went on maternity leave, cashed in her investments, and paid off the debts created by Kwiatkowski. She did know that Kwiatkowski had borrowed money for prescriptions from Mr. Quon without paying him back, and had fraudulently transferred the townhouse owned by Mr. Quon into her own name,

but did not know the particulars. In her opinion, Kwiatkowski is a pathological liar who claimed to be dying of cancer, and when she is caught in a lie, is always able to explain that it is someone else's fault. She believes Kwiatkowski is delusional, and may believe her own lies.

Marco Faiazza testified that he met Kwiatkowski through his family as she had sold cars to his brothers in early 1997. He contacted her and she brought a 1996 BMW for him. Later, she advised him the car was a repossession and said that if it was not delivered to him within 21 days she would refund his money and pay him 8% interest. After Kwiatkowski had received his money, she told him that Mr. Quon was her employer. The witness testified that she gave him a pen with the name Family Auto Sales on it. He then changed his testimony and said that it had the name Assist and Family Auto Sales, however he could not find the pen. He did recognize a card with Kwiatkowski's name and Family Auto Sales on it. The contract for the purchase of the vehicle was written by Kwiatkowski, and Mr. Faiazza was unsure if the dealer's name was filled in at the top. After 21 days the car was not delivered, and Mr. Faiazza contacted a lawyer. Mr. Faiazza stated that he telephoned Mr. Quon four times, and that Mr. Quon said to him "you are another one taken by that lady", then laughed at him. He was not sure if Mr. Quon told him to call the police. The witness lost \$26,589.00 but did receive a 1993 Jeep for \$14,000.00 on February 14, 1997. Mr. Faiazza agreed that he was saving money on the BMW but stated that he had bought a house under power of sale and was not surprised by the price of the vehicle. He confirmed that the bank drafts given to Kwiatkowski were made payable to her own name, and she had told him that the vehicle would be transferred into the name Family Auto Sales.

Filipe Sergio testified that he met Kwiatkowski in 1997 as Marco Faiazza had said that his brother purchased a car from her. Mr. Sergio told her that he wanted a small BMW and on February 13, 1997 he saw the car and on February 14, 1997 he gave her a bank draft payable to her name for \$27,285.00. The dealer name and dealer numbers at the top of the contract were photocopied onto the document, and the other information was written in by Kwiatkowski. When the car was not delivered, Mr. Sergio contacted the police. At the beginning of the transaction, Marco Faiazza had advised him to be careful and not to get involved. However, Mr. Sergio did proceed with the transaction as he knew the price was very good, and he intended to resell the vehicle for a profit. At the time of the transaction, he did not know about Mr. Quon, and only heard of him afterwards through other people who had been victimized by Kwiatkowski.

Maria Volpe testified that her husband was a co-owner of East End Auto Body which was registered as a motor vehicle dealer, and she had some familiarity with the process of selling used vehicles. She wished to purchase a vehicle and contacted Kwiatkowski as her sister had purchased a vehicle from her. Mrs. Volpe was offered three vehicles and chose a 1996 Intrepid due to the price. After a test drive, she agreed to purchase the car and signed a contract although

she could not recall if the dealer's name was at the top of the contract. The funds were made payable to Kwiatkowski personally as she explained that she would have to cash the cheque and give the money to Assist Leasing which is the company she deals with. She was told that the vehicle was a repossession and that provincial sales tax was not payable as Kwiatkowski had an exemption. The car was not delivered, and Kwiatkowski began to give her a series of excuses. When the deal was not completed, the witness demanded a refund or the vehicle, and was provided with cheques which were not honored by the bank. Mrs. Volpe confirmed that Assist Leasing did have a dealer's number but did not make any efforts to contact them, and she had never heard of Mr. Quon. She did not question the transaction despite some irregularities, since she knew people who had received vehicles from Kwiatkowski.

Mr. Marco Rossi testified that he met Kwiatkowski when his father purchased a car from her. He believed that she was the representative of a dealer and could get repossessed vehicles for resale at the cost of the outstanding debt. The witness signed a contract on January 12, 1997 to purchase a 1996 Pontiac motor vehicle for \$10,700.00. At the top of the contract the names of Assist Leasing and Family Auto were written, but the witness was unsure if it was preprinted or filled in by Kwiatkowski. She brought a motor vehicle for a test drive, and instructed him to give her a bank draft in her name. She told him that she worked for Assist Financing and Leasing Inc. but gave no further details, and he had never heard of Mr. Quon. For a period of time while he was waiting for his car, Mr. Rossi obtained a rental vehicle paid for by Kwiatkowski, and he remembered the contract showing her home to address on Barton Street. In July, Mr. Rossi's father was to receive his vehicle, but when he did not, he called the police. When Kwiatkowski pleaded guilty, the court made a restitution order in his favour, but he has not received any money. During this transaction, he and his father both had concerns as Kwiatkowski brought the cars to them and told them that there was no provincial sales tax.

Mr. Bruno Musa testified that he met Kwiatkowski through his God father's sister who purchased a car from her. She brought a car to him which was worth more than he intended to spend, but he agreed to buy it and signed a contract February 18, 1997 for \$10,165.00. He made payment by a bank draft payable to Kwiatkowski. When the car was not delivered, he began to call her, and she provided him with a rental car for three weeks. The rental contract was in the name of Family Auto Sales. When she was convicted by the court, a restitution order was made in his name, but he has not collected any money from her.

Rosa Tropiano and her husband heard about Kwiatkowski through friends and called her to inquire about a motor vehicle. Kwiatkowski brought a 1997 Intrepid to show them, and on March 13, 1997 a contract was signed for \$13,910.00. Kwiatkowski told them that she worked for Assist, and Family Auto, but gave no other information. No mention was made of Mr. Quon. A bank draft was given to Kwiatkowski payable to her. When the motor vehicle was not delivered,

Kwiatkowski began to make excuses and finally gave them a refund cheque which was not honoured. Mr. Tropiano had bought 11 used cars in the past and was concerned with some things such as the price, which seemed unusually low, but she and her husband trusted Kwiatkowski and found her very convincing.

Mr. Vince Tropiano testified, and confirmed the evidence of his wife Rosa Tropiano. He added the facts that he had called Kwiatkowski a few times, and was still paying for the loan. It was agreed by all parties that there was a restitution order in his name from the criminal court.

Mr. Emilio Germana testified that he met Kwiatkowski through friends, and had heard that she dealt in repossessed motor vehicles. His son was interested in a BMW, and Kwiatkowski brought a 1997 BMW for a test drive. The witness and his son knew that the price was extremely low. Mr. Germana signed a contract on March 27, 1997 in the amount of \$23,219.00. The bank draft was given to Kwiatkowski payable to her. She never delivered a car. Mr. Germana assumed that she was working for Assist Financing and Leasing Inc. based on the name at the top of the contract. He made inquiries, but he was not able to speak to anyone on the telephone. When he obtained the phone number for Assist Financing and Leasing Inc., he asked for Kwiatkowski and was told that there was no one there by that name. She had given him a cheque from another person payable to Assist, however it was not accepted by the bank. He never recovered any money. When he asked Kwiatkowski why the serial number of the motor vehicle was not on the contract, she told him that if it was put on she had problems with customers calling the original owner and spoiling the deal. He explained that the price caused him to make the deal and that his judgment was clouded despite the irregularities in the transaction compared with other vehicles he had purchased.

FACTS FOUND PROVEN:

The scheme used by Kwiatkowski was to represent herself to potential customers as the representative of Assist Financing and Leasing Inc. and Family Auto Sales or Family Auto Wholesale and to offer to sell vehicles well below the market value. In some transactions the vehicle would be delivered to lend credibility to her scheme and spread her name through the community. Customers were allowed to test drive a vehicle and were told that the price was very low because it was part of a fleet purchase or they were paying the outstanding balance of a debt on a repossessed vehicle plus a sales commission. As a further incentive, she explained that she had a provincial sales tax exemption. Kwiatkowski has been described by all witnesses as very convincing and, in particular, the investigating officer with experience in fraud cases said that she was about the best he had ever seen. She pleaded guilty to multiple charges in the criminal court and received a penitentiary sentence. At her sentencing hearing, the agreed statement of fact included the fact that she

had falsely held herself out as representing Assist Financing and Leasing Inc. Restitution orders against Kwiatkowski were made in favour of the various victims on the charges before the court, and there was no evidence that any of these were registered as Judgements. There were no charges against Mr. Quon or Assist Financing and Leasing Inc. as being parties to her offenses.

Kwiatkowski mentioned Assist Financing and Leasing Inc. to some of her customers, and wrote the name at the top of her sales contract together with Family Auto Sales or Family Auto Wholesale. She also used the dealer's number and retail sales tax number of Assist Financing and Leasing Inc., however there was no evidence of how she obtained these numbers. It was clear that these numbers are commonly openly displayed by motor vehicle dealers and are on contracts. There is no evidence that Kwiatkowski at any time gave the customer the telephone number for Assist Financing and Leasing Inc. or that anyone from that company assisted her in the completion of any transaction. Any statements made by Mr. Quon to any customer, motor vehicle dealer, his tenant Mr. Pickering or the police officer, denied any involvement with Kwiatkowski and warned people not to deal with her. There was no act or statement by Mr. Quon or anyone acting on behalf of Assist Financing and Leasing Inc. acknowledging that Kwiatkowski was acting as agent for the company. Mr. Quon appears to have been a victim of her fraudulent behavior, as he had rented her an investment property, and she transferred it into her own name by forging documents. Mr. Quon rectified this situation by bringing the appropriate court proceedings to reverse the transaction.

ISSUES:

Did the Fund err in finding that the Applicants were not entitled to compensation under Section 12(10)(c) of the Schedule to Regulation 810 the *Ontario Motor Vehicle Dealers Act* (the "Act").

Did Ms. Patrice Kwiatowski act as agent for Mr. Edward Quon, and Assist Financing and Leasing Inc. a participant in the Ontario Motor Vehicle Dealers Compensation Fund, and thereby entitle the Applicants to compensation.

APPLICABLE LAW:

Section 10 of the *Motor Vehicle Dealers Act* states:

"motor vehicle" means an automobile, truck or other vehicle propelled or driven otherwise than by muscular power, including a motorcycle, but not including a motorized snow vehicle or a farm tractor or other self-propelled machinery primarily intended for farming or construction purposes;

"motor vehicle dealer" means a person who carries on the business of buying or selling motor vehicles, whether for the person's own account, or the account of any other person, or who holds himself, herself or itself out as carrying on the business of buying or selling motor vehicles;

Section 24 of the *Motor Vehicle Dealers Act* states:

The Lieutenant Governor in Council may make regulations,

.....

(o) providing for the establishment, maintenance, and administration of the Motor Vehicle Dealers Compensation Fund including prescribing provisions relating to investing and paying out of money from the Fund;

.....

(q) providing for payment out of the Fund of claims and procedures to be followed in respect thereto;

.....

Regulation 801, of the *Motor Vehicle Dealers Act* - Schedule, Terms of Compensation Fund - Claims:

12(1) The Fund is established as of the 1st day of July, 1986, to stand in the place of a participant for the payment out of the Fund of claims of customers of the participant where the transactions occurred during the period when the participant was registered under the Act and where the participant has refused after demand or is unable to pay the claims.

(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgement in respect of the claim and the judgement has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgement, and statement of claim, for payment of the unsatisfied portion of the judgement and costs as assessed.

2. The participant has been convicted of an offence under the Criminal Code (Canada) involving fraud, theft or false pretences in connection with a transaction out of which the claim arose, and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the conviction and the correctness of the liquidated amount.

.....

(10) Despite subsections (1), (2), (3) and (6) and subsection 15(3) of this Schedule, there shall not be paid out of the Fund,

- (a) more than \$15,000.00 exclusive of costs, to each claimant in respect of each transaction in respect of a claim or claims against any one participant;

- (b) any amount of interest, including interest on a judgement or on costs;

- (c) where there is a judgement, any amount for costs in excess of actual disbursements and fees as assessed;

.....

APPLICATION OF LAW TO FACTS:

The Tribunal finds that Kwiatkowski did not have authorization from Assist Financing and Leasing Inc. to act as agent for that company, and that at no time did Mr. Quon or anyone on behalf of the company acknowledge that she had authority to act as agent for the company. Some persons who dealt with Kwiatkowski had assumed based on statements made by Kwiatkowski and her use of the company name on her contract that she worked for Assist Financing and Leasing Inc. Kwiatkowski met her customers away from the business premises of Assist Financing and Leasing Inc. and did not give the phone number of that company as a contact number to any of her customers. Any cheques given to Kwiatkowski were in her name personally, or in some variation of a business name used by her. When any of her customers contacted Mr. Quon, he made no acknowledgement that Kwiatkowski represented his business in any way.

The consistent and general opinion of the witnesses was that Kwiatkowski did not tell the truth, and she was described as a pathological liar. Even the veteran police officer who dealt with her admitted that despite his years of dealing with persons accused of frauds, she was probably the best he had seen. This Tribunal finds that Kwiatkowski did tell her customers that she was affiliated with Assist Financing and Leasing Inc., however there is no proof that these representations were anything more than additional lies told for the purpose of carrying out a series of fraudulent transactions. When the criminal charges were laid against Kwiatkowski, the police investigated the situation and did not find grounds to bring charges against Mr. Quon or Assist Financing and Leasing Inc. as being involved in any of the fraudulent transactions. When Kwiatkowski was faced with the allegations, a plea of guilt was entered on the basis of the alleged facts, and no mention was made of any involvement by Mr. Quon or Assist Financing and Leasing Inc. No Restitution Orders were made against Assist Financing and Leasing Inc. or Mr. Quon, and there are no judgements against them for any of the Applicants to rely upon.

The Act requires that a claim must be against a registered participant in the Fund, and in this case Kwiatkowski in her personal capacity or under the business names used by her was neither a participant in the Fund, nor an authorized representative of a participant in the Fund. The Fund has no liability for the acts of person fraudulently representing themselves as agent for a participant, and is not a general insurance program to compensate customers for the malfeasance of non participants. Therefore the Fund did not err in disallowing the claims.

DECISION:

Therefore, by virtue of the authority vested in it under the *Motor Vehicle Dealers Act* Regulation 801, section 15(3), the Tribunal directs the Trustee of the Ontario Motor Vehicle Dealers Compensation Fund to disallow each of the claims.

Released: January 8, 2001

CROUGH

DANIEL P. CROUGH

IN THE MATTER of the Highway Traffic Act, R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Daniel P. Crough seeking an extension of the time requirements for this Applicant to commence this appeal from an impoundment order of the Registrar under Section 55.1 of the Highway Traffic Act;

AND IN THE MATTER of

DANIEL P. CROUGH

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Stuart Cork, Presiding Member

APPEARANCES: Kim Beintema
Representative for the Registrar of Motor Vehicles

Daniel P. Crough, Applicant

DATE OF
MOTION:

January 4, 2001

By teleconference

ORDER

A motion was heard by teleconference on January 4, 2001, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The

motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

The Tribunal refused to grant the extension of time requested by the Applicant to commence an appeal for the reasons set out below.

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Copy of Impound Order dated November 11, 2000 relating to the impoundment of the motor vehicle for 45 days. (Exhibit # 1)
2. Original Notice of Appeal, including Applicant's position on Appeal, dated November 25, 2000 received by the Tribunal on December 8, 2000. (Exhibit # 2)

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to the above-captioned legislation.

The motor vehicle was impounded on November 10, 2000 while being driven by Michelle Watson (Jewell), whose driver's licence was under suspension at the time of the impoundment. The vehicle was taken by Michelle Watson (Jewell) without the knowledge or consent the Applicant.

The Applicant testified that on the night of the impoundment, he was informed by police that his vehicle had been involved in a motor vehicle accident, and appeared to be damaged beyond repair, or a "write off". The following day the Applicant telephoned the police, and attempted to ascertain the whereabouts of his vehicle. The Applicant further testified that no one at the police station knew where his vehicle was and that the officer who informed him of the accident the night before, was on vacation.

The Applicant does not know when he received the Order to Impound.

The fifteen-day deadline for filing an appeal with the Tribunal was November 15, 2000.

The Applicant filed his Notice of Appeal with the Tribunal on December 8, 2000, twenty three days into the impoundment period, and twelve days past the appeal deadline date.

Notwithstanding the fact that Notice of Appeal form was received by the Applicant on the date of expiration of the fifteen-day appeal filing period, it took an additional ten days to file the appeal. The Applicant testified that he made his best effort to pursue the matter, and that due to personal difficulties, he did the best he could under the circumstances.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. Where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. The Applicant must establish that he, acting in good faith, was unable through accident, illness or other cause beyond his control to bring the appeal within the prescribed 15 days. The Tribunal is precluded from considering other factors not arising from or directly related to these criteria.

The criteria listed in Section 20(7) which the Tribunal should consider in granting an extension are matters outside the Applicant's control. Whereas the unsupported testimony of the Applicant was that the initial fifteen day delay was caused by his inability to obtain any information from the police, the specific reasons for the further ten day delay in submitting his Notice of Appeal form to the Tribunal remained unclear. The Applicant failed to provide a satisfactory reason as to why this further delay in completing the appeal had occurred.

The Tribunal is not satisfied that the evidence before it shows that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of accident, illness or other cause beyond the Applicant's control.

ORDER:

For the reasons set out above, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is dismissed.

LICENCE APPEAL TRIBUNAL

Stuart Cork,
Presiding Member

RELEASED: January 16, 2001

ADLS - DIS-01

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

The Applicant

IN THE MATTER of an APPEAL of A 90-DAY
ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of
Motor of Motor Vehicles made pursuant to section 48.3(2) of
the *Highway Traffic Act* TO SUSPEND A PERSON'S
DRIVER'S LICENCE FOR A PERIOD OF 90 DAYS

AND IN THE MATTER of a requirement for a hearing
respecting the said DECISION

THE APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), the Applicant initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act, to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a

proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles to suspend the driver's licence of the Applicant for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: January 18, 2001

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

The Applicant

IN THE MATTER of an APPEAL of A 90-DAY
ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of
Motor of Motor Vehicles made pursuant to section 48.3(2) of
the *Highway Traffic Act* TO SUSPEND A PERSON'S
DRIVER'S LICENCE FOR A PERIOD OF 90 DAYS dated
September 2, 2000

AND IN THE MATTER of a requirement for a hearing
respecting the said DECISION

THE APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), the Applicant initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act, dated September 2, 2000 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and

Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated September 2, 2000 to suspend the driver's licence of the Applicant for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 18, 2001

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

The Applicant

IN THE MATTER of an APPEAL of A 90-DAY
ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of
Motor of Motor Vehicles made pursuant to section 48.3(2) of
the *Highway Traffic Act* TO SUSPEND A PERSON'S
DRIVER'S LICENCE FOR A PERIOD OF 90 DAYS dated
October 26, 2000

AND IN THE MATTER of a requirement for a hearing
respecting the said DECISION

THE APPLICANT

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), the Applicant initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act, dated October 26, 2000 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and

Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated October 26, 2000 to suspend the driver's licence of the Applicant for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 18, 2001

FREEMAN

DOUGLAS AND MARIE FREEMAN

MOTION TO CONSIDER AN APPLICATION FOR
EXTENSION OF TIME

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair, Presiding

APPEARANCES:

PAUL OSIER, Counsel, representing the Applicants
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program

DATE OF
HEARING: December 8, 2000 By *Teleconference*

REASON FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999 to extend the time for the Applicants to file an appeal from a decision of the Ontario New Home Warranty Program ("the Program") under section 16(2) of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31.

FACTS:

On consent of the parties, the Motion proceeded by teleconference. The Tribunal received Affidavit evidence on behalf of the Applicants from Allison McAlpine and on behalf of the Program from Filomena Cece, Gregory Bruce Hedley, and James Barnes. The Tribunal makes the following findings:

Counsel for the Applicants was retained in August of 1998 to assist in receiving redress for construction deficiencies in their home. Counsel submits, based upon the Affidavit of Ms McAlpine, that from this point on he had numerous correspondences with both counsel for the homebuilder and the Program. The Affidavit filed by Mr. Hedley solicitor for the builder, states that the first correspondence with counsel for the Applicant was in May of 1999. This was followed, the Affidavit continues, by correspondence throughout 1999 attempting settlement but none was reached.

In February 2000, counsel for the builder received a fax indicating that the Applicants had opted to sue but that settlement remained the preferred option. The outstanding item was the Applicant's claim that the septic system was over saturating, thereby rendering it useless for periods of time. This was followed May 12, 2000 by a letter addressed to both counsel for the builder and the Program proposing another form of settlement and requesting a reply by May 26, 2000.

There was no response to this letter, as, according to the Hedley Affidavit, it had been made clear to the Applicants that settlement on the proposed terms had been previously turned down.

The response of the Program to the May 12 letter was to issue a Decision Letter dated June 7, 2000. According to the Affidavit of Ms. Cece filed in support of the Program, the Decision letter was duly served upon the solicitors for both the Applicants and the builder. Mr. Hedley, solicitor for the builder states in his Affidavit that after receiving the Decision Letter, there were no communications between himself and solicitors for the Applicants.

LAW:

The Act and Regulations set out the procedures to be followed by the Parties in order to effect a claim. The relevant sections for present purposes are:

Section 14(1)(c) of the Act:

14.(1) Where,

.....
.....

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed, the person or owner is entitled to be paid out of the guarantee fund the amount of such damages subject to such limits as are fixed by the regulations.

.....

Section 4 of Regulation 892:

4.(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

(2) Forthwith upon receipt by the Corporation of such notice, the Corporation shall furnish the claimant with such forms as it or the insurers may reasonably require for the purposes of establishing and verifying the claimant's loss.

(3) If the Corporation fails to furnish such forms, the claimant is entitled to make the claim by giving written notice to the Corporation setting forth in reasonable detail information relating to the claim.

(4) Promptly after receipt by the Corporation of all information reasonably required to be furnished to it in respect of the claim and after determination of any disputes between the claimant and the vendors as to the liability of the vendor, the Corporation shall serve notice of its decision under section 14 of the Act.

Section 16 of the Act:

16.(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

There is no material before the Tribunal nor is it contested by the Applicants either in submission or by Affidavit that the requirements of these sections of the governing legislation were not complied with by the Program.

The sole issue before the Tribunal therefore is whether it should exercise the discretion granted under Section 7 of the *Licence Appeal Tribunal Act* 1999. The section reads:

7. Despite any limitations of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

In determining the circumstances under which the Tribunal will exercise its discretion and allow an extension of time under this section the court employs four criteria. These were laid down in the case of in *Re Bilodeau and Ontario New Home Warranty Program* (1994), 26 CRAT 930 and have been subsequently adopted by this Tribunal. They are:

- 1) That there was an intention to appeal within the time limited;
- 2) That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do it later if they did so as soon as the true situation was apprehended;
- 3) That there is not some overriding prejudice to the Respondent in allowing the application;
- 4) That there is a substantial point in issue and the Applicant has some reasonable chance of success.

The Program's Decision letter is dated June 7, 2000 and was served on the Applicant's counsel on June 8, 2000. The Applicant's Notice of Appeal is dated September 19, 2000 and was date stamped as received at the Tribunal September 21, 2000. The time allowed by section 16(2) of the Act for the filing of an appeal from the decision of the Program is 15 days. The filing of the Notice of Appeal is therefore three months after the prescribed time.

In the Decision Letter it states that it is being served pursuant to section 16, the section that contains the limitation period. As well, the letter under the heading, "Right of Appeal" states in bold print that should the owner wish to appeal the decision of the Program that he can do so **"within 15 days"** of service of the letter.

The Tribunal finds that the Applicant was aware of the 15 day appeal period and decided against the appeal.

The Tribunal finds no evidence evincing an intention on the part of the Applicant to pursue an appeal within the 15 day appeal period. Subsequent to the service of the Decision Letter there was no record of any communication between the parties that could be construed as leading to some misapprehension on the part of the Applicant's solicitor as to his client's rights under the Act or the position of the parties relative to the claim such that a reasonable person could conclude that the limitation period was being waived either explicitly or constructively. There was no evidence submitted showing anything beyond the control of the Applicants or their counsel, such as a prolonged illness, which would excuse a party to a proceeding from compliance with the governing statutory procedures. Section 7 of the *Licence Appeal Tribunal Act*, 1999 requires that there are

reasonable grounds for applying for an extension. Here, the Applicant decided against appealing. The 15 day appeal period expired. The Applicant subsequently decided to appeal. The evidence does not establish any reasonable grounds for an extension, and to allow an extension from 15 days to 3 months would render the intention of section 16 of the *Ontario New Home Warranties Plan Act* virtually meaningless.

The Applicant having failed to establish any intention to appeal within the prescribed 15 day period, it is unnecessary to consider whether an extension is prejudicial to the Program or whether a hearing would involve a substantial point in issue. On the evidence presented, the Tribunal finds that it would be inappropriate to exercise its discretion and extend the time for the Applicant to file a notice to appeal the decision of the Program.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act*, the Tribunal orders that the application to extend the time for filing of an appeal in this matter be dismissed.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair, Presiding

Released: January 18, 2001

KINGO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
MARCUS KINGO
as a motor vehicle salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said
Proposal

MARCUS KINGO

Applicant

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), Marcus Kingo (the "Applicant") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, dated December 6, 2000 in terms of which the Registrar proposed to refuse registration of the Applicant as a motor vehicle salesperson;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal dated December 6, 2000 to refuse the registration of Marcus Kingo.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: January 26, 2001

LURKAN HOMES INC.

LURKAN HOMES INC.

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: DAVID J. HUNT, Vice-Chair, presiding

APPEARANCES:

RICHARD LUTZER, as agent for the Applicant
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

December 20, 2000

By Teleconference

REASONS FOR RULING AND ORDER

This is an application to the Licence Appeal Tribunal to extend the time for the Applicant, Lurkan Homes Inc. to file an appeal from a decision of the Ontario New Home Warranty Program ("the Program") pursuant to section 7 of the *Licence Appeal Tribunal Act* ("the Act").

The hearing of this motion proceeded on consent as an electronic hearing. The Tribunal received material and heard evidence from Richard Lutzer the president of the Applicant corporation setting out the reasons for requesting an extension. The Program filed an affidavit on the motion setting out the date of delivery of documents on the Applicant, and the expiry date of the appeal period. There was also some brief information about the Applicant's filing history produced by Connie Carriero the Underwriting Co-ordinator at the Ontario New Home Warranty Program. Mr. Lutzer was given the opportunity to question Ms Carriero but declined the opportunity to do so. The Program opposed the application to extend time, referring to the Applicant's evidence and the Notice of Proposal.

The Tribunal makes the following findings of fact:

Mr. Lutzer received the Notice of Proposal and based on the written warning was aware that he had 15 days to file an appeal. He did intend to file an appeal, but postponed doing so because he was preparing to move his residence. The document was set aside as he thought he would have time to deal with it, and wanted to take care of other matters first. When he did get to it, he was out of time and filed the Appeal on October 11, 2000 with the Tribunal. The appeal was to be filed on October 6, 2000, and was therefore 5 days late.

Under Section 7 of the *Licence Appeal Tribunal Act*, 1999, an Applicant may request an extension of time for giving notice requiring a hearing. This section reads:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or under any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions it considers proper as a result of extending the time.

In determining whether there are reasonable grounds for applying for the extension and for the granting of the relief, the Tribunal takes into account the four factors set out in the decision of the Commercial Registration Appeal Tribunal in Re Bilodeau and ONHWP (1994), 26 CRAT 930:

1. That there was an intention to appeal within the time limited;
2. That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do it later if they did so as soon as the true situation was apprehended;
3. That there is not some overriding prejudice to the Respondent in allowing the application;
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

This Tribunal notes that the fundamental principle in deciding whether to allow an extension is to see that justice is done.

The Tribunal has found that Mr. Lutzer did have the intention to appeal within the time limit but he was pre-occupied by moving his residence. He was aware of the time limit but was not diligent in pursuing it as he decided to deal with other matters in priority to the appeal. Once he filed his appeal, he was beyond the limit but only by a few days. On his own evidence and submissions he was aware of the requirement to file the notice within 15 days. The Tribunal finds that he was careless, but did have the intent to appeal and did file the appeal once he realized he was out of time.

The Tribunal is unable to find any substantial prejudice to the Respondent if the matter were to proceed.

The next issue is whether the Applicant would have a reasonable chance of success on the appeal if the motion is allowed. The grounds raised in the Notice of Appeal do not deny that the Applicant has failed to provide up to date personal net worth statements substantiating the listed assets, or that he has failed to provide a complete 1999 year end financial statement for the company. He raised the following 6 arguments in the Notice of Appeal:

1. He is a small builder and providing the documentation puts a financial burden on him.
2. The Registrar did not clarify the financial criteria for small builders.
3. The Registrar did not consider that there had never been a complaint about the registrant.
4. The Registrar did not consider that the registrant submitted financial data and did not receive assurances of confidentiality.
5. The Registrar failed to consider that the registrant paid a deposit of \$5,000.00 on each home built.
6. The Registrar failed to take into account that the registrant had been registered for 6 years with the Program and complied with the requirements.

Section 7 of the *Ontario New Home Warranties Plan Act* provides that a corporate registrant is entitled to registration unless it fails to meet any of three requirements. These are financial responsibility, the requirement of technical competence, and that the business will be conducted with honesty, integrity and in accordance with the law. The only issue in this Notice of Proposal is the issue of financial responsibility, and there are no issues of technical competence or honesty.

Under Regulation 894 and section 6 the registrant is required to provide the Program with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request, and this requirement is also set out in the Vendor Builder Agreement signed upon the initial registration. The Program has established a system of requiring personal guarantees, deposits, and current financial information to ensure that the test of financial responsibility is met. The grounds of appeal set out in the Applicant's appeal do not deny that the findings by the Registrar in the Notice of Proposal are correct. Instead, they address the issue of whether other matters should be considered instead. In this

case the Registrar is within its jurisdiction under the Act and the Regulations to require the documents and financial information.

The Applicant does assert in point 4 of the Appeal that he has provided financial information, and there could be a triable issue of whether there has been sufficient compliance or there has been a misunderstanding. For justice to be done and to be seen to be done, the Applicant should have the opportunity to have a hearing.

The Tribunal has the jurisdiction under section 9(4) of the Act to direct the Registrar to carry out the Proposal, refrain from carrying out the Proposal or substitute its opinion for that of the Registrar after the hearing has been held. In this case, the Applicant does not have a history of dishonesty, technical incompetence or apparent problems of financial viability. If, after considering the evidence and the submissions, the Tribunal found that the Applicant was able to file the required information within a reasonable time, it would be open to the Tribunal to consider a conditional registration with appropriate terms and conditions to ensure compliance with the filing requirements. The Tribunal finds that there is a substantial point in issue respecting which the Applicant has some reasonable chance of success.

Under these circumstances, it is appropriate for the Tribunal to exercise its discretion and order that the time for filing the appeal be extended to October 11, 2000 when the Applicant filed the request for a hearing.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders that the application to extend the time for filing of the appeal by the Applicant be granted.

LICENCE APPEAL TRIBUNAL

DAVID J. HUNT
Vice-Chair, Presiding

Released: January 4, 2001

373-ALC

MED - 0373

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROBERT EHRLICH, M.D., Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: January 8, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – received December 5, 2000.

- b) Exhibit # 3 Additional submissions –2 pages – received January 8, 2000.

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation submissions – tabs 1 – 10
- received December 27, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with certified copies of Ministry of Transportation documents on file. Also as a courtesy to the Tribunal, the Respondent proffered a file summary with respect to this matter as well as the Carswell “2000 - 2001 Annotated Ontario Highway Traffic Act”; Canadian Medical Association - Determining Medical Fitness to Drive”.

The Applicant submitted a letter from C.M. Industries, and a letter from Applicant's wife. Both letters were entered, on consent, as Exhibit # 3.

FACTS:

The Applicant is appealing the suspension of his driving privileges effective ‘87 12 01” as per Notice of Appeal filed as Exhibit # 1.

The effective date of suspension according to the Ministry is September 26, 1999. (Exhibit 2 Tab 8)

In his letter to the Tribunal the Applicant explains that he is “...*self employed ...required to pay a driver to travel back and forth to work ...responded to the Ministry’s ...requests for medical confirmation ...overcome ...problem with alcohol ...several years prior to ...marriage ...not feasible ...financially to attend or time to attend ...courses ...Ministry requesting.*” Exhibit # 1

In a Medical Report dated 99 04 27 prepared by Physician # 1, the Applicant’s family physician for “2 Yrs”, checks “Yes” for “Addictions (Alcohol, Sedatives, Tranquilizers, Narcotics etc.)” (Exhibit # 2 Tab 1)

A MINISTRY OF TRANSPORTATION ASSESSMENT FORM- dated ‘99 07 05”, completed by Physician # 1, indicates as follows:

“NO” is checked under “Personal Health History” for “Addictions

According to the “PHYSICAL ASSESSMENT AND LABORATORY EVALUATION” “*Blood Pressure - NORMAL 125/70; LIVER; NEUROLOGICAL;*

GGT (6) MCV (90.3)" also checked under the category "NORMAL" (Exhibit # 2 Tab 3A).

Under "Recommended goal for alcohol consumption - Abstinence" is circled" (Exhibit # 2 Tab 3A).

The Applicant's physician comments "No Etyl for 4 months" (Exhibit # 2 Tab 3A).

A MEDICAL ADVISORY COMMITTEE CASE STUDY dated August 12, 1999, upheld the suspension. (Exhibit # 2 Tab 4)

On August 26, 1999 a MEDICAL ADVISORY COMMITTEE CASE STUDY upheld the suspension. (Exhibit # 2 Tab 4)

An ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS dated 'November 3, 2000 " completed by K. M. Biel, details the Applicant's history as explained by the Applicant: "...1986 has industrial accident ...emotional trauma ...begin drinking ...did not like pain killers ...began drinking more than usual ...wrong ...abstinent 1991-1997...occasional social drink ...no bingeing, not getting drunk (last time drunk 1987) ...no more than two beers in any occasion. Alcohol problem in late "80's" no problem now ...did not need licence in past ...too much at stake now ...matured ...realizes mistakes..." (Exhibit # 2 Tab 8)

Exhibit # 2 Tab 10, is a Ministry of Transportation driving Record for the Applicant since 1980, showing two alcohol related offenses - 1983 - 1987 and a Fail or Refuse to Provide conviction in 1988.

Under the letterhead of C.M. Industries Ltd., C. McLennan informs the Applicant by letter dated December 29, 2000 that "...due to restructuring of ...company, each contractor will be required to be licenced ...it will not be feasible to award contracts ...unless you are qualified to drive..." (Exhibit # 3)

In a letter address "To whom it may concern", dated January 3, 2001, Applicant's wife writes that she "...hopes ...licence reinstated ...Applicant has had to cancel ...visits with ...son ...weekend visits have become harder to maintain..." (Exhibit # 3)

At the hearing the Respondent, relied on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 10.

The Respondent advised the Ministry that the first time the Applicant was requested to provide medical information regarding his condition was in 1991. It was not until 1999 that the Ministry received the information requested.

The Applicant stated that he did not pursue the return of his driver's licence earlier, as he did not have the financial means to do so.

The Applicant confirmed that by society's standards he would have been considered an alcoholic at the time, but not now. The Applicant testified that he remained sober from 1991-1997. Did drink socially, the last time he had a drink was New Year's Eve. No longer feels the urge to drink.

In reply to the Tribunal's questioning, the Applicant indicated that if he found himself in a situation where he had drank too much, he would find an alternate way home, rather than drive.

As for relapse treatment programs, the Applicant confirmed that he did attend AA in the past, but no longer attends due to time constraints. He has also looked into other relapse programs but the \$600.00 cost is prohibitive.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to “...suspend or cancel” a driver’s licence for “any ... sufficient reason...”. The Applicant came to the attention of the Ministry as a result of drinking and driving convictions. (Exhibit # 2 Tab 2)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, at the time of the suspension.

The Respondent refers the Applicant’s previous convictions in order to support the contention that the Applicant’s licence not be reinstated. The Tribunal notes that the last conviction, arising out of an offense committed in 1987, occurred in 1988.

The guidelines introduced by the Ministry, as grounds to sustain the suspension are only policy/guidelines, not legislation.

Section 14(b) of Regulation 340/94 under the HTA, also invoked by the Respondent as being applicable, states:

“An applicant for or a holder of a driver’s licence must not,

b)be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

There is no current medical information that confirms that Applicant is addicted to alcohol. This statement is corroborated by the Applicant's physician on '99 07 05". Physician # 1 checked "NO" is under "Personal Health History" for "Addictions, in the MINISTRY OF TRANSPORTATION ASSESSMENT FORM. (Exhibit # 2 Tab 3A)

Further, Physician # 1 confirms, according to the MINISTRY OF TRANSPORTATION ASSESSMENT FORM, that the Applicant's GGT level (6) and MCV level (90.3) are "NORMAL", and that the Applicant had had " No Etyl for 4 months" (Exhibit # 2 Tab 3A)

This Tribunal is thus unable to find that the Applicant is still addicted to alcohol.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14 (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated September 26, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar **be set aside**.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Robert Ehrlich, M.D.,
Member

RELEASED: January 17, 2001

397-ALC

MED - 0397

**Appeal under Section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision
of the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JOHN A. CARMICHAEL, M.D.,
Presiding Member

APPEARANCES:

KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles
Applicant,
by written submissions only

DATE OF
HEARING: January 26, 2001 Kingston

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- #1) Ministry of Transportation and Communications Medical Condition Report.
- #2) CT Head.
- #3) Chest Xray.
- #4) Bilateral Carotid Ultrasound.
- #5) EKG.
- #6) Ministry of Transportation letter - May, 2000.
- #7) Ministry of Transportation Medical Report - June 15, 2000.
- #8) Medical Review Section letter - July 20, 2000.
- #9) Notice of Appeal - December 11, 2000.

FACTS:

On March 22, 2000, The Ministry of Transport and Communications received a Medical Condition Report from the Applicant's family physician stating that the Applicant was "having episodes of dizziness/weakness and almost blanking out", and that this condition was being investigated. (Exhibit # 1)

Investigations carried out over the next two months included C.T. of the head (Exhibit #2), Chest X ray (Exhibit #3), Bilateral Carotid Ultra Sound (Exhibit #4), and EKG. (Exhibit #5)

On May 4, 2000, the Applicant's Driver's Licence was suspended under Section 47(1) of the *Highway Traffic Act*. (Exhibit #6)

On June 6, 2000, the Ministry received a further report from the family physician 1) confirming that the above test were all negative and 2) that the Applicant was addictive to alcohol (12 drinks/day) and "will be seeking Rx. through addiction program". (Exhibit #7)

On July 20, 2000, the Applicant was asked for an "up to date detailed assessment from a physician who specializes in addiction medicine" in order to consider reinstatement of his Licence. (Exhibit #8)

On December 11, 2000, the Applicant gave notice of appeal of his driver's Licence suspension on the basis that all his medical reports were negative, he has never had a conviction, he is in an addiction program and that "it is unjust to assume that I will have an accident". (Exhibit #9)

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant presents two problems, both specifically addressed under the *Highway Traffic Act*. The episodes of dizziness and weakness under Reg. 340/94 Section (a) and the alcohol addiction under Reg. 340/94 Section (b).

The negative medical investigation suggests that the episodes of dizziness and weakness may remain idiopathic and the only evidence of cure will be a history of freedom from such episodes for an appreciable period of time. The Tribunal has received no such evidence.

The Applicant's alcohol addiction as described by the family physician must be considered significant, (and may well be the underlying cause of the dizziness and weakness episodes). The Tribunal notes in statements made by the Applicant and his physician that the Applicant is in an addiction program. The Tribunal has no evidence of the success of this program or the current status of the Applicant's alcohol addiction.

The Registrar has concluded on the basis of the Applicant's medical condition that there is sufficient reason to suspend the Applicant's licence. On the evidence, the Tribunal supports the decision of the Registrar of Motor Vehicles.

DECISION:

Upon the application by the Applicant to appeal the decision dated of May 4, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

John A. Carmichael, M.D.,
Presiding Member

RELEASED: January 31, 2001

355-ALC

MED - 0355

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett, M.D., Presiding Member

APPEARANCES: Kim Beintema,
Representative for the Registrar of Motor Vehicles

Applicant,
Counsel for Applicant

DATE OF
HEARING: January 23, 2001
London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 Notice of Suspension dated June 21, 2000, issued by the Registrar of Motor Vehicles.

Exhibit # 2 Notice of Appeal Form received at the Tribunal November 24, 2000. Filed by the Applicant.

Exhibit # 3 Tabulated documents (1-8) received from the Registrar of Motor Vehicles, dated May 29, 2000.

FACTS:

The Applicant, a 45 year old travelling salesman had his drivers licence suspended July 1, 2000 after the Ministry received an unsolicited letter from Physician # 1, a neurologist, at the London Health Science Centre, dated May 29, 2000.

Physician # 1 reported that the Applicant had lost consciousness on three occasions in the past three years. The first occurred when he fell off his bicycle and struck his head. Repairs to his jaw and nose were required and a subsequent CT scan of his head was normal.

The second occurred a year later, while vacationing in Costa Rica. He bent over to pick up something and lost consciousness for a few minutes. He was disoriented briefly and slightly drowsy, but apparently did not have a seizure. During his evidence, he explained he had been touring the "Rain Forests" and hiking around the Arenal Volcano. He was in a "hot spring" when he felt unwell and climbed out. When he bent over he collapsed. He stated it was a totally different type of episode from the others. He had not been drinking that day, but the day before he had about eight ounces of alcohol.

The third was on "Mother's Day", May 14, 2000. He was at his mother's house when he collapsed. He was orientated when he awoke and had neither been incontinent nor bitten his tongue. He was taken to a hospital for a physical examination, which was negative. The previous day he had had three to four beers, but no alcohol that day.

Physician # 1 diagnosed the seizure due to alcohol withdrawal. The Applicant was advised to stop drinking and seek counselling through his family physician.

Subsequent test results for a neurological examination, EEG, CT scan, ECG were all reported normal.

The Applicant testified that he had changed his whole life style. His last drink was June 26, 2000. He changed his eating habits with the help of a nutritionist, works out regularly at a Health Club and had surgery to correct a problem causing sleep apnea. He went to A.A. for a short period, but did not feel it helped. He is presently attending the "Thames Valley" Addiction Services (ADSTV) and has an appointment for a full assessment on February 7, 2001.

His only medication is Vasotec for high blood pressure.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under

section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to "suspend or cancel" a driver's licence for "any sufficient reason". The Registrar suspended the Applicant's driver's licence after receiving an unsolicited letter dated "May 28, 2000" from Physician # 1, advising that the Applicant has lost consciousness on three occasions in the past three years. Physician # 1's diagnosis of the seizure like episodes was alcohol withdrawal.

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, in suspending the Applicant's driver's licence.

The Applicant, however, argues that there is insufficient medical evidence to justify continuing the suspension and he has submitted evidence to the Ministry to answer all of the Ministry's concerns. He further stated in evidence that the episode in Costa Rica was simply a fainting spell from being exposed to hot steam and humidity in the Rain Forests. He stated that particular episode was completely different than the other two.

Prior to the Applicant's examination and interview with Physician # 1 he had no idea that alcohol and alcohol withdrawal was causing these episodes. He has been a travelling salesman for twenty two years and a driver's licence is essential if he wants to work.

The Tribunal believes the Applicant has demonstrated a clear awareness of his alcohol problem and has taken steps to change his previous life style. He has remained abstinent for over seven months, is exercising at a fitness centre regularly, working with a nutritionist to improve his diet and joined an "Addiction Centre" for counselling.

DECISION:

Upon the application by Physician # 1 (the "Applicant") to appeal the decision dated June 21, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: January 31, 2001

MED-0362

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Kim Beintema
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: December 28, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit #1** Notice of Suspension dated August 24, 2000 issued by the Registrar of Motor Vehicles.
- Exhibit # 2** Notice of Appeal Form received at the Tribunal November 16, 2000, filed by the Applicant.
- Exhibit #3** Tabulated documents received from the Registrar of Motor Vehicles, dated November 21, 2000.

FACTS:

The Applicant, a 24 year old nursery school teacher, had her driver's licence suspended, after the Ministry received three unsolicited letters from Physician # 1 detailing the Applicant's history of two seizures. The first one occurred in November, 1997, while sleeping and partially witnessed by her mother. The description given was a grand mal seizure. There was a history of déjà vu on several occasions during the previous few months, usually associated with her periods.

A CT scan and several blood tests were all reported normal. An EEG and sleep-deprived EEG were both normal and there were no further episodes of neurological dysfunction, so a diagnosis was not made.

The second seizure occurred in April, 2000. This was reported to the Ministry by Physician # 1's letter dated May 24, 2000. It stated that the seizure occurred while the Applicant was sitting in a bar, next to her boyfriend. It was not as severe although she lost consciousness, but was neither incontinent nor did she bite her tongue. Physician #1 stated "she could now be fitted in the diagnosis of epilepsy". This diagnosis was made before receiving the results of another EEG and a sleep deprived EEG. Her CT scan was again reported as normal.

Physician #1 discussed the taking of an antiepileptic drug, but she said she was being married soon and wanted to get pregnant right away, so he left it up to her.

On receipt of Physician # 1's third letter, dated May 24, 2000 the Ministry suspended her drivers licence on September 3, 2000.

The Applicant gave evidence that she was told all of her tests were normal and she did not have epilepsy. She had asked Physician # 1 to send the Ministry the results of her latest tests, but the Ministry has never received them.

The Applicant has been seizure-free since April 2000, has no déjà vu and is not taking any medication. She stated that she only drives to work and never drives on any highways.

ISSUE:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

THE LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (g) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar of Motor Vehicles to "-----suspend or cancel" a driver's licence for "any---sufficient reason---". The Registrar originally suspended the Applicant's licence after receiving unsolicited letters, dated November 21, 1997, January 27, 1998 and May 24, 2000 from a neurologist, Physician # 1. These letters outlined the Applicant's history of two seizures, three years apart and the results of tests ordered prior to the last seizure, in April, 2000. The tests were an EEG, a sleep deprived EEG, a CT scan of the Applicant's brain and several blood tests. They were all reported normal.

Subsequent to the seizure in April, the Applicant had another EEG and a sleep deprived EEG, but the results have not been made available to the Ministry.

Based on the Applicant's history of two seizures, Physician # 1 made a diagnosis of epilepsy in his letter of May 24, 2000. It is unfortunate the Applicant has not been examined by Physician # 1 since April, 2000 and the Tribunal did not have an opportunity to view all of the tests results, but under the circumstances the Registrar had no option, but to suspend the licence until a favourable report is received from a neurologist and the case can be reviewed.

DECISION:

Upon the application by Physician #1 (the "Applicant") to appeal the decision dated August 24, 2000, of the Minister ("Respondent") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("*HTA*"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: January 5, 2001

WEGG

DAN WEGG

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

JULIA COOK, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the
Registrar, Ontario New Home Warranty Program

DATE OF
HEARING: November 10 and 17, 2000 *via teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under section 7 of the *Licence Appeal Tribunal Act, 1999* to extend the time for the Applicant to file an appeal from a proposal of the Registrar, Ontario New Home Warranty Program ("the Program") pursuant to section 9 (2) of the *Ontario New Home Warranties Plan Act*.

The hearing of this matter proceeded on the consent of the parties as an electronic hearing. The Tribunal was provided with a Notice of Application for the Extension of time for Appeal from the Applicant but no affidavit material. Initially at the first hearing date of November 10, 2000 the Applicant did not have an agent. The Applicant, by affirmation, provided the Tribunal with testimony on his reasons for bringing the application. The Program provided the Tribunal with a motion record which included the affidavit of Jamal DaSilva and attached exhibits and caselaw. At the second hearing date of November 17, 2000 the Applicant had his agent represent him.

ISSUES:

Have the requirements for service of a notice under sections 9 and 20 of the *Ontario New Home Warranties Plan Act* been met in this case?

If the requirements were met and the Notice of Appeal was not filed with the Tribunal within the time prescribed by statute, is this an appropriate case for leave to be extended pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

If an extension is granted, should the Tribunal provide any directions upon such an extension?

EVIDENCE:

Testimony of Dan Wegg:

Mr. Wegg testified that his wife had picked up an envelope from the Program on or about June 21, 2000. She did not open the envelope but left it on his desk. On July 5, 2000 Mr. Wegg opened the envelope and saw it dealt with the revocation of his registration by the Program.

Mr. Wegg stated that he called Lynn Woodcroft who works with the Program and who had been his contact person with the Program. Ms Woodcroft told him he had fifteen days to respond to the Notice.

Mr. Wegg was aware that this revocation of his registration would affect the livelihood of his family. He had in the past spoken to a Jamal at the Program as he wanted the release of the monies being held by the Program which he estimated to be in the range of \$50,000.00 to \$60,000.00. Mr. Wegg did not want to provide more security until he got back some of these monies.

Mr. Wegg stated that he also spoke to Julie Cook of the Homebuilder's Association. He felt that he had fifteen days from when he got receipt of the letter to respond to it.

Mr. Wegg stated that the problems between himself and the Program should have been worked out without the Program asking for the revocation of his registration. He felt he was squeezed by the Program; that there were no inspections by the Program; that the Program wanted more monies from him; and that the Program was telling him how many houses he could build.

Mr. Wegg was upset because the Program wanted his wife to sign as a guarantor, but she has nothing to do with his construction company.

In prior contacts with the Program, Mr. Wegg had suggested that the representative from the Program contact his lawyer to get any particulars about his land deeds. Mr. Wegg stated that the market to build houses was good, he paid his bills, there were no problems, and he had never gone to conciliation over a house. He is a young man trying to make a living. The lawyers he had consulted about the Program were Real Estate lawyers who were not familiar with it. Instead, Mr. Wegg turned to the Homebuilders Association for advice.

There was no cross-examination of Mr. Wegg's verbal testimony.

Verbal Arguments:

By the Applicant:

At the resumption of the hearing Ms. Cook, as agent for Mr. Wegg, stated that there had been a history of incidents leading up to the Notice dated June 15, 2000. Mr. Wegg got the Notice on July 6, 2000 and appealed by July 20, 2000. Now he was asking for an extension of time to appeal.

Ms. Cook did not see why the Program was permitted to get into the history of its relationship with Mr. Wegg on a motion to ask for an extension of time to appeal. As well, the Program had sent Mr. Wegg numerous pages via the fax just prior to the first hearing of the application including the Fitch case and the Manz case.

Ms. Cook stated that Mr. Wegg has been registered with the Program for two years. If the extension is not granted, he cannot legally build homes.

By the Program:

Counsel for the Program stated that the test in such motions for extension of time was to be found in the Fitch case, CRAT February 27, 1998. In that case, the Tribunal relied upon four principles:

1. That there was an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do it later if they did so as soon as the true situation was apprehended.
3. That there is not some overriding prejudice to the Respondent in the allowing of the application.

4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

Counsel for the Program conceded points one and two on November 10, 2000 but she did make some argument on these points as to their facts on November 17, 2000. Counsel argued that there was prejudice to the Program and to the public if this Applicant was permitted to have an extension of time to appeal. Counsel stated that the Applicant has now enrolled twelve more homes on top of the four homes already enrolled. The Program stated that there was no evidence of the financial ability of this Applicant to build that number of homes. Currently the Program has deposit monies of \$20,000 but more deposit monies are required for the additional homes, a further \$60,000.00. The Program, stated its Counsel, does not want consumers to be at risk or for the guarantee fund to be at risk.

Regarding the fourth point, Counsel for the Program stated that the Applicant did not have a reasonable chance of success. The Applicant just stopped giving security monies for new homes enrolled. The Program was applying the same principles, those found in Bulletin #22, to every builder in Ontario. When the Applicant did not comply with those principles, then the Program issued its Notice of Proposal.

Counsel for the Program cited the Licence Appeal Tribunal (LAT) case of Irvin Homes Ltd., released August, 2000 which dealt with the requirements of a builder under the Act. Despite a good track record as a builder, Irvin Homes Ltd was required to comply with the Program's request for disclosure of financial documentation or the company's registration would be revoked.

Counsel for the Program stated that the evidence submitted shows that the Applicant has submitted different financial statements with no supporting documentation.

Counsel for the Program relied on the LAT case of Jacob Manz and Lillian Ruel-Manz, released November 9, 2000, in which the Tribunal held that the Applicants had no reasonable chance of success at the hearing.

Counsel stated that the Applicant has breached his agreement as to the number of homes he can construct in a year; he has breached his agreement to pay \$5000.00 security for each home enrolled in the Program; he has breached his agreement to provide information on his equity position.

LEGISLATION:

Section 7 of the Ontario New Home Warranties Plan Act states:

7(1) An applicant is entitled to registration by the Registrar except where,

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;

.....
.....

Section 8(2) of the Act states:

Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 9(1) of the Act states:

Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

Section 20 of the *Ontario New Home Warranties Plan Act* states:

20. Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is

given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date.

Licence Appeal Tribunal Act, 1999 states:

Section 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

The Tribunal has the authority under the *Licence Appeal Tribunal Act, 1999* to extend the time period for an applicant to submit their appeal on the Proposal of the Program. In prior years the authority of the Tribunal to extend the time period was found in the *Ministry of Consumer and Commercial Relations Act*.

In order for the Tribunal to extend the time period to bring an appeal, the Tribunal must be satisfied that there are reasonable grounds provided by the Applicant for applying for the extension and for granting the extension of time. The caselaw on such motions for an extension of time, whether for an appeal under section 9 if the applicant is a builder or for an appeal under section 14 by a homeowner is extensive.

The Angela Bilodeau case of CRAT July 11, 1994 set out four principles which were considered by the Tribunal. At page 4 of the case, the Tribunal states: "While no specific authorities were cited to me, both counsel agreed that the principles to be taken into account when considering such an application are those considered on a similar application in the Courts of Record and are that the Applicant must show:

1. That she had an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if she did as soon as the true situation was apprehended.

3. That there is not some overriding prejudice to the Respondent in the allowing of the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.”

This Tribunal also agrees with the statement of the Tribunal in the Manz supra at page 3 “This Tribunal notes that the fundamental principle in deciding whether to allow an extension is to see that justice is done.”

The Tribunal finds that the Notice of Proposal was sent to the Applicant in accordance with the requirements under the Act. Accordingly, the Tribunal must then consider whether this is a case for granting an extension of time to appeal and if so on what terms and conditions.

The Tribunal finds that the Applicant had the intention to appeal within the time limit. His wife picked up the envelope and brought it home and left it on his desk. He did not open the envelope until some time later. Prior to this envelope, the Applicant had been in frequent contact with the Program regarding the return of previous deposits. The Applicant stated that he thought he could work out this issue with the Program and thereby was not expecting a Proposal to be mailed to him. On that basis the Tribunal finds it not unreasonable that the envelope remained unopened on his desk for a number of days. It is the testimony of the Applicant that once he realized that he had received a Notice of Proposal he contacted the Program for an explanation. As well, he stated that he received advice from the Homebuilder’s Association which led him to believe that he had fifteen days upon opening the envelope to respond to it. He requested a hearing close to the end of what he thought was his time frame.

The Tribunal finds that the Applicant should be excused for not serving the notice of appeal on time. He did not think his situation with the Program had reached that type of situation. He did respond promptly once he realized he was dealing with a Notice of Proposal. Though he misconstrued what was really his time frame to file an appeal he did file the appeal in accordance with his idea of that time frame.

The Tribunal is concerned as to the risk factors to the consumers in this situation. The Applicant has stated that he has continued to enroll homes with the Program in breach of both his allowed number of homes to be constructed and of payment of the security deposits. The Applicant has only been constructing residential homes for the past two years. That is not a significant period of time for an Applicant to establish a record showing that he would fulfill his obligations to his customers as to warranty repairs on his homes. After some consideration, the Tribunal has decided that this concern can be resolved through some conditions being placed upon the Applicant if he wishes to have the opportunity to appeal the Notice of Proposal.

Regarding the fourth principle, the Tribunal finds that there is a substantial point in issue, that being the ongoing registration of this small builder. The Tribunal finds that the Applicant has a reasonable chance in this appeal. It is obvious that there has been miscommunication between the Applicant and the Program. Even the Applicant felt that the grounds of dispute could be resolved without resorting to litigation. It is unfortunate that the Applicant does not have a better understanding of his obligations under the *Ontario New Home Warranties Plan Act*. The Tribunal realizes that the Applicant felt the Program was slow in releasing the prior security deposits. The Applicant needs to understand the purpose of the legislation is to protect the home buying public and accordingly, the Program has been given considerable responsibilities under the Act and it must be vigilant in its duties. The Applicant would be ill advised to rely on others to interpret what are his obligations under the Act and under his contract with the Program. There is an arguable case for this to proceed to a hearing. Justice would not be served by denying this Applicant his right to a hearing.

ORDER

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999* the Tribunal orders that the application to extend the time for filing of the Appeal by the Applicant is granted upon the following conditions:

1. On or before January 29, 2001, the Applicant pays to the Program a security deposit on those homes that were enrolled after June 15, 2000 and for which no security deposit has yet been paid, provided that any existing security deposits held by the Program but now repayable to the Applicant can be used by the Applicant for the payment of security deposits on these particular homes, and
2. The Applicant will not enroll any new homes prior to the hearing and decision of the Tribunal unless he immediately pays a security deposit of \$5000.00 per home to the Program.

LICENCE APPEAL TRIBUNAL

MARJORIE L. HILEY,
Vice Chair, Presiding.

Released: January 17, 2001

DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TO REFUSE TO RENEW A LICENCE

TRIBUNAL:

BEVERLEY J. READE, Vice-Chair, Presiding
CECILIA J. TAYLOR, Member
CHARLES J. SANDIFORD, Member

APPEARANCES:

LISA STICHT, Counsel, representing Duke Oliogu and Danny's Place
Support Services a.k.a. Onyeka Ventures
KATHARINE RENISON, Counsel, representing the Ministry of
Community and Social Services

DATE OF
HEARING:

December 11, 12, 13 & 14, 2000, January 15, 16, &
February 6, 7, & 8, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from a proposal of the Director, under the *Child and Family Services Act* ("the Act"), dated July 4, 2000 to refuse to renew the licence of Danny's Place Support Services to provide residential care for a maximum of six children at 62 Ravenscliffe Court, Brampton. The proposal is based on the provisions of section 196 of the Act.

PRELIMINARY MATTERS:

The Notice of Appeal in this matter was received by the Tribunal on July 14, 2000. It set forth the following areas to be in issue on the appeal:

1. Allegations that the licensee or an employee of the licensee has contravened or has knowingly permitted a person under his care or control or direction or associated with him to contravene the Act or the regulations;
2. Allegations that activities are carried on in a manner that is prejudicial to the children's health, safety or welfare;

3.
 - (a) Allegation that the supervision plans are not read, dated and signed by all staff in the residence;
 - (b) Allegation that the operator failed to ensure that the agency's policies and procedures are brought into compliance and reviewed by staff, residents and parents (where appropriate) during the period of this license;
4. Whether the alleged infractions and contraventions in the Notice of Intention are technical and remedial in nature, many of which had already been rectified to conform to the Regulations under the Act;
5. Whether those not yet rectified are in the process of being corrected;
6. Whether the Applicant had been afforded enough time to correct each infraction and whether he had been diligently working toward doing so within a reasonable amount of time;
7. Whether the notice of intention is premature, in that it did not allow the Program Director sufficient and reasonable time to rectify any infractions pointed out to him at the end of June 2000;
8. Whether the Ministry is succumbing to pressure being applied by certain (and few) neighbours who do not wish to have Danny's Place near their home.

The Tribunal scheduled the hearing for October 2, 3 and 4, 2000. The Notice of Appeal requested a pre-hearing conference and the prehearing was conducted on September 6, 2000. At that time, the parties asked that the hearing be adjourned to December 11, 12, 13 and 14, 2000. A consent order was made deeming the license to continue until the decision of this Tribunal is released, subject to various conditions.

The hearing was not completed within the time allotted in December and was adjourned again in January because of the illness of a witness. The Tribunal considered striking the evidence-in-chief of the witness, who was unavailable to be cross-examined, in order for the hearing to continue in January. Of particular concern is the length of time that has passed since the filing of the appeal in this matter.

Section 201(8) of the Act provides:

Despite section 21 of the *Statutory Powers Procedure Act*, the Tribunal shall make a final decision and notify the parties of it within ninety days from the day the Tribunal receives the applicant's or licensee's request for a hearing under subsection 197(2) or 198(1).

We were persuaded that the decision of the Divisional Court in Marshall v. Ontario (Child and Family Services Review Board) [1994] O.J. No. 2306 has declared the section to be directory in nature and granted the further adjournment on the consent of both parties. The Tribunal received final written submissions on February 19, 2001.

During the course of the hearing, an issue arose as to whether the Tribunal should consider only those facts which were before the Director at the time the notice was issued. The Tribunal ruled that it would hear the evidence and allow counsel to address this issue in their final submissions.

We have considered these submissions in the circumstances of this case and find that it is appropriate to consider evidence subsequent to the July 4, 2000 notice of proposal. There is no statutory prohibition against such a course of action in the Act, unlike other appeals over which this Tribunal has authority. Further, the authorities provided by counsel indicate that this is a discretionary matter which depends on the circumstances of each case. We are persuaded that it is appropriate to consider such evidence in this appeal because the residence has remained in operation since the notice of proposal was issued and continues to accept referrals from various Children's Aid Societies. The ability of the Appellant to comply with the consent interim order of the Tribunal is relevant to our considerations.

FACTS:

Evidence was given on behalf of the Director by Brian Knight, a licensing specialist with the Ministry of Community and Social Services ("the Ministry"); Ronald Smith, the placement supervisor of the Children's Aid Society of Toronto; Rui Alves, the next door neighbour of Danny's Place; Bonnie Corey, the Director who proposes not to renew the license; Mary Ballantyne, a Program Advisor for the Ministry; and Officers Calvano and Stafford of the Peel Regional Police.

Evidence was given on behalf of the Appellant by Duke Oliogu, the unincorporated Operator of Danny's Place, and by Elizabeth Parker, the supervisor hired by Mr. Oliogu following the prehearing.

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

1. Duke Oliogu is an accomplished, personable and intelligent individual who has an impressive background. He has a diploma in Business Administration with a specialization in marketing, a certificate in accounting and auditing, a Bachelor of Religious Studies from the Ontario Bible College and a Bachelor of Arts in Sociology from York University. According to his resume, he holds First Aid and CPR certificates, as well as certificates on crisis prevention and intervention for persons with exceptional needs, defensive driving and intensive training in pharmacology. He is presently working on a Masters degree.

2. Mr. Oliogu's background includes vocational rehabilitation for persons with disabilities, counseling, support, community work and advocacy, according to his resume. He was a volunteer probation officer for the Ministry of Correctional Services. Since 1996, his employment has been as a Program Manager for Onyeka Venture Place in Markham. This is an unlicensed facility which provides full time care to persons with disabilities. It is funded by residents' families, some of whom are given receipts for respite care by Mr. Oliogu in order to qualify for specialized government funding. No evidence of the propriety of this arrangement was provided to the Tribunal.

3. On January 10, 1999, Mr. Oliogu completed an application for a Licence to Operate a Children's Residence at 62 Ravenscliffe Court in Brampton. The property is described in the application form as being located in a quiet neighbourhood with a clean environment. It is located on a quiet residential court and is surrounded by house-proud families, many of whom have young children.

4. The proposal filed with the application noted that there are insufficient services and facilities in both Brampton and Mississauga which provide well-structured, flexible residential services for youth. This shortage was confirmed by other witnesses heard by the Tribunal. It is clear that Children's Aid Societies throughout the province are desperate in their attempts to find placements for children with special needs. Some of these Agencies filed letters supporting the opening of Danny's Place and continue to place children there.

5. Mr. Oliogu's proposal indicated that the operator wished to open a Type I group home for six children over the age of 13. It was proposed that the children to be assisted in the residence would have behavioural, emotional or social challenges which would be met by the experienced and educated staff to be employed in the home. The proposal stated that all residents referred to the home must have an updated psychological assessment and that all staff employed in the home must possess a relevant Bachelor of Arts or College diploma, residential group home experience and a police record check.

6. The proposal filed with the application concluded as follows:

Onyeka Support Services is a private organization operated under the guidance of Duke Oliogu. Duke Oliogu is a well respected member of the community. He has worked in the field of Social Services for

the last 8 years. A true professional, Duke has reliable expertise gained through working with children and youth across the following regions: Vaughan, Toronto, Peel and York. Also, he is a well-trained foster parent with Children's Aid Society, Newmarket and a therapeutic foster parent with Kinark Child and Family Services, Newmarket. Clientele includes psychiatric patients, schizophrenics, the emotionally disturbed, and persons with anxiety disorders, including those afflicted with Down's syndrome, Tourette's syndrome, the autistic, and the mentally challenged individuals.

7. The City of Brampton's zoning by-laws define a Group Home Type 1 as "a supportive housing facility located within a dwelling unit occupied by four to six persons, exclusive of staff and receiving family, who reside as a unit under responsible supervision consistent with the requirements of its residents and which is licensed or approved under Provincial Statute under the jurisdiction of the Ontario Ministry of Community and Social Services or the Ministry of Health." A Group Home Type 1 shall not include a Group Home Type 2 and it may provide accommodation, supervision and treatment for children under the *Child and Family Services Act*.

8. The by-laws define a Group Home Type 2 as a supportive housing facility which can provide service, *inter alia*, to persons who have been charged under the *Young Offenders Act* but who have been placed in open or secure custody.

9. The City of Brampton recognizes the need for supportive housing. A Group Home Type 1 is permitted as-of-right in all residential zones in the City of Brampton. Nothing in the by-law prevents such a Group Home from accepting residents who have young offender records, as long as they are not serving time in open or secure custody. Part of the registration process with the city involves the requirement for the applicant to meet with the area Councillors to determine the method of public notification that will be required and to answer any outstanding questions that may be unanswered at the time. An inspection is also performed by the By-law Enforcement Division and the Fire Department for compliance with all regulations. If the building meets the various regulations, the Office of the Commissioner of Works and Transportation will approve the application for registration and issue a certificate as evidence that the building complies with the *Child and Family Services Act*.

10. The City of Brampton recognizes the rights and concerns of its residents and taxpayers. To balance the effect that the presence of a group home might have on the other residents of the area, the City encourages, assists and insists on proper public notification. In the extensive information provided to Mr. Oliogu by the City of Brampton, the summary noted as follows:

Particular emphasis should be placed on the need for timely public notification of the opening of a group home and the need to inform area residents of the nature of the particular group home. Good planning in this regard can encourage community acceptance which is one major ingredient to the success of a group home operation.

11. In the same documentation, under the heading "PUBLIC NOTIFICATION", one finds:
Upon receipt of an application for registration, or in the case of new construction, a building permit application, the "Group Home Registration Committee" comprised of "the Members of the Steering Committee for the Joint Policy Review on Group Homes and Lodging Houses: will meet with the group home operator and the Regional and City Councillor for the host ward to devise a suitable method of public notification. The following methods of public notification may be considered by the Committee:
 - a. a letter of notification, or brochure outlining the programming of the group home and the City of Brampton By-law requirements for the use, be circulated to residents within a mutually agreed upon impact area, but not less than 60 metres (200 feet) radius of the proposed group home. This letter of notification should be mailed at least 5 weeks prior to the group home being opened; and/or
 - b. the operator may conduct a door-to-door canvassing of the host neighbourhood encompassing a surrounding area of not less than 60 metres radius of the proposed group home; and/or
 - c. an open house to be held within two months after the group home has commenced operations with neighbouring residents within an agreed upon impact area, but not less than 60 metres radius of the group home being invited; and
 - d. any combination of the above-noted methodologies.

Once the method of public notification has been determined, the Group Home Coordinator will assist the group home operator in devising an appropriate letter of notification based on the methodology. If an Open House forum is chosen, the following persons should be in attendance:

- the group home operator;
- the group home coordinator
- the Manager of Zoning Services
- the Supervisor of By-law Enforcement
- a representative from the sponsoring Ministry; and

- Regional and City Councillors for the host ward.

The Open House should be held either in the group home itself or in a public building within reasonable proximity to the proposed location of the group home.

12. Mr. Oliogu required considerable assistance in completing the application for registration with the City and claims that it was because of a template provided by a City employee that the letter of notification to the residents contained so many inaccuracies. He also claimed that the letter was written during a time of stress. No corroboration was provided by the employee he named, nor was there any medical evidence provided to the Tribunal to justify the misleading and erroneous document he sent to the neighbours he knew were integral to the success of the program. In light of the evidence received in this proceeding, this letter is very relevant to the issues before the Tribunal.

13. The letter is written on Onyeka Ventures letterhead, whose address is listed at 62 Ravenscliffe Court, Brampton. It reads, verbatim, as follows:

March 6, 1999

Dear Neighbors:

I would like to take this opportunity to introduce myself and as well my organization. My name is Duke Oliogu. I am the Executive Director of Onyeka Ventures (Danny Place). This program is a community based residential care group home for children who have been sexually, physically and or emotionally abused.

As the Executive Director, it is my responsibility to inform you that our organization has just purchased 62 Ravenscliffe Court, Brampton. It is our intention to use this property to provide care to six children, ranging in age from 13-16 years.

On Wednesday, March 31, 1999 between the hours of 6:30 p.m. and 8:30 p.m. we will be having an open house and we cordially invite you to come and see our home and meet our staff.

My professional background is that of a Social Worker. I'm a graduate of York University, Sociology of the Family. I spent the last 8 years working exclusively with adolescents placed in Group Homes. My staff of 10, who will be providing direct care to the children placed in our care, have a Child Care Diploma or equivalent, and much experience working with children.

This program will be our first in Brampton, as we presently successfully operate a home in Markham. We bring to your community an agency with both experience of meeting the needs of these children as well, good management skills.

We are expecting to comply with all the City of Brampton and Province of Ontario By-Laws requirement and standards by the end of March, 1999. Our target date for opening is Mid to end of April, 1999.

Enclosed please find a series of questions which I have attempted to answer. However, I am most willing to meet with you at a mutually convenient time to discuss any issues that you may have regarding our residence.

I sincerely look forward to hearing from you and I can be reached at (one of two telephone numbers). Should I not be available, please leave a message with the a member of my staff and I will return your call as soon as possible.

Sincerely,

Duke Oliogu.

14. Attached to the letter was an information sheet which told the neighbours the residents would range in age from 13 to 16 years and that a careful screening process would determine the admission of any resident, with a review to include the Executive Director, the Program Supervisor, Assistant Supervisor and Consulting Psychologist. It said the minimum stay of each resident was six months and, "We do not as a rule allow our residence to be used as an overnight crash facility or a short term holding facility." It reiterated Mr. Oliogu's status as "a professional Social Worker with years of experience." It claimed that the educated and trained staff would provide responsible supervision, including knowing where the residents go, ensuring their return on time and following through with consequences.

15. The neighbours were told in the information sheet that their neighbourhood was selected because of its access to services and "sense of family". They were assured that Danny's Place "prides itself on maintaining both the exterior and interior of our residence." Under the heading, "Will the Youth be Dangerous or Violent?", the neighbours were assured:

NO. This program is intended to address the many needs of children who were sexually, physically and or emotionally abused. By and large, the children who make up this population pose no danger to the community. Unlawful activities by any of our residents are not acceptable. This program objects to the mixing of children who are abused and had to leave their homes

in order to receive help with adolescents who have consciously and frequently committed serious criminal offences.

16. During the hearing, the Tribunal observed that Mr. Oliogu's marketing skills are excellent. We find that the letter was intended to assuage the concerns of the neighbours but it was filled with empty promises and blatant lies. We find that the information provided was intentionally misleading and do not accept the explanations provided by Mr. Oliogu. In his evidence, Mr. Oliogu admitted that he is not a professional social worker. He does not have the professional qualifications to call himself one. He is not a member of the College of Social Workers. An appropriate analogy would be for a law clerk or paralegal to claim that he or she was a lawyer. Mr. Oliogu does not have years of experience in running a licensed group home as his material would lead one to believe. In fact, the evidence heard by the Tribunal leads only to the conclusion that he is not the competent supervisor he indicated but instead had no experience whatsoever in operating such a facility. The material was misleading as Mr. Oliogu has not worked exclusively for the last eight years with adolescents in group homes, he had no consulting psychologist involved with the program, he hired staff who did not have the credentials promised, and youths over the age of 16 were permitted residence at the home.

17. The Tribunal finds that Mr. Oliogu is an unreliable witness. He was evasive in his testimony and tended to blame everyone else for matters that clearly were his responsibility. He received assistance from the City of Brampton, yet blames this assistance for inaccurate statements in his own material, signed by him and an integral part of his application. He received even greater assistance from Ms. Ballantyne, Mr. Knight and other Ministry of Community and Social Services representatives. He was provided with information concerning the regulations and requirements for licencing yet complained at the hearing that he did not understand the confusing requirements, that he was given misinformation or that other people made mistakes. He called no corroborating witnesses other than a recently hired employee.

18. Community reaction to the establishment of the group home was swift. The neighbours contacted the press and their politicians. The City assured the neighbours that because the home was a Type 1 Group Home, no young offenders could be housed there. On May 3, 1999, Mr. Oliogu wrote to his neighbours thanking them for their cooperation and promising, "I therefore assume responsibility that the group home will not accommodate young offenders, but children who are physically and sexually abused." At the hearing, Mr. Oliogu acknowledged that he accepted young offenders into the residence on a regular basis.

19. The evidence is clear that despite concerns on the part of the neighbourhood and its own representatives, the Ministry worked with Mr. Oliogu to assist him in his attempts to operate a successful program. Various visits were made to the premises and reviews of the expectations of the Act and the Regulations were conducted with the operator from the time he expressed interest in opening the home. Although Mr. Oliogu denied receiving some documentation, the Tribunal finds that his evidence in this regard is not credible and finds that

over the course of the summer of 1999, he was made fully aware of the expectations and requirements of a Group Home operation.

20. On November 1, 1999, a Provisional Licence to Operate a Children's Residence was issued. According to Mr. Knight, the first provisional license is given to operators in the expectation of full compliance within a short period of time. The licence expired on March 14, 2000 and was subject to the following term and condition:

The operator is to ensure that the agency's policies and procedures are brought into compliance and reviewed by staff, residents and parents (where appropriate) during the period of this license.

21. The Provisional Licence also noted the following:

At the time this residential program was inspected by the Ministry of Community and Social Services, it did not meet all the requirements of the Child and Family Services Act. A provisional license has been issued to give the operator an opportunity to do what is necessary to bring the residential program into full compliance. This provisional license is valid until March 14, 2000. At that time, if all requirements are met, a license may be issued.

22. A Group Home Review Report delivered with the Provisional License noted, "At the commencement of the provisional license, the required policies and procedures were in place". The Tribunal finds that this was not the case at that time. We also note that throughout our review of the documentary evidence in this proceeding, there were other occasions where Ministry Staff were less than diligent in completing their documentation. Some documents presented to us were not signed, not dated or otherwise not accurate. For the most part, however, the Tribunal was satisfied with the accuracy and integrity of the voluminous documentation presented by the Director.

23. The premises were inspected by the City of Brampton and approved. Photographic evidence supplied to the Tribunal show that considerable work was performed on the interior of the premises in order to comply with fire regulations. The ownership of the premises is unclear, but it appears to be owned by Mr. Oliogu or a corporation in which he is involved. Based on the budget provided by Mr. Oliogu, the approved per diem rate for the new residential program was set at \$176.03. The budget filed by Mr. Oliogu with his original application for license includes a salary to him of \$50,000.00 per year. This salary would appear to be in addition to any income he might receive for running the unlicensed Group Home in Markham.

24. Shortly after the provisional licence was granted, residents were accepted into the home. The first admission occurred on December 3, 1999. The evidence discloses that the residents were not screened as suggested and promised by the operator. It was acknowledged by Mr. Smith that the clients referred and accepted were some of the most difficult youth in care. He noted that both his agency, the Toronto C.A.S. and the York C.A.S. were desperately short of alternatives and referred clients with severe conduct disorders and extremely problematic placement histories to Danny's Place and that they were accepted. He noted that typically, the use of violence to solve problems is almost an automatic response on the part of some of these youth, and stated in a report, "It should come as no surprise that the clustering of these types of individuals would result in a pressure cooker environment in which peer conflict, resistance to caregiver authority, and violent posturing became the norms." Mr. Smith also noted that Mr. Oliogu is tenacious in trying to help his residents and that he was even prepared to allow them to damage his property to keep them in his program.

25. On February 2, 2000, Mr. Oliogu completed an application for the renewal of the licence. By that time, there had been several breakdowns in placements at Danny's Place. Community complaints about the observed behaviour of the clients of the home began to escalate. Some children were observed to be unsupervised, hanging around outside the home and smoking on the driveway. The police began to attend the home on a regular basis. Licensing and monitoring visits by Ministry staff noted damage to the interior of the residence and a lack of upkeep to the exterior. Serious Occurrence reports were not submitted as required by the Regulations under the Act.

26. On March 21, a review of the operations of Danny's Place by Mr. Knight found many areas of serious non-compliance with the Regulations. The files of four children were reviewed and it was noted that various educational records, admission and legal documents were not on file. The children's files were disorganized and contained unrelated information, such as staff resumes and real estate documentation. Staff files were also disorganized and criminal reference checks were only found on four of the nine full time employees and no immunization or medical information was located.

27. The Group Home Licensing Review Report dated March 30, 2000, prepared by Mr. Knight, noted that there were no programs provided to the residents, who spent the day hanging around the home. The program schedule was not being followed. He recommended that a six week Provisional License be granted, stating,

"Mr. Oliogu still has to work on and improve in a number of areas related to licensing before a Regular License can be recommended. The areas that need further development primarily relate to the content and organization of

the children's and staff files, the supervision and programming for the children, and staff training."

28. Mr. Oliogu met with Ministry Staff on April 3, 2000 to review the findings from the licensing visit and complaints received from the community. The areas of non-compliance were reviewed with him at that time. The concerns were confirmed in writing, and although Mr. Oliogu disputes the timing of his receipt of this documentation, the Tribunal finds that he was well aware by April 3, 2000 of the deficiencies in his program. The Ministry issued a further provisional licence effective from April 3, 2000 to June 1, 2000 for Danny's Place, subject to conditions designed to encourage Mr. Oliogu to ensure that policies and procedures were brought into compliance with the Act and Regulations.

29. The Tribunal heard extensive evidence concerning the continued difficulties experienced by the Ministry, the neighbours and the police in dealing with the Danny's Place following the meeting on April 3, 2000. A licensing visit by Mr. Knight and Ms. Ballantyne on June 16, 2000 showed continued extensive deficiencies in the operation of the home and the keeping of proper records. The house showed considerable unrepaired damage caused by the residents. Some residents were staying out past their curfews, missing appointments with their probation officers, had been charged with criminal offenses by the Peel Regional Police, or had been observed smoking in and outside the home. Mr. Knight found what appeared to be marijuana in one resident's room. The first aid kit was incomplete and toxic substances were not locked. The posted menu did not comply with nutritional requirements.

30. Under the Regulations, the Operator is required to maintain records on site. On the June 16, 2000 visit, Mr. Oliogu was keeping the confidential records of the residents in his van. The reason for this was that the office in Danny's Place had been broken into by one of the residents, and files were thrown out the window. One of these files was found by Mr. Knight under the kitchen sink, where it was drying out. Mr. Oliogu carried the files in the van until a new, more secure office could be built in the home. No plausible explanation as to how such an event could occur in a supervised group home was provided. It is clear that by the time of this event, concerns of the Ministry and Community that the residents were in fact running the home instead of the Operator had foundation.

31. On the evening of June 27, 2000, Mr. Oliogu faxed a Serious Occurrence Report dated June 26, 2000 to Ms. Corey, advising her that the neighbours were calling police about residents trespassing on their property. He also advised her that the first aid kit had been replaced, toxic substances were now locked up and he had replaced a missing face plate from an electrical outlet.

32. On June 29, 2000, a meeting was held with Mr. Oliogu regarding his licence. Concerns were reviewed with him at some length. He claims that the information required under the Regulations was available to the Ministry, but they had not been able to locate it on their visit. He says that he was refused the opportunity to show the missing documents at that meeting.

The Tribunal does not accept his evidence in this regard. His documentation and record keeping continued to be in disarray up to the date of the completion of the evidence in this matter, even with the assistance of his new supervisor.

33. On June 30, 2000, a plumber working in the residence had called the police and asked that a threatening charge be laid against one of the residents, who was upset because the water had been turned off. The police attended at the residence and warned the youth, but did not lay charges.

34. On July 4, 2000, the Director issued the Proposal under appeal. The Tribunal received the Notice of Appeal on July 14, 2000. Pursuant to section 199 (2) of the Act, the licence and its conditions are deemed to continue until the decision of this Tribunal is released. However, at the Pre-hearing in this matter on September 6, 2000, the parties agreed that the licence would continue until that time with the following terms and conditions:

- a) Subject to approval of the Director, by September 30, 2000, Mr. Oliogu was to hire a supervisor with very specific duties, to oversee all aspects of the group home, including administration and personnel;
- b) All items of non-compliance were to be remedied to the satisfaction of the Director by September 25, 2000;
- c) A specific staff training procedure was to be implemented, with reporting requirements;
- d) The operator was to make his best efforts to establish a mentoring relationship with an experienced operator.

35. On September 11, 2000 a resident of the home was arrested in a stolen car. He returned to reside in the home. On January 5, 2001, this youth was convicted on three counts of car theft and sentenced to custody. All of the occurrences took place while he lived under the supervision of Mr. Oliogu and Danny's Place staff. He admitted to many other car thefts during that time, for which he was not charged. On September 16, staff found two young women with a resident in his bedroom at 3:15 in the morning. This occurred again on September 18 at 2:00 a.m. On September 27, this youth was returned to the home by the police at 4:15 a.m. in an intoxicated condition.

36. The Tribunal received evidence from the Peel Regional Police officers concerning dozens of occurrence reports filed concerning the children at 62 Ravenscliffe Court, Brampton. Many of the reports relate to routine matters such as verbal threats, but they include violent and dangerous criminal behaviours as well. The reports deal with incidents which occurred both before and after the prehearing. It is not necessary to review each report in detail for the purposes of these reasons, but they are chilling in the composite they draw of this home. For

example, the report dated November 4, 2000, deals with a police investigation of a report by Mr. Oliogu that an unknown youth was sleeping in the home which was vacant while its two residents were out on a weekend pass and the home was unsupervised. Mr. Oliogu was concerned because there was no sign of forced entry. The report notes:

Investigation revealed that the unknown party was a friend of the two residents. He advised that himself, the two residents and a number of other youths had been at the home for most of the evening having a party.

During this investigation, police observed that the home was exceedingly dirty, in poor condition with numerous holes in the walls, and there was very little furniture throughout the house. Upstairs in the bedrooms were numerous mattresses lying on the floor with dirty sheets and blankets. Further, police observed open bottles of alcohol and evidence of drug use.

The Complainant advised that one resident had a pass to stay this weekend with a relative in Brampton. However, the Complainant could not provide the name, address or telephone number of the residence he was supposed to be at. The second resident had simply been provided cash to get himself a bus ticket to Toronto so that he may stay with his brother. Again, the Complainant could not provide the name or telephone number of the brother of this resident.

37. The Tribunal heard equally compelling oral testimony from Officers Stafford and Calvano. Officer Stafford attended at the home on September 12, 2000 and September 20, 2000 to arrest two different residents who were later allowed to remain in the home. On October 14, 2000, he reattended with Officer Calvano to investigate a break and enter in Collingwood. Firearms and vehicles had been stolen and the police used the authority granted to them by the *Criminal Code* to execute a warrantless search of the premises. The residents were not home and the Officer was told by staff that he thought they were just outside, having a cigarette. They were subsequently located and arrested well after their curfew.

38. Officer Stafford attempted to search one of the rooms and found it to be locked. He was told by a staff member that this was to enable the children to have some freedom and space of their own. The two officers gained entry to the bedroom and found empty pizza boxes and dirty utensils in a room which had mattresses on the floor. They found what appeared to be marijuana and other drug paraphernalia in the ensuite bathroom, but found no toilet paper.

39. One of the youths subsequently advised Officer Calvano that he could do what he wanted at Danny's Place, including drugs or alcohol, because the staff either did not care or

never checked up. "It was a joke," the youth told the officer, referring to Danny's Place. He admitted to stealing as many as fifty automobiles while residing there.

40. Mr. Oliogu made a good attempt to find a supervisor subsequent to the prehearing. His first choice was rejected by the Director for lack of experience as a supervisor and an inappropriate educational background. His second choice, Ms. Parker, graduated from the Sheridan College Correctional Worker Program in 1995. Her resume shows no work experience as a supervisor, although she lists supervision of staff and students amongst her many skills. At the time she was hired, she was working as a senior child and youth worker at another group home in Brampton. She testified that this involved supervision of other front line staff. Ms. Parker is an enthusiastic individual, who has had many short-term positions. During her career, she has impressed various individuals. She has good community contacts, is aware of issues and is willing to make an effort in her position.

41. On September 29, 2000, the Director approved Ms. Parker as the new supervisor for the Danny's Place. Her letter of approval noted that Ms. Parker met most of the criteria outlined in the Order and that her educational qualifications and work experience would seem to be suitable. The letter expressed concerns that Ms. Parker did not have much supervisory or program administration experience.

42. Ms. Parker commenced employment with Danny's Place on October 25, 2000. She noted in her evidence that the home was in poor physical condition at that time. There were holes in the walls, the garage was not painted and the house was disorganized and cluttered. Since that time, she has made many improvements to the Program. She has reorganized and updated the Policies and Procedures and understands the requirements of the Regulations.

43. Ms. Parker has hired two staff, only one of whom has a Child and Youth Worker diploma. The other new staff member has experience working with disabled and challenged individuals but her resume does not indicate that she has the special training contemplated in Mr. Oliogu's original proposal as being appropriate for this residence. Ms. Parker did not know that this staff member did not have a Child and Youth Worker diploma until after she had been hired. Ms. Parker noted in her evidence that she was in the process of hiring additional staff, and she spoke very highly of the staff already employed. One staff member who was employed prior to Ms. Parker's involvement has not completed all aspects of training but is employed for relief duties.

44. On November 27, 2000, Ms. Ballantyne performed a further licensing review at the request of Mr. Oliogu. She noted that there had been great improvement in the policies and procedures and that Mr. Oliogu's understanding of the requirements was much improved. However, there continued to be outstanding problems with policies and procedures, and the keeping of proper records relating both to the children and the staff. She noted that the criminal reference check for Ms. Parker was dated January 13, 1998.

45. No residents were living in the home at the time of the November 27, 2000 review. They were in custody or detention as a result of their arrest earlier that month. This respite gave the Operator ample time to bring the home back to good physical condition. Ms. Parker had plenty of time to work on the policies and procedures manual for Danny's Place. The policy and procedures manual is important. It provides the direction to staff for the appropriate management of the program, and outlines the program itself, as well as appropriate disciplinary matters, mandatory requirements, and is the instrument through which the program can be held accountable for doing what it says it is going to do. She admitted in her evidence that the manual is still not complete. The Tribunal notes in reviewing this document that it is much improved from earlier versions. There remains, however, much room for improvement. The book is full of grammar and spelling mistakes and contains many non-sequetors. It can best be described as sloppy. Ms. Parker acknowledged that changes need to be made and that such changes could be made quickly. She is quite amenable to any direction provided by the Ministry.

46. Ms. Parker claims to have instituted a more careful screening process of the residents, although young offenders are still accepted. One of the youths who had been involved in the weapons investigation of the Peel Regional police was allowed to return to the home. He was arrested on January 23, 2000 and is no longer welcome in the home, despite the close attachment Mr. Oliogu has with him as his former foster parent. Despite Mr. Smith's evidence in December that no further placements would be made by his agency at Danny's Place, the first new resident was placed by the Metro Toronto Children's Aid Society on January 19, 2000. Within a week, police attended at the residence because he had assaulted a staff member. By February 8, 2001, three residents resided in the home. Ms. Parker has been successful in reestablishing working relationships with referring agencies.

47. The outside training and mentor relationship contemplated in the Prehearing Order of September have not been accomplished.

48. On January 25, 2000, the Director made an unannounced visit to the home. She reviewed some of the records made available to her. In a short period of time, she noted that there were complete days for which no entries had been made by the staff on duty relating to serious events, including the attendance by police on January 23, 2000. Areas of the log were left blank, to be completed, presumably by the staff who had been on duty. In cross-examination, Ms. Parker admitted that the staff person who was responsible for failing to comply with the recording requirements of the Regulations was Mr. Oliogu.

49. Ms. Parker admitted that she had left areas in the log to be completed by Mr. Oliogu at a later date and that she had spoken to him on more than one occasion about the importance of keeping proper records. She said that he continued to leave gaps in the required reporting of information, “unintentionally, I’m sure.” The only explanation she provided as to why certain logs were blank for a period of almost three weeks in January was that the ink had run out of the printer in her office, and they were unable to print the appropriate sheets.

50. Ms. Parker had not recorded the police attendance at the home on January 23, 2000 at the time of the Director’s visit on January 25, 2000. She said that she had run out of forms and she did not know if the Act said that the daily log needed to be completed that day.

ISSUES:

The issue in this matter is whether the Director has reasonable grounds to refuse to renew the license of Danny’s Place Support Services to provide residential care for a maximum of six children at 62 Ravenscliffe Court, Brampton.

THE LAW:

The powers of the Director to refuse to renew a licence are set forth in section 196 of the Act, which reads as follows:

196. A Director may refuse to renew or may revoke a license where, in the Director’s opinion,

- (a) the licensee or an employee of the licensee, or where the licensee is a corporation, an officer or director of the corporation has contravened or has knowingly permitted a person under his or her control or direction or associated with him or her to contravene,
 - (i) this Act or the regulations,
 - (ii) another Act, or the regulations made under another Act, that applies to the activity for which the licence is required, or
 - (iii) a term or condition of the licence;

- (b) the premises where the children's residence is located or the residential care is provided do not comply with the requirements of this Part and the regulations;
- (c) the activity for which the licence is required is carried on in a manner that is prejudicial to the children's health, safety or welfare;
- (d) a person has made a false statement in the application for the licence or for its renewal, or in a report or document required to be furnished by this Act or the regulations, or by another Act or the regulations made under another Act that applies to the activity for which the licence is required; or
- (e) a change has occurred in the employees, officers or directors of the applicant that would, if the applicant were applying for the licence in the first instance, afford grounds under clause 195(b) for refusing to issue the licence.

Section 195(b) allows the Director to refuse to issue a licence where, in the Director's opinion, the past conduct of the applicant affords reasonable grounds for belief that the activity for which the licence is required will not be carried on in a responsible manner in accordance with the Act and the regulations.

Section 197(4) sets forth the powers of the Tribunal in this appeal. It provides:

Where an applicant or licensee requires a hearing under subsection (2), the Tribunal shall appoint a time for and hold a hearing and may, on hearing the matter,

- (a) order the Director to carry out the proposal; or
- (b) order the Director to take such other action as the Tribunal considers appropriate, in accordance with this Part and the regulations,

and the Tribunal may substitute its opinion for that of the Director.

The regulations under the Act relating to licensing of residences are extensive. They provide for responsible obligations on each licensee who provides residential care.

As part of the necessary management practices, every licensee is obliged to maintain an up to date written statement of policies and procedures, the required contents of which are clearly

set out in the regulations. Every licensee is to required to keep daily logs, serious incident reports, and staff records.

Admission requirements are dealt with extensively in the regulations. Every licensee is required to ensure a written agreement for the provision of service to a child is entered into at the time of admission or as soon as possible thereafter. Every licensee must ensure that each child has had a general medical examination by a physician within thirty days prior to admission or within seventy-two hours after admission.

Programming requirements dictate that a written plan of care for each resident be prepared within thirty days of admission, in consultation with various individuals. Educational and nutritional needs are also stipulated.

Extensive requirements are set forth in the regulations relating to records and reports. Written case records for each resident must be maintained for twenty years. Serious occurrence reports must be made to the Director and others within twenty-four hours of the occurrence.

The Regulations also deal with emergency procedures, staffing, licensing documentation, accommodation, fire safety and health. They require every licensee to ensure that drugs and records are kept in locked containers and that only persons authorized by the licensee have access to them.

Section 1(1) of the Act provides as follows:

The paramount purpose of this Act is to promote the best interests, protection and well being of children.

The powers of the Tribunal on this appeal are circumscribed by the decision of Brenner v. The Registrar of Motor Vehicle Dealers and Salesmen, 19 CRAT 59, a decision issued by the Divisional Court in 1983. In overruling a decision of the Commercial Registration Appeal decision, Southey, J. stated:

The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty.

Due to the particular facts in this case Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it. The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051 the Court held:

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.

It is only if the Tribunal finds that the Director was in error in her conclusions that an order can be made directing the Director to refrain from carrying out her proposal. This Tribunal is not entitled to substitute its discretion for that of the Director, but is only to determine whether there are reasonable grounds to support the decision of the Director. If reasonable grounds do not exist, the Tribunal can exercise its discretion and direct the Director accordingly.

APPLICATION OF LAW TO FACTS:

The Tribunal is satisfied on the facts before it that the Director has reasonable grounds for proposing not to renew the licence of Danny's Place.

There is uncontradicted evidence that Mr. Oliogu has contravened and knowingly permitted persons under his control or direction to contravene the Act and the regulations. It is clear that the Group Home has been carried on in a manner which is prejudicial to the children's health, safety and welfare. We find that the alleged infractions were not technical and remedial in nature but serious breaches which put children and the public at risk. We find that the Applicant was afforded more than enough time to correct each infraction and that he had not been diligently working toward doing so within a reasonable amount of time.

We find that the Ministry did not succumb to pressure being applied by certain (and few) neighbours in issuing the Proposal.

The addition of Ms. Parker to the staff at Danny's Place has improved the situation immensely, but it is still Mr. Oliogu who is the licensee. The Tribunal finds that he is not competent to carry on the activity for which the licence is required in a responsible manner in accordance with the Act and the regulations. Ms. Parker is unable to provide appropriate controls over his actions.

DECISION AND ORDER:

Pursuant to the authority vested in it by section 197(4)(a) of the *Child and Family Services Act*, the Tribunal directs the Director to carry out her proposal dated July 4, 2000 to refuse to renew the licence of Danny's Place Support Services to provide residential care for a maximum of six children at 62 Ravenscliffe Court, Brampton.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair,
Presiding

Cecilia J. Taylor, Member

Charles J. Sandiford, Member

RELEASED: February 23, 2001

NICOLINI

VITTORIO NICOLINI

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

RAYMOND NICOLINI, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the
Ontario New Home Warranty Program

DATE OF
HEARING:

November 24, 2000

via teleconference

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under section 7 of the *Licence Appeal Tribunal Act, 1999*, to extend the time for the Applicant to file an appeal from a decision letter dated June 28, 2000 of the Ontario New Home Warranty Program ("the Program") pursuant to section 16(2) of the *Ontario New Home Warranties Plan Act*.

The hearing of this matter proceeded on the consent of the parties as an electronic hearing. The Tribunal was provided with a Notice of Application for the Extension of Time for Appeal from the Applicant but no affidavit material. The Program provided the Tribunal with an affidavit of Phil Humphreys and three photographs. The Applicant, by affirmation, provided the Tribunal with testimony on his reasons for bringing the application for an extension of time. His son, Raymond Nicolini, by affirmation, provided further testimony. Mr. Humphreys, by affirmation, provided additional explanation of the matters covered in his affidavit.

Mr. Vittorio Nicolini verbally confirmed prior to the start of the motion that he had retained his son, Raymond Nicolini, to be his agent for the motion.

ISSUES:

Have the requirements for service of a notice under sections 16 and 20 of the *Ontario New Home Warranties Plan Act* been met in this case?

If the requirements are met and the Notice of Appeal was not filed with the Tribunal within the time prescribed by statute, is this an appropriate case for leave to be extended pursuant to section 7 of the *Licence Appeal Tribunal Act 1999*?

If an extension is granted, should the Tribunal provide any directions upon such an extension?

EVIDENCE:

Testimony of Raymond Nicolini:

Mr. Raymond Nicolini testified that there had been a great period of time lapse between the initial inspection of the property and when his father received the conciliation report. He stated that he got the mail for his father and he had noticed an envelope with ONHWP on the corner. He did not open the mail. By the time his parents returned there was only one or two days left in the notice period. His parents wanted to contact a friend in the construction business to get advice on this matter. This friend said the problems were the fault of the builder. Then the Notice of Appeal was couriered to the Tribunal.

Mr. Raymond Nicolini stated that there is a videotape of the problems with the deck, the brickwork and basement floor. He thought there would be witnesses to testify on these problems though he could not provide any details on these witnesses. As well, he stated that he felt the construction violated the bylaws of the City of Vaughan and the building code as evidenced by the concrete basement floor cracking.

Mr. Raymond Nicolini stated that he had been active in two previous appeals of decisions of the Program dealing with his house and that of his father, and he had signed the notices of appeals.

Testimony of Vittorio Nicolini:

Mr. Vittorio Nicolini stated that he was away on vacation. When he returned he opened his mail and saw the decision by the Program. He had his son read it as his English is not good. He knew he could appeal. His son could take care of the appeal for him. It had been his son who had picked up the mail, but Mr. Vittorio Nicolini was the one who opened the mail.

Mr. Vittorio Nicolini testified that he felt the building regulations required four steps and a railing and a deck. He stated that the builder first promised to do it and then promised him a refund. He said the brickwork at the back is out by one inch and the Program does not want to fix it. He was there when the representative from the Program and the builder came to inspect his house. The builder only repaired the window.

Mr. Vittorio Nicolini testified that there is a crack in the basement floor which the builder promised to fix but never did. It is his understanding from the municipality that there is a certain type of cement to be used. He has not yet had the cement in his basement tested. He called a friend who is in the concrete business who said that when concrete cracked as it had in the Applicant's house, it could mean it was not on a good base.

Under cross-examination, Mr. Vittorio Nicolini stated he had travelled to Quebec City and Montreal with his wife and friends. He did not remember when he left or came back and thinks the trip was about 10 days or two weeks in length. He stayed at a motel and did not call his son while on the trip.

Mr. Vittorio Nicolini first stated the signature on the postal receipt form was his signature. Then he said it was his son's signature. His son has signed documents for him for the Program. Mr. Vittorio Nicolini stated that anything was possible when asked if he could have forgotten that he had signed for the envelope with Canada Post. He felt that his wife signed her own signature on documents for the Program.

Mr. Vittorio Nicolini stated that he could have got the conciliation report some months before the decision letter from the Program.

Testimony of Phillip Humphries:

Mr. Humphries stated that he was familiar with the form sent in by the Applicant for a request for conciliation. It is dated December 13, 1999. It has two signatures on it. Mr. Humphries stated that to the best of his knowledge one signature was that of Vittorio Nicolini and the other Lina Nicolini. Mr. Humphries felt in his opinion the signature of Vittorio Nicolini on the request for conciliation form and that of the signature on the Canada Post receipt were very similar. Mr. Humphries stated that Mr. Raymond Nicolini's signature as found on the previous Notice of Appeal is different from that of the signature on the request for conciliation form.

Regarding the February 8, 1998 request for conciliation form, Mr. Humphries stated that the signature under owner is similar to that of the Canada Post receipt but not similar to that on the Notice of Appeal and the signature of co owner L. Nicolini is similar to that on the other request for conciliation form.

Regarding the Certificate of Completion form of September 18, 1997 Mr. Humphries stated that there is only one signature on it. That signature is similar to the signature on the Canada Post receipt but not similar to the signature on the Notice of Appeal form.

Mr. Humphries stated that in his opinion the signature on the Notice of Application for extension of time is not similar to that on the Canada Post receipt.

Mr. Humphries stated that the photographs were taken by him on November 21, 2000. They are photographs of the main entranceway to Mr. Vittorio Nicolini's home.

VERBAL ARGUMENTS:

By the Applicant's Agent:

Mr. Raymond Nicolini stated that his father was just a few days late in submitting his notice of appeal. His father has explained why that was the case.

The Tribunal should not give any importance to the signature on the Canada Post receipt as you have to write small on that form. The printing on that receipt is definitely that of Raymond Nicolini.

By Counsel for the Program:

The Program is relying on the Jacob Manz and Lillian Ruel-Manz case by LAT released on November 9, 2000. In that case, the Tribunal found that the Applicants did not have a reasonable case to take to a hearing and the extension was denied.

Counsel stated that there are four points to consider:

1. Is there intention to Appeal? It is the position of the Program that Mr. Vittorio Nicolini was vague in his testimony as to what happened with the decision letter. The Program does not feel that Mr. Vittorio Nicolini formed an intention to appeal.
2. Whether the explanation for being late in appealing is one that the Tribunal can accept as an excuse and permit the applicant to have an extension of time? Counsel for the Program stated that the testimony that Raymond Nicolini signed for the Canada Post receipt is not one to be believed. The comparison of signatures of Mr. Vittorio Nicolini and Mr. Raymond Nicolini with other documents shows there is a difference. As well, Mr. Humphries in his affidavit speaks of a prior CRAT decision whereby the Tribunal had an adverse finding of credibility against Mr. Raymond Nicolini and Mr. Vittorio Nicolini. Mr. Vittorio Nicolini has previous experience in filing appeals. He knows that a report is not necessary prior to filing the notice of appeal.

3. Counsel for the Program conceded there is no prejudice against the Program by allowing the extension of time to appeal the decision letter.
4. The Applicant needs to show there is a substantial point in issue and there is a reasonable chance of success. Here, Mr. Vittorio Nicolini speaks of someone saying there is a problem with the concrete. But there is no report on this. Mr. Humphries's affidavit states the findings on the concrete are the same as when he did the conciliation report. He feels the crack is due to shrinkage. Regarding the brickwork, Mr. Humphries has stated that the builder has done repairs and there is no other problem with it. Regarding the deck, that is not a Program issue as there is nothing in the Agreement of Purchase and Sale which speaks of the provision of a deck. Mr. Humphries stated that the construction complies with the Building Code. The same argument applies to the railing for the front steps which is neither mentioned in the Agreement of Purchase and Sale nor in non-compliance with the Ontario Building Code. Regarding the garage door, Mr. Humphries states that the door from garage to house is an insulated door, but there is no purpose in having an insulated door from the non-insulated garage to the outside. Counsel stated that it is the position of the Program that the Applicant does not have a reasonable chance of success respecting these claims.

LEGISLATION:

Section 14 of the *Ontario New Home Warranties Plan Act* states:

(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

Section 16 of the Act states:

(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Section 20 of the Act states:

Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date.

Licence Appeal Tribunal Act, 1999 states:

Section 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 2 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Under the *Licence Appeal Tribunal Act, 1999*, the Tribunal has the authority to extend the time period required for an Applicant to submit their appeal on the decision letter filed by the Program. Previously, the Tribunal had this authority under the *Ministry of Consumer and Commercial Relations Act*.

The Tribunal must be satisfied that there are reasonable grounds provided by the Applicant in applying for an extension of time and for granting that extension of time. The principles used in applying this discretion are found in the CRAT case of Angela Bilodeau July 11, 1994.

At page 4 of that case the Tribunal states, “ While no specific authorities were cited to me, both counsel agreed that the principles to be taken into account when considering such an application are those considered on a similar application in the Court of Record and are that the Applicant must show:

1. That she had an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if she did as soon as the true situation was apprehended.
3. That there is not some overriding prejudice to the Respondent in the allowing of the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.”

The Tribunal, in the Manz case supra also held at page 3, “This Tribunal notes that the fundamental principle in deciding whether to allow an extension is to see that justice is done.”

The Tribunal finds that the decision letter was sent to the Applicant in accordance with the requirements under the Act. Now, the Tribunal must consider whether this is a case for granting an extension of time to appeal and, if so, on what terms and conditions.

The Tribunal does not find that the Applicant had an intention to appeal within the time limit. At best his evidence is vague. He cannot remember when he received the decision letter or when he went on his trip. He cannot recall the exact length of time that he was away. He leaves all of these issues to his son. But his son is also vague about the specifics of when he received the notice and when it was decided to send in a Notice of Appeal. The Tribunal finds this vagueness to be significant as the son has participated in two previous appeals to this Tribunal and is well aware of what are the time frames for filing an appeal.

Both father and son have experience in filing an appeal. The Tribunal cannot accept their vague evidence as showing an intention to appeal within the time limit. There was an intention to dispute the findings of the Program but this intention is not shown to have occurred within the time limit for making the appeal but afterwards when a friend of the father's says that the concrete basement floor has problems that are not just due to shrinkage but due to improper workmanship.

The Tribunal does not find that the excuse why the notice of appeal was not served on time is such that the Applicant should be excused for not doing so.

It is agreed that at some point in the relevant time frame the Applicant was on holidays. It is vague as to whether these holidays occurred when the decision letter was delivered by registered mail to the home of the Applicant or whether the holidays occurred after the Applicant had signed for the registered mail. The Tribunal has considerable problems with the testimony of the Applicant who first states that he signed the postal receipt for the decision letter and then when he realizes the implications of his statement backtracks and states that the signature on the postal receipt is that of his son Raymond. The Tribunal puts great weight on the observations of Mr. Humphries who as the Program's warranty representative has had extensive dealings with the Applicant and has viewed the paperwork submitted by the Applicant in his dealings with the Program prior to the issuance of the decision letter. While Mr. Humphries is not a handwriting expert the Tribunal accepts his commonsense observations that the handwriting on documents already in the file of the Program which the Applicant has admitted to signing bear a great similarity to the handwriting on the postal receipt. Those observations when combined with the initial statement of the Applicant that he had signed for the postal receipt leads the Tribunal to conclude that the Applicant knew of the decision letter at the time when it was delivered to his home. Whether he went on his holidays prior or after that time is a matter of speculation as the Applicant could not supply any details on this.

The Tribunal concludes that the Applicant decided to appeal the decision letter at some time when he had the opinion of his friend who works in the concrete business. The Applicant never provided any details which would give any significance as to the credentials of this friend. This is not an excuse acceptable to the Tribunal for an extension of time.

Regarding the third point, the Program has conceded that there is no prejudice.

Regarding the fourth point, the Tribunal finds on the evidence before it that it is unlikely that the Applicant could have any reasonable chance of succeeding on the points raised. The Applicant failed to point out any particular regulation under the Ontario Building Code which states that you must have a deck at the back of his house. Indeed, Mr. Humphries in his affidavit states that the exit from the house does not violate the Building Code and that there is nothing on this point in the Agreement of Purchase and Sale. The Warranty Program is not

there to litigate what should have been in an agreement. The Applicant must pursue other legal remedies for that issue.

Regarding the brickwork, it is speculative at best as to whether the Applicant could provide any evidence to show that this is not a matter of personal taste but one of workmanship or a violation of the Building Code.

Regarding the basement crack, the Applicant has not demonstrated that this matter has any chance of success. Mr. Humphries is stating that the crack is due to shrinkage. The Applicant makes allegations of a failure to follow the rules of the municipality but he has not even had the cement tested nor has he given any details of how this violates the regulations of the municipality. He speaks of a friend who says the crack is due to an improper base, but he does not provide any details on the credentials of this friend or on what basis this friend made this statement. It is pure speculation.

Regarding the railing for the front steps, the Tribunal had the opportunity to examine the photographs taken by Mr. Humphries just prior to the motion. They show no obvious defect. In his testimony the Applicant did not state where in the Building Code it supported his contention that there was a building code violation. This is another matter in which the Agreement of Purchase and Sale is silent. Again the Applicant has other legal avenues to pursue his remedy for this issue.

The garage door is purely an issue within the sphere of the Agreement of Purchase and Sale. There is nothing in the wording which convinces the Tribunal that it would be a reasonable interpretation to hold that there should be an insulated door leading from a noninsulated garage to the outside. This again is a matter for other legal remedies.

Given these facts the Tribunal does not find it appropriate to exercise its discretion and order that the time for giving the notice be extended. There are no reasonable grounds to do so.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999* the Tribunal orders that the application to extend the time for filing of the Appeal by the Applicant be dismissed.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

Released: February 20, 2001

FARRAR

DAVID FARRAR

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE MOTOR VEHICLE DEALERS
COMPENSATION FUND

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

DAVID FARRAR, the Applicant,
LARRY A. BANACK, Counsel, representing the Board of Trustees of
the Motor Vehicle Dealers Compensation Fund

DATE OF
HEARING:

November 30, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Board of Trustees (the "Board") of the Motor Vehicle Dealers Compensation Fund (the "Fund") dated July 21, 2000, wherein the Board denied the Applicant's claim dated April 28, 2000. By Notice of Appeal dated August 8, 2000, the Applicant stated that he wished to appeal the decision of the Board.

POSITION OF THE PARTIES:

The Board denied the claim of the Applicant for the following reasons:

1. the Applicant did not deal with a registered motor vehicle dealer;
2. the bill of sale for the vehicle, the subject matter of the Applicant's claim, was between the Applicant and a private individual who was not a dealer;
3. the bank draft for which the vehicle was purchased was made out to a private individual who was not a participant in the fund; and

4. the Applicant never attended at the registered premises of the dealer to view or purchase the vehicle.

For the reasons stated above, it is the Board's position that the Applicant's claim does not meet the requirements for compensation from the Fund.

The Applicant's position is that because a registered dealer, Peter Nenkov ("Nenkov"), operating as Pepa Export-Import of Kitchener, Ontario ("Pepa"), was involved in the transaction, the transaction was in fact a transaction involving a registered motor vehicle dealer and therefore the Applicant's claim meets the requirements of the Fund.

The Applicant's claim is for \$18,322.52 which amount is comprised of \$8,450.00 paid for the Vehicle, \$3,333.49 (shown as \$3,336.49 in the Superior Court judgment) for repairs, \$745.22 for interest on the aforesaid amounts and \$5,790.81 for legal expenses.

THE EVIDENCE:

At the commencement of the hearing, the following documents were entered as exhibits in these proceedings: the document brief prepared by counsel for the Board as Exhibit 3; a used vehicle information package as Exhibit 4; a vehicle warranty information sheet as Exhibit 5 and a Director's Certificate stating that Bojan Savic is not and never has been registered under the Act as Exhibit 6.

The Applicant testified that in August 1997 he decided to purchase a VW Golf GTI and saw an advertisement in the Auto Trader magazine for a 1992 Volkswagen Golf GTI. The Applicant arranged to see the vehicle which he drove and, upon being assured that the vehicle had not been involved in any accidents, agreed to purchase the vehicle and gave the seller a deposit of \$200.00. The Applicant referred to a sales agreement appearing at Page 7, Tab 1, Exhibit 3, being an undated sales agreement between Bojan Savic ("Savic") of Mississauga, Ontario who agreed to sell a VW Golf GTI, V.I.N. 3VWHE01G7NM033384 (the "Vehicle") for a price of \$8,000.00. In the sales agreement, Savic acknowledged having received a \$200.00 down payment. The form, which appears to be preprinted, provides a space for the parties to enter their agreement with respect to how the balance of the purchase price, is to be paid however, that space is blank. The form also contains the statement that: "the Vehicle is sold as is, with no warranties except the following" and the words: "4 MONTHS POWER AND TRAIN" have been inserted and initialed. The name of the Applicant is inserted at the bottom of the form, and the Applicant stated that both Savic and the Applicant signed the document.

The Applicant stated that on August 21, 1997, he paid the balance of the purchase price and picked up the Vehicle. The Applicant referred to a second sales agreement which appears at Page 8, Tab 1, Exhibit 3, which is identical in form to the previous sales agreement and has

been filled out in much the same fashion, however in the space where the seller acknowledges receipt of a down payment, the amount of \$8,000.00 has been inserted and after the preprinted words regarding terms for payment of the balance, the words: "NO BALANCE" have been inserted. In addition, the statement with respect to the Vehicle being sold as is and without warranties has been amended to read: "THE VEHICLE IS SOLD WITH WARRANTIES FOLLOWING: 4 MONTH POWER AND TRAIN. 21 08 1997 - 20 12 1997." According to the Applicant, the form was signed by both the seller, Savic and the Applicant.

The Applicant then referred to a copy of the purchaser's receipt for a bank draft appearing at Page 9, Tab 1, Exhibit 3, made out in the name of Jasmina Savic and although the amount stated on the copy is unclear, the Applicant testified that the amount of the draft was \$8,250.00. It was the Applicant's evidence that Savic requested the money be made payable to his wife.

The Applicant stated that he then went to the licence bureau and was told that the Vehicle had already been transferred and the tax paid.

The Applicant testified that when Savic first indicated that he was a motor vehicle salesperson selling for a registered dealer, the Applicant asked that the transaction be cancelled, but Savic refused to cancel the transaction and threatened to take legal action if the Applicant did not complete the purchase of the Vehicle.

The Applicant testified that when he began to experience trouble with the Vehicle he went to Queensway Volkswagen who advised the Applicant that the Vehicle had been written off. The Applicant referred to an invoice from Milton Complete Automotive at Page 14, Tab 1, Exhibit 3 and testified that he had repair work done on the Vehicle at a cost of \$1,617.24 in February 1998.

The Applicant introduced a copy of a used vehicle information package dated January 30, 1998, which is Exhibit 4 in these proceedings. The used vehicle information package states that the Applicant is the current registrant of the Vehicle as of August 21, 1997 and that Nenkov was the previous registered owner as of the same date, August 21, 1997. The used vehicle information package discloses that there had been four owners previous to Nenkov.

The Applicant testified that in 1998 he contacted OMVIC and spoke with Annette Jones. He stated that, as a result of his conversations, OMVIC reached an agreement with Nenkov whereby Nenkov would refund the Applicant's money when Nenkov sold the Vehicle. On June 30, 1998, the Applicant was advised that it was unlikely that Nenkov would give a refund to the Applicant.

It was the Applicant's testimony that Annette Jones told him about the Fund and the need to sue the parties involved in order to qualify under the requirements of the Fund.

The Applicant testified that he commenced legal proceedings against Savic, Nenkov and Pepa, also known as Pepa Exporters and Importers, and referred to a judgment of Superior Court of Justice (Page 29, Tab 1, Exhibit 3) whereby the Applicant obtained judgment against Nenkov and Pepa. The judgment provides that the sales agreements dated August 18, 1997 and August 21, 1997 for the purchase and sale of the Vehicle were rescinded and that those defendants were ordered to pay to the Applicant the sums of \$8,450.00 and \$3,336.49 together with interest of \$745.22 on the aforesaid amounts and costs of \$5,790.81. In addition, the court order provides that upon receipt of the sum of \$8,450.00, the plaintiff is to return the Vehicle to Nenkov. Lastly, the action against Savic was dismissed without prejudice to the Applicant to bring a further claim against Savic should he so intend.

The Applicant referred to an application for transfer, a copy of which appears at Page 11, Tab 1, Exhibit 3, whereby a Ruzica Gavrilov, who is shown as the owner prior to Nenkov on Exhibit 4, transferred the Vehicle to Pepa on August 21, 1997. The Applicant pointed out that in the space to be completed by the buyer, in the blank for insertion of the RIN or driver's licence number, the number 101454975 had been inserted. The application for transfer is dated at the bottom beside the signature of the buyer as "97/08/21." The Applicant then referred to the copies of the vehicle permit appearing at Pages 12 and 13, Tab 1, Exhibit 3, which shows on Page 12 the registered owner of the Vehicle as being "Peter Nenkov, Pepa Export-Import, 528 Lancaster Street West, Kitchener, Ontario." Page 13 is a copy of the completed application for transfer which shows, under the name of the buyer, David Farrar with his address as 1133 Forestvale, Burlington, Ontario L7S 3G6 and is dated "97/08/21" with his signature. The Applicant testified that it was not his signature. The Applicant stated that these documents indicated that a dealer's licence was used to transfer the Vehicle.

The Applicant testified that he tried to contact Nenkov to collect on the judgment without success and passed on whatever information he had to OMVIC.

Under cross-examination, the Applicant stated that he had been employed by SMC Lavelin with respect to the Voisey Bay project but worked in Etobicoke and that he was not an engineer but had a degree in economics. The Applicant stated that he had attended night school at various universities taking accounting courses and had worked as an accounting clerk. The Applicant left SMC Lavelin in January 2000 and was now working as a financial analyst for AT&T.

The Applicant confirmed that he lived at Forestvale Drive in Burlington and had car pooled to his work in Etobicoke using the Vehicle once every four days. The Applicant stated that he was single and resided with his parents. Prior to the car pooling arrangement, the Applicant stated that he had travelled to work with a person for a fee but that that person had left the company, and therefore the Applicant required a vehicle.

The Applicant stated that he had, for some time, wanted to acquire a VW Golf GTI and concentrated on models made in 1992 as they were affordable to the Applicant. The

Applicant stated that the Vehicle for sale by Savic was the third or fourth VW Golf that he had looked at. The Applicant testified that he had done all of his searching within the month of August 1997 and that he had obtained all of his leads through the Auto Trader.

The Applicant stated that he intended from the outset to purchase from a private seller and that he had a price range of between \$8,000.00 and \$9,000.00. The Applicant could not remember the specific prices for the other vehicles that he looked at but believed the prices to be approximately \$8,200.00, \$8,500.00 and \$8,700.00. With respect to the others vehicles, the Applicant stated that they did not appeal to him or had been modified and that he recalled that the mileage on one vehicle was approximately 120,000 kilometers and on another between 95,000 and 97,000 kilometers and on a third between 130,000 and 140,000 kilometers.

With respect to the Vehicle he purchased, the Applicant stated that he test drove the Vehicle but did not negotiate a price. He now knows that he was to pay the 8% PST, but the Applicant was not sure whether sales tax was applicable at the time of his purchase but he was prepared to pay the sales tax and the licensing fee. He considered the cost of certification as a fixed cost.

The Applicant stated that he wanted a private deal as he did not want to pay a "locator fee" and did not want to pay a marked-up price which he felt would be incurred if he went to a dealer.

The Applicant stated that he did go to a dealership but found the vehicles to be overpriced He did not negotiate with the dealership and therefore did not know what the actual sales price would have been.

When asked about his use of the term "locator fee," the Applicant stated that he was referring to the profit a dealership makes on the sale of a vehicle. It was the Applicant's opinion that a purchaser would pay more for a vehicle purchased from a dealer than if bought privately. The Applicant was most emphatic that he did not want to purchase a vehicle from a dealer.

The Applicant stated that the advertised price for the Vehicle for sale by Savic was \$8,500.00 and that the Applicant expected to be able to negotiate that price which he considered to be in the mid-range. The sales price was agreed at \$8,450.00 and Savic said he would pay the tax for the extra \$450.00. The Applicant stated that at that time he did not know the amount of the tax.

The Applicant did not take the Vehicle to a mechanic nor did he ask if he could take the Vehicle to a mechanic. The Applicant test drove the Vehicle for approximately ten minutes.

The Applicant stated that he never met Nenkov and did not know him except through the documentation that he had received and comments by Savic. The Applicant stated that he never saw Nenkov nor did he have any knowledge of Pepa.

The Applicant testified that after he paid the deposit the parties shook hands and the Applicant believed that he had concluded a private sale. The Applicant stated that at the time of purchase the Vehicle had between 92,000 and 95,000 kilometers.

The Applicant testified that the Vehicle had standard transmission and air conditioning and now has approximately 170,000 kilometers. The Applicant still owns the Vehicle even though it was not now on the road. The Applicant drove the Vehicle once every four days to work which was approximately 90 kilometers round trip but did not take long trips with the Vehicle.

The Applicant stated that Savic had told him that he was a mechanic who worked on the Vehicle and had owned it for one year and that he would ensure that the power and train worked. The Applicant stated that he had no way of knowing if Savic drove the Vehicle.

The Applicant testified that he never spoke to the previous owner, Gavrilov.

The Applicant stated that in addition to the work shown on the two Milton Complete Automotive invoices (Pages 14 and 15, Tab 1, Exhibit 3), other repairs had been made to the Vehicle by friends who had only charged for the parts. The Applicant stated that he had transmission work done for a cost of approximately \$800.00 about one year ago at which time the mileage would have been approximately 155,000 kilometers. The Applicant stated that he had muffler work done for approximately \$200.00 at about 140,000 kilometers. The Applicant stopped having repair work done at Milton Complete Automotive because they were too expensive. The Applicant confirmed that the Milton Complete Automotive invoice appearing at Page 14 was in the amount of \$1,617.24 and showed a mileage of 110,950 kilometers on February 23, 1998 and that the invoice from Milton Complete Automotive at Page 15 dated November 11, 1998 showed 141,810 kilometers was for a charge of \$316.25. The Applicant testified that he had replaced the tires which he purchased from a friend for between \$200.00 and \$250.00.

The Applicant stated that he had not sold the Vehicle nor had he tried to sell the Vehicle because he felt that he would have to disclose that it was a write-off. The Applicant testified that he did not believe that Annette Jones told him that Savic was not a registered salesperson. It was the Applicant's testimony that he had been told by a lawyer who was purportedly a specialist in motor vehicle law that the insertion of the number 101454975 on the application for transfer appearing at Page 11, Tab 1, Exhibit 3, meant that the Vehicle had been transferred by a dealer. It was the Applicant's understanding from what was told to him by the lawyer, whose name he thought was Gray, that only registered parties had a RIN.

The Applicant's attention was directed to the enquiry history for the Vehicle appearing at Tab 5, Exhibit 3, and he agreed that the entry for the Applicant's acquisition of the Vehicle shows a RIN. The Applicant acknowledged that the entry on the enquiry history at Tab 5 beneath the Applicant's, is for Nenkov and the RIN associated with that entry is the same number as shown on the application for transfer at Page 11, Tab 1, Exhibit 3.

The Applicant stated that it was not until he obtained the used vehicle information package (Exhibit 4) that he first became aware of Nenkov or his involvement.

The Applicant testified that he had no notes of his conversations with Savic. The Applicant stated that the lawyer drafted the affidavit at Page 16, Tab 1, Exhibit 3. When asked about paragraph 8 of the affidavit at Page 19, the Applicant acknowledged that Savic had not used the words as set forth in that paragraph but repeated that Savic had disclosed that he was selling the Vehicle on behalf of a dealer. The Applicant testified that he was told that he would pay less tax if the deal was done through a dealer. The Applicant admitted that he did not understand why there would be a savings of sales tax if the transaction was done through a dealer.

When asked why he wanted to cancel the deal when told that Savic wanted to put the deal through a dealer, the Applicant stated that he believed that the trust relationship established between Savic and himself had been destroyed by Savic's disclosure. The Applicant stated that his first impression of Savic was that he was someone who could be trusted, however that feeling disappeared upon Savic's statement.

The Applicant testified that Savic pressured the Applicant to complete the transaction and said he would not give the money back as the Applicant made a binding deal.

When asked about the statement contained in the affidavit at paragraph 8, Page 19, wherein the Applicant said that "both defendants" refused to rescind the transaction, the Applicant stated that the use of the word "both" was a mistake.

The Applicant testified that he now had a new vehicle as he would never again buy a used vehicle.

Douglas Lamb was called to give evidence on behalf of the Board.

Mr. Lamb identified himself as having been in the automobile industry for 30 years, was a member of the GM Technician Guild and for 26 years, has been a licensed mechanic.

Mr. Lamb stated that he had appeared as an expert witness in court and had testified before this Tribunal in the past.

Mr. Lamb testified that a RIN was assigned to a transaction as it was possible for a vehicle to be owned without a licence.

Mr. Lamb testified that, calculating backwards, taking a purchase price of \$8,450.00, if the sale had been private with only 8% PST being paid, the actual purchase price for the Vehicle would have been \$7,824.00. If the sale had been made through a dealer where GST and PST would have been paid, the sale price would have been \$7,347.00.

The witness referred to the extract from the Canadian Black Book for used car valuations appearing at Tab 10, Exhibit 3, dated August 15, 1997, which he identified as being a compilation of market values for vehicles obtained through the dealer network for the previous two weeks. The witness stated that for the Vehicle to fall within the average category, it would have to show approximately 20,000 kilometers per year mileage and would have a black book value of \$9,400.00. The price range for a car similar to the Vehicle would be between \$11,000.00 in a retail sale and the mid \$8,000.00 range for a private sale.

Mr. Lamb testified that the mileage shown on the Milton Complete Automotive invoice at Page 14, Tab 1, Exhibit 3, of 110,950 kilometers was consistent with a 1992 vehicle in 1998. The witness stated that the items listed on the invoice would be categorized as "wear items" which would be required maintenance on a vehicle of that age with that number of kilometers. Mr. Lamb's attention was directed to the Milton Complete Automotive invoice at Page 15, Tab 1, Exhibit 3, and he indicated that he would not be surprised that a vehicle with 141,000 kilometers would require replacement of the power steering pump. In addition, the witness stated that the need to change a exhaust system is not unusual as European exhaust systems had a life span of approximately five to six years.

The witness was presented with Exhibit 5 which is a warranty information statement and asked if he knew the meaning of the letter "T" after the word "status" on this form, Mr. Lamb stated that the "T" stood for "totalled" but that there could be a variety of occurrences which gave rise to this status other than a collision such as theft recovery or fire damage. Mr. Lamb testified that it often happens that a car will disappear and after 30 days, the insurance company will pay out the value under the insurance policy and the vehicle subsequently reappears but as the claim has been paid, the vehicle status is shown as "T".

Mr. Lamb stated that the wholesale and retail values shown on Exhibit 4, the used vehicle information package, would have been as of the date of the report, January 30, 1998 and that the value may have been higher six months earlier. The price would not be affected until October or November.

Mr. Lamb stated that the black book value for the Vehicle now, with approximately 170,000 kilometers, may be \$5,000.00 and could be as high as \$6,000.00 to \$6,500.00 if certified. The witness testified that as a car becomes older it is categorized as "rough" whether or not previously written off.

Under cross-examination, Mr. Lamb acknowledged that he had not fixed Volkswagen vehicles but stated that he had knowledge of Volkswagen vehicles. The witness disagreed that the cost of Volkswagen parts was two to three times that of General Motors products.

When asked about the Impact Auto Auction Ltd. invoice appearing at Tab 6, Exhibit, 3, Mr. Lamb stated that Impact Auto Auction Ltd., as an auction, only sells to dealers and the prices are less than the prices for which a dealer would sell similar vehicles.

Mr. Lamb stated that there was no PST payable on the Impact transaction as the Vehicle was purchased for future resale.

Mr. Lamb testified that the used vehicle information package (Exhibit 4) did not disclose any dealer as an owner at any time other than Impact Auto Auction Ltd.

The witness acknowledged that he had never inspected the subject Vehicle.

Mr. Lamb defined the expression: "curbsider" as a licensed dealer representing himself as a private seller.

ISSUE:

The issues in this hearing are whether or not the transaction involving the Applicant is a transaction for which a claim may be made to the Fund and if so, has the Applicant suffered a pecuniary loss with respect to the transaction described in the evidence.

LAW:

The applicability of the Fund to a particular transaction is premised on certain definitions which appear in Section 1 of the Schedule to Regulation 801 defines the following terms:

"claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

"participant" means a registered motor vehicle dealer who participates in the Fund.

Section 12(3)(1) of Regulation 801 states:

.....

12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay, even if the motor vehicle dealer with respect to whom

the claim is being made ceased to be a participant after the refusal or failure to pay and where the claim meets one of the following requirements:

12(3)1. The customer has recovered in any court of Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.

.....

APPLICATION OF LAW TO FACTS:

In order for the Applicant to succeed with his claim to the Fund, the Applicant first must establish that the transaction was with a registered motor vehicle dealer and secondly that he has suffered a pecuniary loss.

It is clear from the evidence introduced at this hearing that the four reasons given by the Board for denying the Applicant's claim to the Fund are correct. The question then becomes, notwithstanding those four reasons, can the Applicant make a claim to the Fund.

In the decision of this Tribunal in Karter Brar v The Board of Trustees of the Motor Vehicle Dealers Compensation Fund, CRAT Released June 19, 1998, a registrant sold a vehicle from premises other than his registered premises, the purchase price was paid to the registrant personally, and a receipt was given without reference to the vendor being a registered dealer. The registrant in the *Brar* decision was found to be a "curbside dealer" or to use another expression "a curbsider." The consumer was entitled to make a claim to the Fund.

The significant distinction between the *Brar* decision and the matter before this Tribunal is that the consumer in the *Brar* decision, even though he did not know it, dealt with a registered motor vehicle dealer whereas the Applicant did not. The Applicant's dealings were solely with Savic who, according to the Director's Certificate (Exhibit 6) was not and never has been registered under the Act and therefore is not a curbsider.

The fact that Savic was not registered under the Act raises the question of what was the relationship between Savic and Nenkov. It is true that the Vehicle was never registered in the name of Savic and was transferred from Nenkov to the Applicant, however there is no evidence before this Tribunal to show that Nenkov received the money paid by the Applicant for the Vehicle. Although there was the vague suggestion that Nenkov was prepared to refund the money upon the sale of the Vehicle, there was no evidence as to the basis of such a proposal.

In order to extend the benefit of the Fund to a consumer, there must be a more direct relationship between the consumer and the registered motor vehicle dealer than exists in the present situation.

Although the Applicant may have been intimidated by Savic's demand that he complete the transaction, he could have contacted OMVIC immediately thereafter. Instead, he made no complaint until after he experienced problems with the Vehicle and learned that the Vehicle had been written off.

Based on the evidence introduced at this hearing, the Tribunal finds that the Applicant's transaction was not a transaction involving a registered motor vehicle dealer.

Counsel for the Board raised the alternative argument that if the Applicant was entitled to make a claim to the Fund, the Applicant had not suffer a pecuniary loss.

The amount that the Applicant paid for the Vehicle, as a private sale, taking into account GST, was \$7,824.00. There is no suggestion that this amount was excessive. The value of the Vehicle today ranges from a low of \$5,000.00 to a high of \$6,500.00. The Applicant has owned the Vehicle for more than three years and in that period put approximately 75,000 kilometers on the Vehicle.

In considering this matter, the Tribunal is assisted by the decision of the Divisional Court in Didaskalou (1994) 26 CRAT 1034. In that case, the court found that although the excessive price paid for the vehicle in question by the consumer constituted a pecuniary loss, the repair costs were not sufficiently linked to the transaction to be compensated by the Fund.

The Tribunal finds that the repairs done to the Vehicle are in keeping with the type of maintenance repairs that would be required for a vehicle of the age and mileage of the Vehicle and do not therefore constitute a pecuniary loss suffered by the Applicant arising from a trade in a motor vehicle. The difference in the value of the Vehicle in August 1997 and today is reasonable given the passage of time and the additional mileage on the Vehicle.

The Tribunal finds that, if the Applicant had been entitled to make a claim to the Fund, the Applicant has not suffered a pecuniary loss.

The issue of whether the Applicant would be entitled to compensation for his legal costs is more troubling.

In the present situation, the Tribunal finds that the Applicant has not suffered a pecuniary loss and therefore no payment would be forthcoming from the Fund. In such circumstance, it is difficult to accept that the Applicant would be entitled to recover his legal costs with respect to the default judgment. As the Tribunal has found that the Applicant is not entitled to make a claim to the Fund, it need not decide this matter.

ORDER:

The Tribunal finds that the Applicant has not proven his claim for compensation and therefore, pursuant to the provisions of section 15(3) of the Schedule to Ontario Regulation 801, R.R.O., 1990 as amended, made pursuant to the Act, the Tribunal hereby confirms the decision of the Board with respect to the application of the Applicant.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: February 20, 2001

McLAREN

IN THE MATTER OF a CLAIM by
DAVID LARRY McLAREN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAVID LARRY McLAREN

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 8-10, 2001;

AND WHEREAS, upon consent of the parties the hearing was adjourned to February 5-7, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Respondent* to commence at the Sheraton Four Points Hotel, Regency North Room, 1696 Regent Street, Sudbury, Ontario, at 9:30 a.m., on Monday, March 19, 2001 and to continue March 20 and 21, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

FRATTAROLI

DAVID AND MARY FRATTAROLI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair, Presiding

APPEARANCES:

No appearance from David and Mary Frattaroli
BRIAN M. CAMPBELL, No longer representing the Applicants
MICHAEL BADER, Counsel, representing the Ontario New Home
Warranty Program
No appearance from the Added Party, 1160373 Ontario Ltd.

DATE OF

HEARING: February 14, 2001

Toronto

ORDER

Following attendances on February 14, 2001 at the hearing before the Licence Appeal Tribunal, no one appearing for the Applicants, David and Mary Frattaroli (the "Applicants"), Brian M. Campbell, appearing but no longer representing the Applicants, Michael Bader, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program"), and no one appearing for the Added Party, 1160373 Ontario Ltd. (the "Added Party"),

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter O.31, as amended, David and Mary Frattaroli (the "Applicants"), appealed a decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated August 9, 2000;

WHEREAS at the commencement of the hearing Mr. Brian M. Campbell appeared and advised the Tribunal that he no longer represented David and Mary Frattaroli in this matter and requested to be taken off the record as his clients had not briefed him and he was unable to contact them;

AND WHEREAS, the Tribunal recessed the matter for one-half hour to allow additional time for the Applicants to appear;

AND WHEREAS, after half an hour, the Tribunal reconvened and proceeded in the absence of the Applicants;

AND WHEREAS the Applicants have failed to appear before the Tribunal, although duly notified, this Tribunal finds that due to non-attendance and failure to proceed on the part of the Applicants, the Applicants have abandoned these proceedings;

NOW THEREFORE, this Tribunal Orders that the appeal by the Applicants is dismissed and pursuant to the authority vested in the Tribunal under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Program is directed to disallow this claim.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair, Presiding

Released: February 16, 2001

MADORE

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
LEO AND MARYANN MADORE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting the
said Decision pursuant to section 16(2)

LEO AND MARYANN MADORE

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

20 NIAGARA STREET LTD.

Added Party

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by the Applicants, Leo and Maryann Madore and Counsel for the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal to settle the issues in the claim and two other claims;

Having reviewed the written Minutes of Settlement signed by the Applicants and signed on behalf of the Ontario New Home Warranty Program and the Added Party, 20 Niagara Street Ltd. and having reviewed the Full and Final Release Agreement signed by the Applicants together with the letter from Leo Madore asking that the appeal be withdrawn, which documents are filed and collectively attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, pursuant to section 16(3) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, this Tribunal orders that the issues set out in Schedule "A" in this matter are disposed of on the basis of the terms set out in the said Schedule AA and the matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: February 8, 2001

ANDREWLENE FARMS LTD.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ANDREWLENE FARMS LTD. AND ANDREW KEMBER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: October 17, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANDREWLENE FARMS LTD. AND ANDREW KEMBER

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on February 15 and 16, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Middlesex County Building, North Room, 399 Ridout Street, London, Ontario at 9:30 a.m., on Wednesday May 9, 2001 and to continue May 10, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 19, 2001

KLEIN/ WEINSTEIN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ELISA KLEIN AND ELLIOT WEINSTEIN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

ELISA KLEIN AND ELLIOT WEINSTEIN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TRAILWOOD HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on February 20-21, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, May 9, 2001, and to continue May 10, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

PHELAN

PREHEARING

TIMOTHY AND GAIL PHELAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

TIMOTHY PHELAN, Appearing on his own behalf and on behalf of
Gail Phelan,
ANDREA YORK, Counsel, representing the Ontario New Home
Warranty Program,
JOHN RAPOSA, Agent, representing the Added Party, J.R. Diamond
Homes Inc.

DATE OF
PRE-HEARING: February 14, 2001

Toronto

ORDER

FOLLOWING attendances on February 14, 2001 at a prehearing before the Tribunal of Timothy Phelan, on his own behalf and on behalf of Gail Phelan (the "Applicants"), and Carol Street, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and John Raposa, Agent on behalf of J.R. Diamond Homes Inc., (the "Added Party");

The Tribunal makes the following Order on consent of all parties:

1. The Parties to the hearing are the Applicants, the Program and the Added Party.

2. The Parties have agreed to a complete settlement of all warranty issues on the following basis:
 - i) The Program will pay to the Applicants the sum of fourteen thousand dollars (\$14,000.00), of which four thousand dollars is to be paid by the Added Party.
 - ii) The Added Party will pay its contribution of four thousand dollars (\$4,000.00) to the Program by Wednesday, February 28, 2001.
 - iii) The Program will then pay the total amount of fourteen thousand dollars (\$14,000.00) to the Applicants by Wednesday, March 28, 2001.
 - iv) The Applicants will within seven days of receipt of the monies mentioned in paragraph # 3, sign a release that has been prepared by Counsel for the Program and return that release to the Program forthwith.
 - v) The terms of the release are as follows: a) that it is a release for both the Program and the Added Party; b) that for the payment of fourteen thousand dollars, the Applicants, Timothy and Gail Phelan hereby release the Program and the Added Party from all warranty claims up to and including the date of February 14, 2001. Such warranty claims are extinguished by the payment of the fourteen thousand dollars. The payment of monies and the release is in no way connected with the issue of delayed closing.
3. Now therefore, upon consent of the parties, this Tribunal orders that the proceedings in this matter are concluded on the basis of the terms set out in this order.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: February 21, 2001

TOMASZ WRZALKA O/A TOMY COMMISSION AUTO SALES

TOMASZ WRZALKA O/A TOMY COMMISSION AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

ANTHONY BAK, Counsel representing the Applicant
AVIVA HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF

HEARING: January 29, 2001

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* ("the Registrar", and "the Act" respectively). The Notice of Proposal dated November 7, 2000, proposed to revoke the registration of Tomy Commission Auto Sales ("Tomy Commission") under the Act.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of Tomy Commission Auto Sales (the "Registrant"). The grounds relied upon by the Registrar for the Proposal are set out below:

1. The past conduct of Tomy Commission Auto Sales, the Applicant OR an officer of COMPANY NAME affords reasonable grounds for belief that the Registrant's will not carry on business in accordance with law, and with integrity and honesty, TO WIT;
 - (a) The Registrant has failed to make disclosure to customers that vehicles sold

had been purchased by the Registrant at auction with the disclosure that they were 'accident repaired' or 'accident repaired and frame damage', and has failed to make disclosure that the true distance traveled was unknown.

- (b) The Registrant has failed to make disclosure to other dealers when vehicles were sold at auction that when these vehicles were purchased there was disclosure of "frame damage", "structural damage", and "accident repaired".
- (c) The Registrant has failed to make disclosure that vehicles purchased from Enterprise Rent a Car through the Toronto Auto Auction were 'daily rentals' when the vehicles were sold to customers.

The Registrant has been registered under the Act since November 19, 1991 and has carried on business at 599 York Road, Guelph, Ontario. Mr. Tomasz Wrzalka is the sole proprietor of the business and presently has no employees. He purchases vehicles for resale either wholesale or retail and the vehicles in question in this matter were all acquired at the ADESA Montreal auto auction in Montreal, Quebec, or at the Toronto Auto Auctions. The motor vehicles purchased in Montreal were all sold to the Dealer with disclosure of one or more of the following deficiencies; "accident repaired"; "structural damage"; "frame damage"; and "true distance traveled unknown". When these vehicles were sold to customers there was no such disclosure on the Bill of Sale, however some customers were advised that the vehicle had been in an accident. Other vehicles were sold at auction and there was no disclosure made to the purchasers. The Registrant purchased vehicles at the Toronto Auto Auction, which had been owned by Enterprise Rent a Car, and did not advise the purchasers that these vehicles had been "daily rentals" by marking the appropriate part of the Bill of Sale. There was a record of only one customer complaint involving the Registrant however it did not appear to have been followed up by the customer.

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows;

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

".....the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Due to the particular facts in this case Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that

the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051 the Court held:

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.

Off Lease Motor Car Sales Inc and Vasilios Tharrenos (November 5, 1999) Commercial Registration Appeal Tribunal

In this case, a Notice of Proposal had been issued against the Registrant on the basis that he employed unregistered sales persons and was selling vehicles without proper disclosure. The Tribunal found that the Registrant had purchased vehicles which had been involved in serious accidents and had been written off or salvaged. These vehicles were sold to customers without notifying them of the condition of the vehicle. No thorough inspection of the vehicles was done by the Registrant, and in one case he decided that a vehicle had not been in an accident based on a one minute examination of it. In the case of one vehicle, the Tribunal found that the Registrant knowingly sold a seriously damaged vehicle to a consumer and refused to settle the matter until O.M.V.I.C. intervened. For another vehicle with obvious dents and scratches, the Tribunal found that although there was non-disclosure it was not material and did not amount to a misrepresentation due to the visible nature of the damage. There had been allegations of odometer tampering, but the Tribunal found that there were no misrepresentations.

The Tribunal found that a purchaser of a vehicle is entitled to know all relevant information regarding the vehicle. The statement "accident repair" was found to be information that could influence a customer in deciding whether or not to purchase a vehicle, and was therefore relevant and material to the contract. Six instances of material non-disclosure were found, and Mr. Tharrenos was found to be the author of the acts and omissions. In the circumstances the Tribunal found that the past conduct of the Registrant gave the Registrar proper grounds for the decision to revoke the registration.

Coates v. Ontario (Registrar Of Motor Vehicle Dealers and Salesman) Ont. Div. Ct. (1998) 65 O.R. 2d 526

In this case, the company pleaded guilty to 2 counts of fraud and 13 counts of tampering with vehicle odometers. Charges against the Appellant were withdrawn. A Notice of Proposal was issued to revoke the registration of the Registrant to buy and sell vehicles, and this decision was upheld by the Commercial Registration Appeal Tribunal. On appeal to the Ontario Divisional Court the decision of the Tribunal was overturned and the Court found that there was

no proof that the Appellant knew of the fraud. The Court found that the granting or refusal of a license in a regulated industry is a privilege, but the revocation of an existing license interferes with a right not a privilege. The Court accepted the ratio of the *Bernstein* case (1977, 15 O.R. 2d 447) that even though the civil standard of proof is a balance of probabilities, when dealing with a matter involving the loss of the right to make a living there must be clear and convincing proof based on cogent evidence accepted by the Tribunal. The Tribunal must exercise great care as the matter to be decided involved the professional life of the Registrant.

R v. Ontario Chrysler (1977) Ltd (Ont. C.A.) 1994 O. J. No. 428

In this case, the dealership and 9 of 13 salesman were charged with fraud. One of the counts related to the sale 'daily rental' vehicles, and there was evidence that the salesmen clearly understood the history of the vehicles. The Court found that the value of these vehicles was less, as the value is determined by the market place. There was evidence from customers that they perceived the daily rental vehicles as being of less value than those owned by the manufacturer or dealership. The rental vehicles are driven by numerous people who have no interest in the vehicle, whereas vehicles owned by the manufacturer or dealership are more likely to be maintained. On this basis, customers who purchased daily rental vehicles without disclosure of that fact, were the victims of a fraud.

Aria Auto Sales Limited, (October 22, 1998) Commercial Registration Appeal Tribunal

In this case, the Registrant purchased 2 motor vehicles which were in accidents. One car had been declared a total loss by the insurance company, and the other had been in an accident and repaired. When the vehicles were sold, there was no disclosure of this information to the purchasers. The Tribunal found that disclosure should have been made at the time of the sale especially in the case of the vehicle which was a total loss. This non-disclosure of material facts was a dishonest and unethical business practice. There were other complaints against the Registrant including situations in which he collected money for warranties by an independent company, and did not pay the money to the company or register the vehicles. He also employed an unregistered sales person. The Tribunal upheld the decision of the Registrar and found the revocation of the registration to be justified.

ISSUES:

The issue in this case is whether the Registrar was wrong in his decision to revoke the Applicant's licence under the Act on the basis of the Applicant's conduct respecting the allegations of nondisclosure.

WITNESSES FOR THE REGISTRAR

Ms. Louise Gingras testified that she was an inspector for the Ontario Motor Vehicle Industry

Council (O.M.V.I.C.) and held that position for three years. Prior to that she had experience in the private sector as a private investigator, and as an investigator for the Federal Department of Employment and Immigration. She explained that O.M.V.I.C. was formed in 1997 to enforce the provisions of the Motor Vehicle Dealers Act and carry out inspections, registrations, complaint mediation and prosecutions. According to the Act the Dealers are required to carry on business with honesty, integrity, and in accordance with the law.

Based on her investigation, Ms. Gingras formed the opinion that the Registrant failed to meet the standard required by the Act based on the nondisclosure to customers that vehicles purchased by him had disclosure of accident repair, frame damage, structural damage, distance travel unknown, and that some had been daily rentals. On May 25, 2000 she inspected the Registrant's premises, and was given access to all of his books and records for the six-month period as required. The reason for this inspection was that she was carrying out a "blitz" inspection of all dealers in the area. During this inspection she took copies of his purchase invoices, and the bills of sale to customers, and other dealers through the auction. The following transactions were noted by her as failing to meet the requirements of carrying on business with honesty, integrity, and in accordance with the law.

The Registrant purchased a 1997 Nissan, Altima on February 9, 2000 at the Adesa Montreal auction with disclosure declarations on the bill of sale showing that there was no safety check certificate, "accidented and repaired", and "frame damage". On February 19, 2000 the vehicle was sold to Andrea Henry and there was no disclosure on the bill of sale of any accident or defects.

The Registrant purchased a 1998 Nissan, Maxima on January 26, 2000 at the Adesa Montreal auction with a disclosure declaration of "accidented and repaired". On February 7, 2000 the vehicle was sold to Christopher A. Henry with no disclosure on the bill of sale of an accident.

The Registrant purchased a 1995 Neon at the Adesa Montreal Auction with a disclosure of "accidented and repaired" and "frame damage". On March 25, 2000 the vehicle was sold to Catherine Vantrigt with disclosure on the bill of sale that the head gasket would be replaced and a reference to the passenger front door seal.

The Registrant purchased a 1997 Toyota, Camry on March 15, 2000 at the Adesa Montreal auction with disclosure of "accidented and repaired", and "frame damage". On April 2, 2000 the vehicle was sold to Mr. Janusz Boron with no disclosure on the bill of sale of any accident or frame damage.

The Registrant purchased a 1993 Dodge, Shadow on March 9, 2000 at the Canadian Auction Group in Kitchener with disclosure of "bank repo", red light and TKU. This odometer reading on the bill of sale of 149,387 km. On April 8, 2000 the vehicle was sold to Dawn Calder, and there was no disclosure that the vehicle was a bank repossession and the distance traveled had been disclosed as TKU on the original purchased by the Registrant.

The Registrant purchased a 1995 Plymouth, Neon on January 1, 2000 at the Adesa Montreal auction with disclosure of "accident and repaired", "structural damage", and "motor knock". On January 27, 2000 the vehicle was sold by the registrant at the Canadian Auction Group in Kitchener with no disclosure of an accident, structural damage or a motor knock on the bill of sale.

The Registrant purchased a 1995 Chrysler, Intrepid on January 26, 2000 at the Adesa Montreal auction with disclosure of "accident and repaired", and "frame damage". The vehicle was sold by the Registrant at the Toronto Auto Auctions with no disclosure on the bill of sale.

The Registrant purchased a 1994 Infinity on February 9, 2000 at the Adesa Montreal auction with disclosure of "accident and repaired". The vehicle was sold by the Registrant at the Toronto Auto Auctions with no disclosure on the bill of sale.

The Registrant purchased a 1996 Plymouth, Voyager on February 16, 2000 at the Adesa Montreal auction with disclosure of "accident and repaired". On March 2, 2000 the vehicle was sold by the registrant at the Canadian Auction Group with no disclosure.

The Registrant purchased a 1995 Pontiac Grand Am on March 15, 2000 at the Adesa Montreal auction with disclosure of "accident and repaired", "frame damage", and "motor knock". On April 27, 2000 the Registrant sold the vehicle at the Canadian Auction Group with no disclosure.

The Registrant purchased a 1998 Toyota Corolla on April 18, 2000 at the Toronto Auto Auctions. Enterprise Rent-a-Car was the prior owner of the vehicle. On April 1, 2000 the vehicle was sold to Tadeusz Puk Regina and on the bill of sale there was no check mark in the box indicating that the vehicle was a 'former daily rental' or other disclosure.

The Registrant purchased a 1999 Nissan Maxima on March 14, 2000 at the Toronto Auto Auctions. Enterprise Rent-a-Car was the prior owner of the vehicle. The vehicle was sold to Leonid Koursounski and on the bill of sale there was no check mark in the box indicating that the vehicle was a "former daily rental" or other disclosure. On the bill of sale to the customer, the date of the sale was shown as March 10, 2000.

The Registrant purchased a 1998 Toyota Corolla on March 7, 2000 at the Toronto Auto Auctions. Enterprise Rent-a-Car was the prior owner of the vehicle. The vehicle was sold to Karen Kazazien in the on March 8, 2000 and on the bill of sale there was no check mark in the box indicating that the vehicle was a "former daily rental" or other disclosure.

Ms. Gingras testified that when there is a notation of "accident and repaired" it means that

the vehicle has been damaged in an accident but has not been repaired. The witness spoke with Mrs. Henry and was advised that her husband had been told that the vehicle she purchased was in an accident and was off lease. She advised Mrs. Henry to contact Nissan Canada to get further particulars of the damage to the vehicle and get back to her, but has not heard from her since then. The witness attempted to contact Catherine Vantrigt but spoke to her husband who advised her that there was no disclosure at the time of the sale but he suspected that there had been some damage as some of the paint on the car did not match. He told her that he approached the dealer to ask about this, but it was neither confirmed nor denied that the car was in an accident.

The witness stated that the position of the Registrar on the issue of the disclosure of damage and distance travel by a vehicle is that they are both material facts which effect the purchaser's decision of whether to purchase the vehicle, and that buyers have the right to know exactly what they are buying. In her opinion, it is a material nondisclosure for the Registrant to withhold this information from the customer.

In cross-examination the witness agreed that section 18 (2) of Regulation 801 under the *Consumer Protection Act* states:

"No motor vehicle dealer shall advertised or offer for sale any motor vehicle that has been used as a taxicab or police cruiser without making this disclosure in the advertisement for the offer for sale."

She agreed that this section did not include rental vehicles but maintained that it was still a material fact that should be disclosed as it affects the price even if it is not specifically set out in the *Motor Vehicle Dealers Act* or the *Consumer Protection Act*. The witness agreed that she did not know whether the vehicles owned by Enterprise Rent a Car had been used as rental vehicles or employee vehicles. During her investigation, she had no contact at any time with Adesa Montreal auction and had no information about who filled in the bills of sale, or any background information about whether there had been actual damage to the vehicles or the extent of any repairs. The only proof of damage was the notation on the bills of sale, and she acknowledged that just because something is on a piece of paper it does not make it true. On the issue of the 1993 Dodge Shadow with the TKU notation on the original bill of sale from the auction, she agreed that she did not know if the document had been filled out prior to the recording of the actual distance traveled.

In cross-examination the witness stated that she did the complaint mediation for Mr. John Porter and tried to get a settlement, however she was not aware of any legal action brought by him, and the Notice of Proposal did not rely on allegations of a lack of financial responsibility.

It was suggested to the witness that a dealer at an auction would write a false disclosure that a vehicle was in an accident to protect themselves from allegations of nondisclosure in the future and costs of the arbitration process, but she did not venture a firm opinion on this matter.

Ms. Gingras described the business premises as an old gas station with two bays, but did not know if there were hoists in the bays on which the dealer could inspect cars. She was not aware what if any inspections were carried out, or whether he retained third parties to examine the vehicles. The witness was shown a bill of sale from Adesa Montreal (Exhibit 4, tab 1) showing a notation of frame damage for a 1998 Nissan Altima which was not the subject of this proceeding. In cross examination, the witness agreed that at exhibit 4, tab 5, there was an inspection sheet from Toronto Auto Auctions Post Sale Inspection for the same vehicle showing no notation of damage to the frame, however she pointed out that there was no check mark for 'frame' and she did not know if the frame had been inspected for damage or had been repaired.

WITNESS FOR THE APPLICANT

Tomasz Wrzalka testified that he is 42 years of age, has been married for 19 years and has 2 children who are 14 and 17 years of age. He came to Canada from Poland in 1989 and has worked in the motor vehicle industry all of his working life. In Poland he began working part-time in his father's auto repair shop at 15 years of age, and continued his employment there after completing college. Mr. Wrzalka has no formal training and acquired his experience on the job. In 1991 he was licensed as a motor vehicle dealer and did not taken any training to earn the licence. His premises can accommodate between 30 and 40 cars on the lot, there are 2 bays with hoists and a small garage for cleaning vehicles. He explained that he purchases cars primarily at auctions from banks and financial institutions, and also vehicles at the end of a lease. These vehicles are than personally inspected by him to check their mechanical condition and look for any damage.

Mr. Wrzalka stated that he remembered the vehicle sold to Andrea Henry. When he purchased it at the Adesa Montreal auction, the disclosure on the bill of sale stated "accident and repaired" and "frame damage", however when he inspected the vehicle he saw that the front right corner had been bumped but there was no damage to the frame. The radiator support was damaged and replaced, but this did not form part of the frame. He took the car into the service bay, and looked under the hood and checked the bumpers. In his opinion, the car had not been in a serious accident, and the frame was not damaged as the original manufacturer's number was on the parts he inspected. He stated that he advised the purchaser that the car was in an accident but did not put it on the bill of sale at the request of the purchaser as it would have affected the warranty. A Maxima was also purchased from the Adesa Montreal auction and sold to Mr. Henry. He followed the same steps or the inspection of the vehicle and the right rear door appeared to have been repainted. On that basis he told the customer that the car had not been in an accident and permitted Mr. Henry to take the car for an inspection by an independent mechanic. The witness stated that he called Nissan Canada and was advised that the car was not in an accident and it was under warranty. After he received the

Notice of Proposal he contacted Mr. and Mrs. Henry who provided him with a letter.

The witness testified that the car sold to Catherine Vantrigt had been purchased through the Adesa Montreal auction and he acknowledged that the disclosure stated "accidented and repaired" and "frame damage". In his opinion there had been damage to the bumper and radiator support but it was repaired, and based on his inspection of the vehicle he concluded that there was no frame damage. After the Notice of Proposal was issued to him, he obtained a letter from the customers (Exhibit 4, tab 4) stating that they had been advised that the vehicle was in an accident and everything was looked after by the dealer to their satisfaction. He also borrowed the Neon from the customer, and took it for an inspection to Miltowne Collision, a company that checks cars for the Toronto Auto auction. (Exhibit 4, tab 3) There had been no repairs and according to his evidence they found no problems with the vehicle. Their report indicated "yes" and "no" for whether the frame had been repaired, and there was no indication whether or not the frame was within the required specifications. In the written additional comments it stated that there was an accident repair to the front but still damage to the right radiator apron and radiator support.

Mr. Wrzalka stated that he knew Mr. Boron since he came to Canada and had sold him several vehicles. The subject vehicle was Toyota Camry purchased by the dealer at the Adesa Montreal auction with a notation of "accidented and repaired" and "frame damage" on the bill of sale. He inspected the vehicle together with Mr. Boron by putting it up on the hoist and determining that the front right corner had been struck, and there had been a repair to the radiator support and replacement of the bumper. The customer took the vehicle to a Toyota dealer to find out if it had a repair record. Mr. Boron provided a letter (Exhibit 4 tab 7) stating that he was advised the car had been in an accident, had the car independently checked, and was satisfied with it. The witness said that nothing about an accident or damage was put on the bill of sale to the customer at the customer's request.

The Registrant stated that the vehicle sold to Dawn Calder was purchased through the Canadian Auction Group and he did not see any problem with the odometer as it appeared to be working. He obtained a used vehicle information package (Exhibit 4, tab 2) on November 10, 2000 and said that he determined that the distance traveled was approximately 150,000 km. Although there was no indication of distance traveled on the information provided, he explained that he looked at the age and condition of the car, and calculated that the mileage shown was appropriate so it was written on the bill of sale.

Mr. Wrzalka testified that he purchased a 1995 Plymouth Neon at the Adesa Montreal auction (Exhibit 3, tab 10) with the disclosure of an accident, structural damage, and a motor knock. He inspected this vehicle and found that the only damage was to the rear control arm, and determined that this occurred during shipping, and not in an accident. In his opinion the control arm is a mechanical part, and not a part of the body. As a result he replaced the control arm himself, and when he sold the car at the Canadian Auction Group he did not disclose the information shown on his bill of sale.

The witness testified that the 1995 Chrysler Intrepid (Exhibit 3, tab 11) and the 1994 Toyota Infinity (Exhibit 3, tab 12) were both purchased at the Adesa Montreal auction and sold at the Toronto Auto Auctions. He determined that in his opinion, neither car was damaged, and there was nothing to be replaced despite what was in the disclosure information. As a result, he did not make disclosure of any prior damage on the sale at auction. Similarly when he examined 1996 Plymouth Voyager which he had purchased at the Adesa Montreal auction he found that although "accident repaired" was noted on the bill of sale, he examined the vehicle and found that the only sign of damage was that the door had to be repainted. The repainted area was where the door closed, and in his experience this was caused by normal wear on this model of the vehicle, and not by an accident. Therefore he did not make disclosure of any prior damage or accident when he sold the vehicle at auction.

The Registrant testified that he purchased a 1995 Pontiac Grand Am at the Adesa Montreal auction. Although the disclosure of the bill of sale indicated "accident and repaired", "frame damage" and "motor knock", he stated that he inspected the vehicle, and the only sign of damage was that a trailer hitch had been removed. As a result of his opinion, he sold the vehicle at the Canadian Auction group without any disclosure of prior damage or mechanical problems. In total, he estimates that he sold approximately 10 cars which were purchased at the Adesa Montreal auction with disclosure items listed on the bills of sale, without repeating that disclosure on the bill of sale to the purchaser. He testified that in each case he inspected the vehicle and was satisfied that the disclosure was not correct. In his opinion the incorrect disclosure is put on bills of sale because there is no one to inspect the vehicles, and it is in the interests of the commercial vendors to sell vehicles with the disclosure and avoid the possibility of an arbitration if there is later found to be a problem with the vehicles. He explained that the arbitration process is very expensive and dealers wish to avoid it. This disclosure also lowers the price of the vehicles, and makes it easier for them to sell if they have been put up for sale before, but not sold due to the price. To try to prove this point, he purchased a 1998 Nissan Altima at the auction with a disclosure of 'frame damage' on the bill of sale (Exhibit 4, tab 1). He stated that although this vehicle was not mentioned in the Notice of Proposal, he took it for an inspection as a test, and produced the inspection sheet showing no indication of damage (Exhibit 4, Tab 5).

Mr. Wrzalka testified that he has never sold a vehicle that he knew was damaged to a customer without informing them, and has never had a vehicle returned or an arbitration for a vehicle sold at auction. In his experience, even when a customer is advised that the vehicle has been damaged in an accident and repaired, the customer usually does not want this put on the bill and it is left off at their request. He agreed that there had been one complaint about a vehicle not listed in the Notice of Proposal, but said that the problem involving the odometer on the vehicle was not his fault and nothing came of it.

In cross-examination, he agreed that he is not a licensed mechanic or autobody repairman, and had taken no courses either before or after coming to Canada. Prior to the autumn of

1999 he had a licensed mechanic working for him, but he could not afford the salary so he released the mechanic. Since that time, he has been working by himself and all of the vehicle referred to in the hearing were purchased and sold by him.

He stated that for the Nissan sold to Andrea Henry, he saw that frame damage was listed on the bill of sale and took steps to inspect the vehicle personally. To do this he looked at the vehicle from underneath, contacted Nissan, and noted that the only problem was the right front corner. He did not measure the frame to determine if it was damaged, because he test drove the vehicle, and testified that if the frame of the car is not properly aligned, it will be apparent when the car is test driven. In his opinion a car with a damaged frame would not pass a safety inspection even though an inspection of the frame is not part of the safety inspection. His garage facility does not have the equipment necessary to measure the frame, but in his opinion it is not necessary. With his experience, he is confident that he can carry out a visual inspection without any equipment or measurement, and determine if the frame is properly aligned, or has sustained damage. He stated that even some mechanics do not have his ability to make this determination. His inspection of each vehicle takes approximately one hour as he puts the car up on the hoist, looks at the frame, and checks the parts to see if they have been replaced. He then replaces any mechanical parts which are defective and test drives the vehicle. If after this inspection he has determined that the vehicle is in proper condition, he will resell it. No notes are made of this inspection process unless parts are replaced. On the Andrea Henry vehicle he testified that he called Nissan Canada and spoke to three or four people about the service, warranties, repairs, and whether there were any repairs due to an accident, but he made no notes of the conversation. The witness confirmed that he did not tell Mr. or Mrs. Henry that there was a disclosure of frame damage on the vehicle. In his opinion the frame was never damaged so it was not necessary to advise the customer. Instead, he located the damage on the vehicle, and showed it to them. Similarly, he did not advise Mr. Henry that the bill of sale from the auction for the Maxima had disclosure of an accident as he had checked the car himself and found that it had not been in an accident, so there was no need to advise Mr. Henry. He did give the vehicle to Mr. Henry prior to sale so that he could take it to his mechanic for an inspection.

Mr. Wrzalka testified that he was the only person who inspected the vehicle sold to Catherine Vantrigt. He did not tell the purchaser or her husband that when the car was purchased there was a disclosure of an accident and repair and frame damage. Instead, he showed them that there was a weld on the radiator support prior to selling them the car. They are satisfied with the car and they bring it back to him for service. There was no indication of the extent of the service provided, or whether they know that he is not a licensed auto mechanic. Once the Notice of Proposal was served on him, he took their vehicle to a collision repair shop for an inspection, and produced the report (Exhibit 4, Tab 3). There was no notation on the report of whether the frame was within the required specifications, and there was a check mark in both the "yes" and "no" boxes which indicated whether the frame had been repaired. In the additional comments, it stated:

"accident repair front still damaged to right rad apron and rad support"

The witness testified that during this inspection, the car was not put up on the hoist as the damage was visible. He did not know if they measured the frame. In his opinion, it is possible to determine if there is damage to the frame while the car remains on the ground. He explained that it was noted on the report that the car was still damaged because it was repaired by being welded and was not in original condition.

The Registrant stated that for the Boron vehicle (Exhibit 3, Tab 8) he showed the customer the bill of sale from the auction, so Mr. Boron did see the disclosure of the accident repair and frame damage. Mr. Boron inspected the vehicle with him and took it for a further inspection by a Toyota dealership. In the letter of support provided by Mr. Boron (Exhibit 4, Tab 7) it is stated that he was told the car had been accident, he took it to be checked by the local Toyota dealership and that he was satisfied with the vehicle.

Mr. Wrzalka stated that for the Calder vehicle he verified the distance traveled by obtaining a "used vehicle information package" from the Ministry of Transport. When it was pointed out to him that the information provided does not give the distance traveled he stated that he found the distance was accurate based on the condition of the car. 21,000 kilometers per year seemed about right to him, and in his opinion that verified the distance traveled. He stated that he purchased a second "used motor vehicle information package" after the Notice of Proposal was issued. When he was asked why the "used vehicle information package" obtained by the Registrar only listed the later package being ordered on November 10, 2000 he explained that their records must have been in error. In addition, he stated that he tried to verify the distance traveled by calling the previous owner who told him that the vehicle was in good condition and not to bother him anymore.

The Registrant testified that for the 1995 Plymouth Neon (Exhibit 3, tab 10) the disclosure on the bill of sale of "accident and repaired" and "structural damage" must have referred to a mechanical part that he replaced, and disagreed that there was a motor knock. Again on this vehicle he did the repair work personally and has no documents, or receipts and did not bring his notes with him to the hearing. To confirm that there was nothing wrong with the vehicle, the witness said that he sent a fax to F. M. Auto Service which purchased the vehicle through the auction, but had received nothing back from them. There was no copy of the fax in his materials.

The witness stated that he purchased a 1995 Chrysler Intrepid at the Adesa Montreal auction with a notation of "accident and repaired" and "frame damage" on the bill of sale (Exhibit 3, Tab 11). When he examined the vehicle himself, he determined that the vehicle had not been damaged and there were only little plastic pieces missing around the light. As a result he sold the vehicle at auction without disclosure of any damage. Similarly the 1994 Infiniti (Exhibit 3, Tab 12) purchased by him at the Adesa Montreal auction with a notation of "accident and repaired" was examined by him and determined not to have been in an accident. He testified

that he telephoned Guelph Nissan and spoke to three or four people in the service department who advised him that everything was fine. Based on this he sold the vehicle with no disclosure.

Mr. Wrzalka testified that he purchased a 1996 Plymouth Voyager at the Adesa Montreal auction. The bill of sale from the auction disclosed that the vehicle was "accidentated and repaired", however when he sold it at the Canadian Auction Group he made no disclosure to the purchaser. He examined the vehicle and determined that the vehicle had not actually been in an accident as he found that the only damage was a repair to the paint in the area of the hatch. He stated that it was common knowledge that this is normal paint through wear and tear for a 1996, 1997 or 1998 Plymouth Voyager. The vehicle had been properly repaired and there was therefore no need to make disclosure on the sale.

The Registrant testified that he purchased a 1995 Pontiac Grand Am at the Adesa Montreal auction with disclosure of "accidentated and repaired", "frame damage", and "motor knock" on the bill of sale. When he re-sold the vehicle at the Canadian Auction Group, he did not make any disclosure to the purchaser as he had examined the vehicle and determined there had not been an accident and that the frame damage mentioned was as result of holes in the frame caused by the attachment and removal of a trailer hitch.

The witness testified that in his experience it is not common for the disclosure on the vehicles sold at auction to routinely have a disclosure notation of "accidentated and repaired", or "frame damage", but at the Adesa Montreal auto auction it is normal. When there is an indication of frame damage at the auction in Toronto there is more information given, including the location of the damage. In his opinion, many of the disclosures given are not correct, especially with repossessed vehicles which the vendor is trying to sell quickly. By over disclosing, the vendors protect themselves from the time and costs of the arbitration process. To obtain reliable information about accidents, he testified that he has often had to contact the original owner for information about the nature of the accident and repairs.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that the Registrant is operating a motor vehicle dealership selling used cars directly to the public and to other dealers through auctions. Many of these vehicles, and all of the vehicles which are the subject of this hearing were purchased through the Adesa Montreal auto auction or the Toronto Auto Auctions. All of the vehicles purchased in Montreal had notations on the bills of sale that they were "accidentated and repaired", had suffered "frame damage" or had an "engine knock". The vehicles purchased at the Toronto Auto Auctions were all vehicles which had been the property of Enterprise Rent-a-Car. In each of these cases there was no disclosure on the bill of sale for the cars sold retail to customers or wholesale at auction that the car had been purchased with disclosure of the above information, or was a "daily rental vehicle".

There was no evidence before the Tribunal on the issue of whether the vehicles had been in accidents or the severity of any accident other than the fact that there was obviously repaired damage on different vehicles. The Tribunal heard no evidence that the vehicles previously owned by the rental company had been used by employees and not rented to the public. No effort was made by the Registrant or the Registrar to find out whether these vehicles had been rental vehicles. These cars were sold by him with no written disclosure in each case, and there was no check mark in the box provided on the bill of sale. Upon the purchase of all of these vehicles by the Registrant, he followed the same process which was to visually inspect each vehicle to determine if it was damaged, and if it was mechanically sound. He carried out the inspection of the frame without the use of any measuring tool or any equipment. The witness is not a licensed mechanic and had no formal training either in Canada or in Poland. His knowledge has been gained through working in the field as a salesman. To his credit, no record of customer complaints has been produced, and there was no evidence that any vehicles were ever returned from auction sales as defective. If Mr. Wrzalka found damage that he thought was consistent with an accident, he did advise his customers that the vehicle had been in an accident, and he was willing to allow the customer to take the car for an inspection by an independent mechanic. When he was challenged on the issue of what if any background checks he made on some of the vehicles, his evidence was evasive and unsubstantiated. He had no notes of any conversations, and did not know who he spoke to at the service departments of the dealerships. For the one vehicle for which the odometer reading was an issue, his method of confirming mileage rather than noting "distance traveled unknown" on the bill of sale, was to determine the age of the car and find if the average mileage per year seemed appropriate to him.

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of the Registrant where the Registrant's past conduct affords reasonable grounds for belief that the Registrant will not carry on business in accordance with the law, and with integrity and honesty. In this case the Registrar was not dealing with a series of customer complaints about substandard vehicles, and it appears that all of the vehicles involved in this matter have been found satisfactory by the purchasers. In most cases, the purchasers have been advised that the vehicle has been in an accident although the particular disclosure from the original bill of sale was not disclosed. The Registrant made an effort to inspect the vehicles, and made whatever repairs he thought were necessary. He is not a trained and licensed mechanic, but felt confident relying on his own knowledge although he had neither specialized training, nor modern equipment. In this way he decided that the disclosures on the bills of sale were not accurate. He did not provide the information in the disclosure to the customer and allow them to decide if they wanted to purchase the vehicle with full knowledge. It was open to him to provide the information, and

explain why he disagreed with it, but to simply determine that it was incorrect and not provide it to the customer, defeats the purpose of disclosure being made at all. This is a regulated industry, and the dealer is obliged to provide information which will be material to the customer's decision of whether or not to purchase the vehicle, and what is the appropriate price. Although the Registrant's methods provided the customers with vehicles which did not generate complaints, the customers were denied material information. The public must have confidence that the dealer or salesperson will provide them with all relevant information and will not knowingly or inadvertently misrepresent the value or quality of the vehicle. To permit a dealer, especially one who is not a licensed mechanic, to simply inspect a vehicle visually and manually, then unilaterally decide that the disclosure provided to him is wrong, defeats the purpose of requiring material disclosure.

The Tribunal finds that the Registrant failed to make adequate disclosure, however he did inspect the cars to the best of his ability and allowed the customers to have the vehicles independently examined. Unlike the case of *Off Lease Motor Car Sales Inc and Vasilios Tharenos*, Mr. Wrzalka was not selling vehicles which were written off or were salvage without informing his customers, and he was not employing a number of unregistered salespeople. In this case, the Tribunal finds that the Registrant intended to sell serviceable vehicles, but did not adequately comply with the disclosure requirements for a regulated industry.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with integrity honesty and with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to refrain from carrying out his proposal dated November 7, 2000 to revoke the registration of the Applicant, but directs the Registrar not to revoke the registration of the Applicant if the following conditions are met.

1. The Registrant shall disclose on each bill of sale to any purchaser of any vehicle from the Registrant, any information disclosed in writing at the time of the purchase of the vehicle by the Registrant. This shall include but not be limited to accidents, repairs, frame or structural damage, body damage, engine knock or any other information relating to the physical condition or history of the vehicle.
2. The Registrant shall disclose on each bill of sale to any purchaser of any vehicle from him, whether the vehicle purchased was previously owned by a company that is engaged in the daily rental or lease of vehicles to the public.

3. The Registrant shall disclose on each bill of sale to any purchaser of any vehicle from him, the true distance traveled if known, and if unknown or estimated, shall disclose to the purchaser that the true distance traveled is unknown.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair, Presiding

Released: February 23, 2001

NAJJAR

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
IMAD AL NAJJAR

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: November 2, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

IMAD AL NAJJAR

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Imad Al Najjar, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 1, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

From: Imad Al-Najjar
762 Victoria Ave.
Windsor, ON N9A 4N2

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Imad Al-Najjar (hereinafter referred to as "the Registrant") hereby consents to the following terms and conditions to his registration as a motor vehicle salesperson.

In accordance with section 4.1 of the Statutory Power Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Registrant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Registrant agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
3. The Registrant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Registrant shall not be an officer, director, owner or partner in a dealership.
5. The Registrant will not be the final signatory on any bills of sale.
6. The Registrant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Registrant agrees that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Registrant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Registrant acknowledges that the Registrar may take legal action, including a Provincial Offences

prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

10. The Registrant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Registrant will provide a copy of this order to his employer forthwith.
12. The Registrant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Registrant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Registrant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____, 2000.

Imad Al-Najjar

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

BIGG

KAY AND NORMAN BIGG

APPEAL FROM A DECISION OF THE COMPLAINTS COMMITTEE
OF THE BOARD OF FUNERAL SERVICES UNDER THE
FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

KAY BIGG, representing herself and Norman Bigg
KEVIN McGIVNEY, Counsel, representing Lloyd Needham, Funeral
Director, Needham Funeral Service Inc.
BERNARD C. LeBLANC, Counsel, representing the Registrar, Board
of Funeral Services

DATE OF
HEARING: February 9, 2001 Toronto

ORDER

WHEREAS, the Complaints Committee of the Board of Funeral Services issued its decision dated October 5, 2000 in regard to a complaint by Kay and Norman Bigg ("jointly referred to as the " Complainants") against Lloyd Needham, Funeral Director ("Needham");

AND WHEREAS, the Complainants appealed the decision of the Complaints Committee to the Licence Appeal Tribunal;

AND WHEREAS, Complainants appeal was set down for hearing before the Tribunal, for 9:30 a.m., on February 9, 2001;

AND WHEREAS, the Complainants, representing herself and Norman Bigg, Kevin McGivney, Counsel for Needham and Bernard C. LeBlanc, Counsel for the Registrar, were all present at the hearing on February 9, 2001;

AND WHEREAS, upon commencement of the hearing, the Tribunal was advised that on consent of all parties they have concluded a settlement in terms of which the Complainants have withdrawn their complaint against Needham and their appeal to the Complaints

Committees' decision;

NOW THEREFORE this Tribunal orders, on the consent of the parties, that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: February 9, 2001

BLEWETT

SHIRLEY-ANN BLEWETT

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Shirley-Ann
Blewett seeking an extension of the time
requirements for this Applicant to commence this
appeal from an impoundment order of the
Registrar under Section 55.1 of the Highway
Traffic Act;

AND IN THE MATTER of

SHIRLEY-ANN BLEWETT

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Stuart Cork, Presiding Member

APPEARANCES: Claire Rowett,
Representative for the Registrar of Motor Vehicles

Shirley-Ann Blewett, Applicant

DATE OF
MOTION: January 31, 2001

By teleconference

ORDER

A motion was heard by teleconference on January 31, 2001, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the

Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Copy of Impound Order dated November 25, 2000, relating to the impoundment of the motor vehicle for 45 days. (Exhibit # 1)
2. Original Notice of Appeal, including Applicant's position on Appeal, dated December 21, 2000, received by the Tribunal on December 29, 2000. (Exhibit # 2)
3. Letter from the Applicant received by the Tribunal December 29, 2000.

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to the above-captioned legislation.

The motor vehicle was ordered impounded on November 25, 2000 while being driven by Douglas Karl Blewett, whose driver's licence was under suspension at the time of the impoundment. The vehicle was taken by Mr. Blewett without the knowledge or consent the Applicant.

The fifteen-day deadline for filing an appeal with the Tribunal was December 10, 2000. The Applicant filed her Notice of Appeal with the Tribunal on December 29, 2000, thirty three days into the impoundment period, and nineteen days past the appeal deadline date.

The Applicant testified that she was not aware of the impoundment, and was informed when she received the Order to impound on December 1, 2000. She was subsequently informed by the impound facility of the procedures for filing an appeal, though she was aware of the appeal process from the information contained in the Order. The Applicant assumed that the fifteen day deadline for filing her appeal was measured from the date she received the appeal information package from the Tribunal.

Notwithstanding the fact that the Notice of Appeal form was received by the Applicant on the day after the date of expiration of the fifteen-day appeal filing period, it took an additional six days to file the appeal. The Applicant testified that she made her best effort to pursue the matter, and that due to personal difficulties, suffering from the flu, as well as a general

misunderstanding of the process, she did the best that she could under the circumstances. The Applicant did not provide the Tribunal with any evidence to support her testimony that these reasons prevented her from filing her appeal within the prescribed fifteen day filing period.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that she, acting in good faith, was unable through accident, illness or other cause beyond her control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. The Tribunal is precluded from considering other factors not arising from or directly related to these criteria.

The criteria listed in Section 20(7) which the Tribunal should consider in granting an extension are matters outside the Applicant's control. Whereas the testimony of the Applicant was that the initial fifteen day delay was due to her receipt of the Notice to Appeal information package sent by the Tribunal on December 16, 2000. However the specific reasons for the further thirteen day delay in submitting her Notice of Appeal form to the Tribunal remained unclear. A variety of reasons were given, including a misunderstanding of the intent of the regulations regarding the date of which the fifteen day Notice of Appeal filing period was to commence. Upon receipt of the Notice of Appeal package, a further six day delay occurred before the form was sent to the Tribunal, which did not receive the form until another six days had passed. The Applicant failed to provide a satisfactory reason as to why this further delay in completing and delivering the appeal had occurred.

The Tribunal is not satisfied that the evidence before it is sufficient to show that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of accident, illness or other cause beyond the Applicant's control.

ORDER:

Accordingly, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is dismissed.

LICENCE APPEAL TRIBUNAL

Stuart Cork,
Presiding Member

RELEASED: February 8, 2001

MAHMOUD YONECH-MELERDI O/A AR AUTO WHOLESALE NETWORK

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MAHMOUD YONECH-MELERDI O/A AR AUTO WHOLESALE NETWORK

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: December 28, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MAHMOUD YONECH-MELERDI O/A
AR AUTO WHOLESALE NETWORK

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on May 4, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Friday, June 1, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 12, 2001

ANBEL BUS LINES INC.

PREHEARING

ANBEL BUS LINES INC.

IN THE MATTER OF an application by Anbel Bus Lines Inc. dated January 15, 2001 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Deputy Registrar dated January 15, 2001;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator Registration CVOR # 129-750-805 issued to Anbel Bus Lines Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure dated January 15, 2001, the plate portion of permits and numbered plates issued to Anbel Bus Lines Inc.;

AND IN THE MATTER of the safety record of Anbel Bus Lines Inc.;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
 KEITH MUCKLER, Agent for the Applicant

DATE OF
PRE-HEARING: February 15, 2001

Toronto

ORDER

A Pre-hearing Conference between the parties was held on February 15, 2001 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated January 29, 2001.

AND WHEREAS, upon review of the material, Keith Muckler, Agent for Anbel Bus Lines Inc. informed the Tribunal that his client was withdrawing his appeal to the Registrar's order;

AND WHEREAS the Tribunal after having explained the consequences of the Applicant withdrawing his appeal, and having satisfied itself that Keith Muckler knows and understands the consequences of withdrawing his appeal;

AND WHEREAS Keith Muckler has informed the Tribunal by letter dated February 21, 2001, which is attached hereto, of the Applicants request to withdraw their appeal;

NOW THEREFORE on hearing submissions of Counsel for the Registrar, this Tribunal orders with the consent of both parties, that the appeal in this matter is hereby withdrawn, and the matter is concluded.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *February 22, 2001*

PITEK

RAYMOND PITEK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

RAYMOND PITEK, Applicant
unrepresented

DATE OF HEARING: February 2, 2001

DECISION RELEASED: February 8, 2001 Toronto

REASONS FOR DECISION

A hearing was held on February 2, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Raymond Pitek (the “Applicant”)
Motor Vehicle:	1995 Chevrolet Van, plate # YF2651 (the “vehicle”)
Date of Appeal:	January 16, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 2, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals which were entered into evidence as exhibit #3.

All documents were submitted into evidence with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

EXCEPTIONAL HARDSHIP
LICENCE REINSTATED

The Applicant testified that he works as a carpenter and contractor. He relies upon his vehicle for the transportation of tools and materials used in his business. The loss of his vehicle has had a severe economic impact upon him in that he has been forced to find other work at reduced pay.

He further testified that his vehicle was impounded after the police had stopped him while he was driving it on January 4, 2001, and found that his licence was then under suspension. The term of the suspension that he was currently serving was due to expire on January 16, 2001.

The Applicant stated that the economic impact of the impoundment was being felt by him alone. He also believed that he could not afford any alternatives to the impounded vehicle, and none had been investigated.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Raymond Pitek;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 14, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making

arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

Section 22(3)(d) of Regulation 632/98 precludes the Tribunal considering the impact of any loss as a result of the impoundment that may be upon the person who was driving the vehicle at the time of the impoundment while their driver's licence was then under suspension. In this case, the Applicant testified that he was driving his vehicle at the time of the impoundment, while his drivers licence was then under suspension.

In order for the Applicant 's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation).

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. In fact, the testimony of the Applicant was that he had not pursued any alternatives since he believed that they would be too costly.

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: February 8, 2001

FLEMING

CHRISTINE FLEMING

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: F. CLAIRE ROWETT,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF HEARING: February 5, 2001

DECISION RELEASED: February 8, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended, Christine Fleming (the "Applicant"), appealed a decision of the Registrar of Motor Vehicles (the "Registrar") as set out in the Order to Impound, dated January 4, 2001;

WHEREAS the Tribunal set a hearing for February 5, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., which did proceed;

AND WHEREAS the Applicant was duly notified by Notice of Hearing, dated January 19, 2001, was delivered by courier to the Applicant on January 22, 2001, and proof of service filed. At 10:00 a.m., the hearing was adjourned until 10:30 a.m. to allow the Applicant more time to arrive or make contact by telephone if they wished to participate. At 10:30 a.m. there being no communication from the Applicant, the hearing commenced in the Applicant's

absence.

AND WHEREAS F. CLAIRE ROWETT, representing the Registrar of Motor Vehicles was present at the hearing on February 5, 2001 and no one appeared on behalf of the Applicant;

AND WHEREAS ON READING the Applicant's Notice of Appeal, Owner's Position, Ministry of Transportation's submissions, no one appearing for the Applicant although properly served as appears from proof of service filed, this Tribunal finds that due to non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings;

THIS TRIBUNAL ORDERS that the appeal by the Applicant is dismissed and pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, the Tribunal confirms the Registrar's Order to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: February 8, 2001

MACDONALD

BILLIE-JO MACDONALD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NORMAN MEALING,
Presiding member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

BILLIE-JO MACDONALD, Applicant
unrepresented

DATE OF HEARING: February 8, 2001

DECISION RELEASED: February 16, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing was held on February 8, 2001, *by teleconference*, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Billie-Jo MacDonald (the "Applicant")
Motor Vehicle:	1995 Chevrolet Cavalier, plate # AHDE 893 (the "vehicle")
Date of Appeal:	January 19, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 8, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To whom it may concern,

My name is Billie-Jo MacDonald, I have written to you previously to put in an appeal based on hardship as to the 45 day impoundment of my vehicle. I am a 4 month pregnant single mother who is having a hard time financially and emotionally. I am behind in my rent of \$475/month for a bachelor leaving no other choice but to move back home to try to save some money. I only make minimum wage at the moment. In about another 3 months my wages will be cut in half for my maternity leave. I am scared I will loose my car if I don't come up with the money to get it back. I need my car to go back and forth to work and to go to doctors appointments. If I win this appeal I will have my car towed back to my parents house even if I have to give you my plates. I will have CAA tow it back to St. Catharines. I have an appointment with the Licence Appeal Tribunal in Hamilton on February 8th, 2001. So I hope you will help me get my car back in St. Catharines as soon as possible. Thank you for your time.

Billie-Jo MacDonald

P.S. I have already sent in my \$100.00 application fee.

Ms. MacDonald appeared on her own behalf, and restated the reasons for appealing the impound order. Under questioning, she indicated she currently works from 2:30 p.m. until 1:00 a.m., Monday through Thursday, at Bizarre Novelty. In order to get to and from work, she has been able to secure rides from her co-workers, and her father. She further stated that, from time to time, she had been able to use public transit to get to work, but that the service was not available at the end of her shift, and that she had, on occasion, walked home from work. Ms. MacDonald also indicated that she had been able to secure rides from her father to attend to her doctor's appointments.

In her written statement, Ms. MacDonald indicated that she would arrange to have her car towed to her home should it be released before the end of the impound period, and not use it. The Chair questioned this statement, and she responded that she understood that the car could not be used prior to the end of the impound period. This distinction is relevant because, under questioning, Ms. MacDonald indicated that her major concern was the cost of releasing her vehicle from the impound yard.

Although not the grounds for the appeal, Ms. MacDonald indicated that Mark Dunn, the driver of the vehicle, had permission to use her car, and that she was not aware that his driver's licence had been suspended.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Mark Dunn;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 14, 2001.

Mr. Kyle Biel, Agent for the Registrar of Motor Vehicles, presented the Registrar's position, and questioned the Applicant extensively. Mr. Biel submitted that exceptional hardship had not been demonstrated in that Ms. MacDonald had been able to make alternative arrangements for transportation to and from work, her doctor's appointments, both through rides from her co-workers and her father, and through the use of public transit. He further submitted that the cost of releasing the car from impound was not included within the definition of exceptional hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section

55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose

- driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a),(b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The evidence indicates that the Applicant has been inconvenienced due to the impoundment but that she has been able to secure rides from others, use public transit or walk to work when required. Other alternatives to her impounded vehicle are available to her. There is no evidence of there being a health or safety issue as a result of the impoundment. The Tribunal cannot consider inconvenience as exceptional hardship. Also, the Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of the Regulation).

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: February 16, 2001

SNIDER

PATRICIA SNIDER

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ELMER MERKLEY,
Presiding member

APPEARANCES: KIM BEINTEMA,
KIM GROSSKURTH,
Representatives for the Registrar of Motor Vehicles

PATRICIA SNIDER, Applicant

EDWARD KIERNAN, Solicitor for Applicant

DATE OF HEARING: February 7, 2001

DECISION RELEASED: February 13, 2001 Simcoe

REASONS FOR DECISION

A hearing was held on February 7, 2001, at Simcoe, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Patricia Snider (the "Applicant")
Motor Vehicle:	1993 Pontiac Sunbird, plate # AHPV917 (the "vehicle")
Date of Appeal:	January 19, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on February 7, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

STATUTORY DECLARATION

CANADA	}	In the Matter of
Province of Ontario	}	a Motor Vehicle Impoundment - Appeal

TO WIT:----

I, Patricia Snider, of the Town of Norfolk [Simcoe], in the Province of Ontario, am the owner of a 1993 Pontiac Sun-bird, VIN 3G2JC11H8PS831937 bearing Ontario Licence Plate No. AHPV 917 and as such have knowledge of the matters hereinafter deposed.

1. I am the common-law spouse of Wade Reid. We reside at 63 Main Street, Simcoe, Ontario N3Y 2M2.
2. I do not work, I am disabled and am on a disability pension.
3. My spouse, Wade Reid, works in Ancaster, Ontario.
4. Mr. Reid lost his licence for a period of time resulting from a charge of impaired driving.
5. Mr. Reid had completed his suspension period and had paid his fine in respect of same and I was of the understanding, and verily believed, that his licence was in fact reinstated. On the date the car was impounded, Mr. Reid was using my automobile to drive to work. I did believe he had his driver's licence reinstated at this time.
6. Due to my numerous disabilities, I require my vehicle for even short distance transportation. I can not walk very far. I, must attend doctor's appointments, pick up prescriptions, do errands. I cannot manage to do these things without transportation.

7. I live on a disability pension and my income is limited. I can ill afford the cost of the impound and may lose my vehicle as a result of same.
8. The loss of my vehicle has caused me severe hardship and emotional distress coupled with my pre - existing medical problems this has caused further stress in my life.
9. I sincerely require my vehicle to carry on the activities of my every day life and trust you will give due consideration to my appeal.

AND I MAKE THIS SOLEMN DECLARATION conscientiously believing it to be true and knowing that it is the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

DECLARED before me at the Town of	}	
Norfolk, Province of Ontario	}	"Patricia Snider"
this 19th day of January 2001.	}	Patricia Snider
January, 2001	}	

"Lesley Magill"
A Commissioner etc.

LESLEY VIOLET MAGILL, a Commissioner, etc.,
Regional Municipality of Haldimand-Norfolk, for
Smelko Law Office, Barristers and Solicitors.
Expires August 14, 2003.

This Statutory Declaration is supported by a medical report prepared by Dr. B. L. McMeekin, Ms. Snider's family physician. The handwritten report offers the following.

RE: Patricia Snider

This ptnt is on disability due to chronic injuries of her neck, back and knee. She requires the use of a cane, as she is unable to walk greater than 2 blocks due to her knee pain. She lives in an area where there is not public transportation, and is unable to get to medical appointments without a car. She is also under treatment for stress related problems, and is presently suffering from increased headaches due to the stress of having lost her car. I would request that because of these medical problems, she be allowed to get her car back.

Dr. B. L. McMeekin, M.D., C.C.F.P.

The Applicant produced pay stubs from the Ontario Disability Support Program indicating she is on a disability pension and receiving \$930.00 per month for shelter and basic expenses. Ms. Snider's disability is a result of a car accident in 1992 that has left her with manic depression, difficulty walking and chronic injuries to her neck and back. She is currently on six

(6) medications for disability and two (2) other medications for depression. While she has not had to travel to the Carlisle Medical Centre during the impoundment period, she is required to attend the Mental Health Centre in the Norfolk General Hospital in Simcoe as well as have periodic blood work done. During the impoundment period, she has missed one visit to the Mental Health Centre and one visit for blood tests. Renting a vehicle or utilizing a taxi during the impoundment period are out of the question since her disability cheque of \$930.00 per month is fully consumed paying \$700.00 per month for rent, \$33.00 for telephone service and \$44.00 for T.V. cable. Her common law spouse, Mr. Wade Reid, a crane operator in Ancaster, earns \$530.00 per week and assists with groceries, the car insurance premium, and small bills. He has absolutely no money left over after paying for his daily ride from Simcoe to Ancaster as well as the fines and other loans that currently exist.

In her testimony, the Applicant stated that she knew Mr. Reid's driver's licence was suspended in 2000 and truly believed it was reinstated before loaning him her car on January 21, 2001. While she never directly asked him, she assumed the one year suspension was up because he served time in jail in early January 2000 and she witnessed him paying his \$750.00 fine in early January 2001 for driving while disqualified.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Wade Curtis Reid;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified or Prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 10, 2001.

The Respondent submits that the Applicant has not required or missed a medical appointment with her family physician situated one hour away in Carlisle, Ontario during the impoundment

period. While the Respondent acknowledges that the Applicant suffers with some chronic medical problems and is on a full disability pension, opportunities exist such as utilizing a taxi, calling on friends to supply needed rides, and investigating the possibility of having the pharmacy deliver her prescriptions free within the Town of Simcoe.

Three additional vehicles, according to the Ministry of Transportation records, are registered to the Applicant and could be available for transportation during the impoundment period. The Applicant responded by saying that one is absolutely not roadworthy and the other two may be still in her name and operated by her ex-husband.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if

the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The first issue to be considered in this appeal is whether the motor vehicle owner exercised due diligence to determine that the driver's licence was not suspended.

The onus of proof, based on the balance of probabilities, rests with the Applicant.

The Applicant readily admits that she did not directly ask Mr. Reid if he had a valid driver's licence before loaning her car. She simply assumed that his driver's licence was reinstated after serving time in jail in early January 2000 and paying his \$750.00 fine. Therefore, the one year suspension should have expired in January 2001. The evidence shows that the Applicant took no steps to ascertain the status of Mr. Reid's driver's licence.

The Tribunal finds that the owner of the motor vehicle in accordance with Section 50.2(3)(c) of the H.T.A. did not exercise due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.

The Applicant also requested an appeal on the grounds of "exceptional hardship" under Section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case argued that the impoundment is causing her severe stress and major inconvenience in attending doctor appointments and

running errands during the impoundment period. In order for these claims to be considered under Section 22(2), the Applicant must have demonstrated that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle.

The Applicant testified that she investigated the use of a taxi to get to and from her medical appointments but quickly discarded the idea based on the \$7.00 taxi fare. The Applicant has not asked Mr. Reid to assist with the cost of her transportation problems or contribute to the impoundment fees upon the release of her vehicle. As well, the Applicant has not established that reasonable alternatives have been considered.

While the Applicant has missed two local medical appointments during the impoundment period, it was not clear to the Tribunal whether every reasonable option had been considered and enquired into that could eliminate the problem. In respect to the three additional motor vehicles registered in her name, the Applicant was only able to say that one was not roadworthy. The status of the two other vehicles is unknown to the Tribunal.

With regard to the Applicant's second ground of appeal that the impoundment will result in exceptional hardship, the Tribunal finds that the Applicant has not established exceptional hardship, as prescribed under Section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: February 13, 2001

LORENZ

SANDRA LYNN LORENZ

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"),
FOR AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES
PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA, Representative of Registrar of
Motor Vehicles

SANDRA LYNN LORENZ, representing herself

DATE OF
HEARING: February 20, 2001 *By teleconference*

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H. 8 as amended, Sandra Lynn Lorenz (the "Applicant") appealed a decision of the Registrar of Motor Vehicles (the "Registrar") made under section 55.1 of the Act to impound a certain 1989 Chevrolet SLE motor vehicle, plate number AELX 142 (the "motor vehicle");

UPON MOTION, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing;

UPON READING the exhibits and hearing submissions of the representative of the Registrar as well as submissions by the Applicant, this Tribunal finds that the ground of exceptional hardship [section 50.2(3)(d)] upon which the Applicant relies in this appeal, does not apply by virtue of section 50.2(4) as a previous order to impound under section 55.1 was made with

respect to the motor vehicle then owned by the Applicant;

NOW THEREFORE, this Tribunal orders that after considering the evidence and the submissions of the Applicant and the Representative of the Registrar, pursuant to Section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: February 21, 2001

LIRETTE

HYACINTHE LIRETTE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING, Presiding Member
WILLIAM WARBURTON, Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

HYACINTHE LIRETTE, Applicant
unrepresented

DATE OF HEARING: February 13, 2001

DECISION RELEASED: February 20, 2001 Toronto

REASONS FOR DECISION

A hearing was held on February 13, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Hyacinthe Lirette (the "Applicant")
Motor Vehicle:	1990 Chevrolet Cavalier, plate # 621 JOS (the "vehicle")
Date of Appeal:	January 26, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on February 13, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I was unaware that the Drivers Licence was under suspension at the time of the impoundment.
Apparently it occurred while I was on vacation.

Mrs. Lirette was accompanied by her husband.

Mrs. Lirette testified that her son David was at home waiting to be picked up to go to Hockey practise. When his friend did not turn up, she told him that he could use her car. She said that she and her husband were away in New Brunswick from June to October, and she was under the impression that David may have lost his licence during that time and did not tell them.

Upon being questioned she did admit that David had not been driving. His sister who lives nearby normally drives him to work, and his friends drop by to take him to hockey, etc.

Mrs. Lirette was asked by the representative whether she knew that David had previous suspensions, and she replied that she did not know.

She also stated that she had never asked David whether he had a valid Driver's licence. She did not know that he did not have a valid licence when she suggested he could use the car to go to Hockey practise that day, and was quite surprised when she was advised that her son had not had a valid licence since 1994.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David J. Lirette;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS of Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 21, 2001.

The Registrar's submission was that Mrs. Lirette's evidence confirmed that she and her husband had relied on trust regarding the status of their son's driver's licence and that, therefore, they had not exercised due diligence as stipulated in the Act.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that

the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must that he exercised due diligence as required in Section 50.2 (3)(c) of the Act.

Mrs. Lirette confirmed that neither she nor her husband were aware that their son's licence was under suspension at the time of the impoundment. Indeed, she was shocked to learn that her son has been without a valid driver's licence for almost seven years. It is clear that neither the Applicant nor his wife took any active steps to confirm the status of their son's driver's licence. Without taking such steps, the Lirettes could not establish that they exercised due diligence as required by Section 50.2(3)(c) of the Act. Accordingly, the Applicant could not meet the onus required of him under the Act to succeed in this appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

William Warburton, Member

RELEASED: February 20, 2001

MONIGHAN

JOSEPH E. MONIGHAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

JOSEPH E. MONIGHAN, Applicant
MICHAEL MORRISON, Agent for Applicant

DATE OF HEARING: February 16, 2001

DECISION RELEASED: February 22, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing was held *by teleconference* on February 16, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Joseph E. Monighan (the "Applicant")
Motor Vehicle:	1989 International Harvester Truck, plate # 451 OJN (the "vehicle")
Date of Appeal:	January 30, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on February 16, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There were no preliminary matters and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Jan. 29, 2001

To Whom it may concern:

Re: Impoundment of 1989 International Harvester Truck

On Jan. 16, 2001 I was informed that our truck was impounded due to the fact our driver was under a licence suspension.

I was totally unaware of this man's suspension. In fact his driver's licence number was given to our insurance company, as a new driver, early in December. (Pearson - Dunn Insurance, Hamilton, Agent Larry French)

This incident was a complete surprise to us and an exceptional hardship. This is the only large truck that I operate in a small local moving business.

We have a number of bookings in the month of February and employ four other people. Without that vehicle we are effectively out of business for the month and our people will be unemployed.

It will be difficult enough to pay the storage and tow fees as it is and the elimination of our February revenue will make it even more difficult.

The driver in question, Mr. Don Beamer, has been dismissed with no possibility of re-hire. I feel his stupid mistake should not affect innocent parties unrelated to his problem.

Any relief of this situation would be greatly appreciated.
Please contact the undersigned as early as possible.
Thank you in advance for your consideration.

"

"

Michael Morrison
905-525-8332

Letter from Michael Morrison dated January 29, 2001 states "...*Totally unaware of this man's suspension ...without this vehicle we are effectively out of business for the month and our people will be unemployed...*"

At the hearing the Applicant's agent, Michael Morrison made a statement according to his knowledge of the facts surrounding this matter.

Michael Morrison is the owner of a moving company that uses the truck owned by the Applicant Joseph E. Monighan.

Joseph E. Monighan was relying on Michael Morrison to ensure that due diligence was carried out.

Michael Morrison requested a driver's licence number from his part-time employee Donald Beamer, sometime in December. This number was submitted to Mr. Morrison's insurance company for further checking. There was no indication from the insurance company that there was any problem.

As for losses, Mr. Morrison claims that he incurred a minimum of \$1,000.00 loss within a month, due to the impoundment of the vehicle. He has had to resort to rent vehicles for the moves and has had to turn down businesses as equipment needed is in the impounded truck.

Mr. Monighan owns a smaller truck, and Mr. Morrison owns a comparable sized truck, but it is not licenced. It would cost several thousands of dollars to fix.

Mr. Morrison feels that the spirit of the law was not intended to punish innocent third parties, but rather to punish those who drive with suspended licences.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Donald G. Beamer;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 23, 2001.

The Respondent offered no viva voce evidence at the hearing choosing to rely on the information provided.

In closing the Respondent asked the Tribunal to uphold the suspension.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the

vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor

vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

(3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish due diligence and exceptional hardship ground of appeal as provided in subsection 50.2(3)(c) and 50.2(3)(b) and (d) of the Act, respectively.

The Tribunal will address the matter of due diligence first.

The Respondent contends that the Applicant did not exercise due diligence as the driver's

licence of the driver, Donald Beamer was not actually validated by the owner of the vehicle, Mr. Joseph E. Monighan, nor by his agent Mr. Michael Morrison.

The Applicant's Agent stated that the law is harsh and that he believes the spirit of the law was not to hurt "innocent" third parties. The Tribunal concurs. Unfortunately, the law, as written is quite clear, Sect. 50.2 (3) (c) requires:

"that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension."

In order to exercise proper due diligence the owner of a motor vehicle must take active steps to confirm the status of the driver's licence. What will be required will depend on the circumstance of each case. At a minimum, active inquiry is required. Here, neither the Applicant, nor his agent, made any efforts to check that the driver of the vehicle had a valid driver's licence.

The Tribunal is not satisfied that the criteria for due diligence as set out in Section 50.2(3)(c) was met.

With respect to undue hardship as per subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss. These criteria are cumulative. That is, all must be met to establish exceptional hardship under section 50.2(3). The evidence indicates that two of the four criteria are not met.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provides that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant stated the business has had to resort to rentals. Thus the criteria of Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 does not apply.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

Although, the losses incurred by Mr. Morrison may not be recoverable, such losses are not permanent. Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

As previously stated the individual affected by the impoundment, has an alternative method of transportation, and has incurred no permanent loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship as prescribed by section 50.2(3) of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

ANTOINE AOUAD, M.D.,
Presiding Member

RELEASED: February 22, 2001

ALLAN

LESLIE G. ALLAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

LESLIE G. ALLAN, Applicant (not present)

YVONNE ALLAN, Agent for Applicant

DATE OF HEARING: February 13, 2001

DECISION RELEASED: February 21, 2001 Toronto

REASONS FOR DECISION

A hearing was held on February 13, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar

pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Leslie G. Allan (the "Applicant")
Motor Vehicle:	1991 Buick LLF, plate # ACBB 160 (the "vehicle")
Date of Appeal:	January 30, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on February 13, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The hearing was adjourned for 30 minutes as the agent for the Applicant was not present at the start time for the hearing. The hearing was reconvened and the hearing proceeded.

There were no preliminary matters in dispute between the parties.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

This is my consent to waive any disclosures and request the earliest date possible for a hearing.

Yvonne Allan

As the Applicant was not present to give testimony, Yvonne Allan, agent for the Applicant, was sworn and gave the following testimony. She testified that the vehicle was indeed impounded and that the driver of the vehicle was her husband, Leslie Allan. It was her position that the loss of the vehicle presents an exceptional hardship to her as she relied on that vehicle for her job in sales. She did however state that she has rented a vehicle and had just renewed the vehicle for a further period of time and presented a copy of the receipt (see Exhibit # 4). She has no further testimony to provide as she did not want to go into any details surrounding the impoundment of the vehicle.

The Respondent did not have any questions of the agent.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle

at the time it was detained was being driven by Leslie G. Allan;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS of Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 4, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same *owner*.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98,

provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate

or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

In order for the Applicant's claims to be considered under Section 22(2)(a)(b), and (c), he must have demonstrated that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant had made no specific claims of exceptional hardship as described in Section 22(1)(a)(b). The Agent for the Applicant did however elude to his current medical conditional but did not provide any substantive documentation to that effect.

The Agent for the Applicant had stated that the Applicant was now employed but did not specify how he was managing to get to work.

Furthermore, the Agent for the Applicant stated that a rental vehicle had been used since the impoundment as the Agent required the vehicle for her work and would be taken for a further period of rental. Alternative transportation is available, therefore.

The Tribunal finds that the Applicant has not met the onus under Section 22(4) of the Regulation, and is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms

the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.
LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: February 21, 2001

MURISON

THOMAS BRUCE MURISON

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: MALCOLM FEALING,
Presiding member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

THOMAS BRUCE MURISON, Applicant
BILL INGRAHAM, Agent for the Applicant

DATE OF HEARING: February 12, 2001

DECISION RELEASED: February 20, 2001 Toronto

REASONS FOR DECISION

A hearing was held on February 12, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Thomas Bruce Murison (the "Applicant")
Motor Vehicle:	1999 Mercury Cougar, plate # SOV 675 (the "vehicle")
Date of Appeal:	January 30, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on February 12, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

January 29, 2001

Attention: Detective Young

On January 24, 2001 a Cougar licence plate # SOV675 was brought in to our Service department for repairs, to the front end. A repair order was opened and the owner, Mr. Thomas Murison, signed it. After it had been determined that the vehicle needed parts, it was then parked outside that morning, by the front-end technician waiting for the part to arrive the following morning. The technician hung the keys in the designated area, which is accessible to all the Service department personnel.

Between 5 and 6 pm that evening our Service Advisor Kimberly Mercer was approached by Grant Angus, one of our General Technicians, while he was still in his work uniform and requested to take the vehicle out for a "Road Test", the Cougar in question. Kimberly granted the Road Test. Three issues are at stake here:

- A) Only the front-end technician was qualified to work on the vehicle. Grant Angus had not worked on the vehicle, and was not qualified or authorized to do so.
- B) The vehicle was being used for his own personal use, while knowing he was prohibited to drive a motor vehicle, as his licence was revoked.
- C) Permission can only come from Dealership management to drive a customer's vehicle outside of normal working hours. i.e. Intermittent drivability complaints where our specialized technicians would hook up our diagnostic equipment for an extended Road Test or cold start, and I was unaware that Grant's licence was suspended.

Our customer has been extremely anxious and distraught over this matter and, we feel he should not be inconvenienced any longer, therefore I request a Warrant for the arrest of Grant Angus for car theft so we may begin Appeal Tribunal process to have Mr. Murison's vehicle released from impoundment.

Yours truly,

"W.R. Ingraham"
W.R. Ingraham
Service Manager

Mr. William Ingraham, Service Manager for Cruickshank Motors, who appeared as Agent for

the owner, provided evidence as follows.

Between the hours of 5:00 p.m. and 6:00 p. m. on January 24, 2001, Mr. Grant Angus an employee of Cruickshank Motors, approached Ms. Kim Mercer while she was busy with the Company's administrative work, and asked for the keys to the 1999 mercury, plate no.SOV675, so that he might take it for a road test. Although it is normal practise for the mechanics to log off work at 5:00 p.m., Ms. Mercer was aware that some times a mechanic would continue working past that time in order to finish a job. She presumed that was why Mr. Angus was still on site.

Ms. Mercer was also very busy at the time, so without giving Mr. Angus's request further thought, she allowed him to take the keys.

Mr. Ingraham testified that Grant Angus was not qualified to work on the vehicle and therefore had no authority to use the vehicle. Moreover, no vehicle should be taken off the lot without permission from management. Mr. Angus was aware of this, and was also aware that Ms. Mercer was not management. He seemed to have planned the timing of his request when Ms. Mercer was most busy, so that he could catch her off guard.

The owner was advised of the impoundment and reviewed the matter with the dealership. Mr. Angus drove the car from the dealership and that evening he was stopped by the police and the car was impounded. A few days after learning of the impoundment, and dealing with the owner of the motor vehicle, Mr. Ingraham wrote Detective Young and asked "for the arrest of Grant Angus for car theft".

Angus was hired on November 22, 1999. A search of his driving record was made at that time. The driving record which covered a three year period from 1996– 1999, showed that he had an A.D.L.S. suspension. Mr. Ingraham stated that he did not know what A.D.L.S. stood for, or he would not have hired Mr. Angus. He did not agree with Ms. Grosskurth, the MTO representative that he should have made a special effort to find out what the letters stood for.

When Grant Angus was approached concerning the unpaid fines, he provided proof that these had been paid. As a result, his employer presumed that his licence had been reinstated. No further checks were made.

Detective Warren Young, badge no. 2410, of 21 Division was introduced as a witness for the Applicant. After being sworn in, Detective Young testified that Mr. Ingraham came to 21 Division on January 26, 2001 to request that a Warrant for the arrest of Mr. Grant Angus be issued for car theft. Detective Young consulted with a Senior Detective, Alex Poole about the matter, and also consulted with Crown Attorney, Mr Paul Leishman. It was decided that Mr. Angus should be arrested and charged. A court hearing is pending. The detective stated that when he interviewed Mr. Angus about the circumstances under which he had taken the car, Grant claimed that Ms. Mercier knew that he was taking the vehicle home, and would be

returning it to work the next day.

Mr. Angus was charged with Theft by Conversion – theft over \$5000.00. However, Detective Young did indicate while under oath that it was his opinion, (not the court's), that Mr. Angus would probably be convicted of taking the vehicle without consent.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Grant Angus;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 21, 2003.

The Ministry's position was that the owner handed over the care and control of the motor vehicle to Cruickshank Motors, and it was their responsibility to see that only the person or the persons with authority should drive the car. Although it could be construed that Ms. Mercer had been taken advantage of, she did know that she had no authority to give a mechanic permission to take the car keys.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect

- (c) of which the order was made was not then under suspension;
that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The evidence has established that Mr. Angus Grant breached the conditions of his employment, when he:

1. Tricked Ms. Mercer into believing that he was working on the automobile;
2. Took the car off the lot after working hours without permission

As a consequence of his actions, he has lost his job and has been charged with theft by conversion.

The Tribunal must note here that the police do not charge a person with theft lightly. However, the Tribunal notes that Mr. Ingraham did not ask that Angus be charged for theft for a few days following the impoundment. In the circumstances of this case, the Tribunal must draw the conclusion that Mr. Angus' employment in the dealership's service department did not support the conclusion that Mr. Angus intended to take the vehicle permanently albeit an unauthorized taking of the vehicle. This is the first time that the Chair of this appeal has seen a case where an automobile has been taken without permission, and a charge for theft has been laid. The Ministry, usually thorough in presenting its case, could not provide any precedent.

With respect to an appeal under Section 50.2(3)(a), alleging that the vehicle was stolen, the meaning of stolen is not provided in the *Highway Traffic Act*.

This Tribunal must rely on the evidence presented. Firstly, Mr. Angus, however wily he may have been, did ask for the keys. He did not sneak into the office and remove them.

Secondly, he did receive permission to take them. Although the evidence shows that he was aware that Ms. Mercer did not have the authority to let him have the keys, he did ask.

The Shorter Oxford Dictionary defines "stolen" as: Accomplished or enjoyed by stealth; secret.

Black's Law Dictionary defines "stolen" as, Acquired, or possessed, as a result of some wrongful or dishonest act, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with intent to deprive the owner of the benefit of ownership (or Possession) permanently.

On the basis of the evidence and the definitions before it, the Tribunal finds that Mr. Angus availed himself of the use of the car in a very sly manner, and the taking was unauthorized but that he did not mean to retain possession of the property or that he wished to deprive the owner of the benefit of ownership permanently. The Tribunal can conclude that Mr. Angus took the vehicle in an unauthorized manner, but the Tribunal can not conclude that the taking amounted to the vehicle being stolen, as required under section 50.2(3)(a) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: February 20, 2001

WILLIAMS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
WINSTON WALTER WILLIAMS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 19, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WINSTON WALTER WILLIAMS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Winston Walter Williams, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.

Chair

Released: February 16, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Winston Walter Williams
103 Quince Crescent
Markham, ON L3S 3T7

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Winston Walter Williams (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Power Procedures Act, do hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any of an offence, his registration shall be automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act*.
4. Should the Applicant wish to transfer his registration under the *Motor Vehicle Dealers Act*, the Applicant shall submit a new application. This application shall be subject to the Registrar's prior written approval.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant will not be the final signatory on any bills of sale.
7. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
8. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.

9. The Applicant agrees that he will not be involved with the buying and selling of motor vehicles without the benefit of registration. This includes any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts.
10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
11. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

Winston W. Williams (initials)

12. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if the Applicant's sponsoring dealer is not acceptable to the Registrar, the Registrar is directed to and shall carry out the proposal.
13. The Applicant will provide a copy of this order to his employer forthwith.
14. The Applicant will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
15. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
16. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
17. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of February 2001.

Winston Walter Williams (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

KENNY

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MICHAEL J. KENNY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 23, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MICHAEL J. KENNY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Michael J. Kenny, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: February 22, 2001

TO: The Registrar
 Motor Vehicle Dealers Act
 Ontario Motor Vehicle Industry Council
 36 York Mills Road Suite #110
 North York, Ontario
 M2P 2E9

AND TO: Licence Appeal Tribunal
 One St. Clair Avenue West, 12th Floor
 Toronto, ON M4V 1K6

FROM: Michael Kenny
 31 Andrew St.
 Kitchener, ON
 N2H 5R1

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Michael J. Kenny (hereinafter referred to as "the Applicant"), and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged in the future, he will immediately notify his employer in writing of the charges against him and provide a copy of the notification signed by his employer to the Registrar.
- 2) The Applicant agrees that if he is criminally convicted in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full disclosure on all future applications.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 6) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 7) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 8) The Applicant agrees to forthwith provide the Registrar with documentary evidence that he is currently making restitution regarding his fraud conviction.

- 9) The Applicant agrees that if he does not continue to make restitution in regard to his fraud conviction, he will be automatically revoked.

Michael J. Kenny (initials)

- 10) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
- 11) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 12) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 13) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 14) The Applicant will provide a copy of this order to his employer forthwith.
- 15) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 16) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 17) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2001.

(Signature) MICHAEL K. KENNY

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

DUNN

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1605200 OWNED BY: Caron Dunn of: L5 C6 RR1, Norwood, Ontario K0L 2V0 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: January 27, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

CAROL DUNN

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Carol Dunn, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.

Chair

RELEASED: *February 21, 2001*

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Carol Dunn

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #V1605200** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on February 26, 1999.
2. The applicant, **Carol Dunn**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(c) of the Highway Traffic Act, stating **that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of motor vehicle at the time of the impoundment was not then under suspension.**
4. Having reviewed the Ministry of Transportation records, the Registrar is satisfied that the driver's licence of the person driving the motor vehicle at the time in respect of which the order was made was valid.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Board set aside the order to impound.

Carol Dunn

(signature of Applicant)

(date)

(signature of Registrar)

(date)

ELLIOTT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
KEITH ELLIOTT
as a motor vehicle salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KEITH ELLIOT

Applicant

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), Keith Elliott (the "Applicant") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, dated November 28, 2000 in terms of which the Registrar proposed to refuse registration of the Applicant as a motor vehicle salesperson;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal dated November 28, 2000 to refuse the registration of Keith Elliott.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: February 8, 2001

F.L.

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor Vehicles
made pursuant to section 55.1 of the *Highway Traffic Act* of an Order to
Impound a motor vehicle for a period of 45 days dated December 30,
2000

AND IN THE MATTER of a requirement for a hearing respecting the said
ORDER

F.L.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), F.L. (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of that Act, dated December 30, 2000 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to commence an appeal within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures*

Act, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

3. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
4. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated December 30, 2000 to impound the F.L. motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: February 28, 2001

J.O.

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor of
Motor Vehicles made pursuant to section 48.3(2) of the *Highway Traffic
Act* TO SUSPEND A PERSON'S DRIVER'S LICENCE FOR A PERIOD
OF 90 DAYS dated December 9, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

J.O.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), J.O. (the "Applicant") initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act, dated December 9, 2000 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the

Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated December 9, 2000 to suspend the driver's licence of J.O. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: February 8, 2001

M.S.

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor of
Motor Vehicles made pursuant to section 48.3(2) of the *Highway Traffic
Act* TO SUSPEND A PERSON'S DRIVER'S LICENCE FOR A PERIOD
OF 90 DAYS dated December 19, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

M.S.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), M.S. (the "Applicant") initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act, dated December 19, 2000 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed

without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated December 19, 2000 to suspend the driver's licence of M.S. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: February 8, 2001

S.M.

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor of
Motor Vehicles made pursuant to section 48.3(2) of the *Highway Traffic
Act* TO SUSPEND A PERSON'S DRIVER'S LICENCE FOR A PERIOD
OF 90 DAYS dated December 9, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

S.M.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), S.M. (the "Applicant") initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act, dated December 9, 2000 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed

without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated December 9, 2000 to suspend the driver's licence of S.M. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: February 8, 2001

407- ALCL

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Kim Beintema,
Representative for the Registrar of Motor Vehicles

Applicant,
Counsel for the Applicant

DATE OF
HEARING: February 2, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit #1 Notice of Suspension dated February 18, 2000 issued by the Registrar of Motor Vehicles.

Exhibit # 2 Notice of Appeal Form received at the Tribunal January 4, 2001, filed by the Applicant.

Exhibit #3 Tabulated documents received from the Registrar of Motor Vehicles.
(Tabs 1-10)

Exhibit #4 Applicant's Driving Record from the Ministry.

THE FACTS:

The Applicant is a fifty six year old car salesman, who has worked steadily at one dealership for the past seven years. His driver's licence was suspended February 18, 2000, pursuant to section 47(1) of the *Highway Traffic Act*, by the Registrar of Motor Vehicles. An unsolicited letter, dated January 14, 2000, had been received from Physician # 1 at the Peel Memorial Hospital's Chemical Withdrawal Centre, stating the Applicant had presented there in an intoxicated state. Officials at the Ministry assumed drugs were the problem, since it was a doctor from the Chemical Withdrawal Centre, who had reported the incident and recommended suspension.

The Deputy Registrar forwarded the letter of suspension on February 18, 2000, but apparently the Applicant never received it. When he was finally made aware of the suspension, he contacted the Ministry and made an appointment with a Mr. John Wozny. He informed Mr. Wozny that he did not have any problems with drugs, it was alcohol. He was advised that this was a medical suspension, so it really did not matter. The necessary steps to be taken for reinstatement of his licence were outlined to him and an Alcohol Assessment Form was provided.

Physician # 2, the family physician completed the form with the Applicant and forwarded it with a letter outlining the Applicant's medical history. Unfortunately the assessment form, dated May 4, 2000, was incomplete, inaccurate and unacceptable to the Ministry.

This frustrated the Applicant because he thought he had been forthright in answering the questions. He knew the Ministry were aware of his episode in December 1999 when he ended up at the detox centre, so he did not mention it and besides he had gone there to try and help himself and instead he was punished. Prior to that, he had abstained for over a year and since then he has only had one glass of wine at a wedding.

He readily admitted his past alcoholic history is terrible, but he has tried. He is a member of two AA groups and attends two to three times every week. He participated in the Renascent Centre program for three weeks in late 1998. He suffers from chronic Hepatitis "A", which prevents the use of blood tests, such as MCV and GGT, to monitor alcohol use.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

THE LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly Interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to "---suspend or cancel" a driver's licence for "any sufficient reason---". Section 14 of Regulation 340/94 provides that a holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with the holder's ability to drive a motor vehicle safely. The Registrar suspended the Applicant's licence after receiving an unsolicited "note", dated January 14, 2000 from Physician # 1 stating the Applicant had been admitted to the Peel Hospital Chemical Withdrawal Centre in an intoxicated state. There was no mention of what the problem was or any blood tests to confirm the type of intoxication. There was an assumption in the letter that he had driven himself to the hospital, because no one had seen anyone with him, when in fact his daughter and her husband had driven him. The lack of information and follow-up in the letter led to misunderstandings and confusion in the Ministry and ultimately a feeling of distrust and paranoia on the Applicant's part.

The Tribunal believes that he has been honestly attempting to overcome his alcoholism by attending his physician and AA regularly. He has a full time job and his boss supports him and attended one of his "Administrative Reviews". He remained abstinent for over a year in 1999 and has only had one glass of wine in March 2000, which hardly could be considered a relapse.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 18, 2000, by the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED : February 9, 2001

416 - DRUG

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROBERT EHRLICH, M.D., Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: February 13, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal, by way of a written hearing, by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit # 1 Notice of Appeal - Dated December 7, 2000.

- b) Exhibit # 2 Letter from the Applicant – received December 15, 2000.
- b) Exhibit # 3 Letter from the Applicant – received January 29, 2001.
- c) Exhibit # 4 Letter from Ms. Adrienne Laudry – received February 1, 2001.
- d) Exhibit # 6 Additional submissions by the Applicant – received February 8, 2001.

By the Respondent:

- a) Exhibit # 5 Ministry of Transportation submissions – tabs 1 – 7 –
- received February 3, 2001.

FACTS:

The Applicant is appealing the suspension of driving privileges effective “00/02/18” as per Ministry of Transportation Driver’s Abstract. (Exhibit # 5 Tab 7)

The Applicant came to the attention of the Ministry as a result of an unsolicited letter, dated “December 2, 1999” from Physician # 1 who informs the Ministry that the Applicant “...has a problem with a psychiatric illness. He might not be fit to operate a vehicle as he tends to have periods of confusion.” (Exhibit # 5 Tab 1)

In an undated handwritten note, received by the Tribunal “Dec 15 2000”, the Applicant states that he “...had a problem with drugs, and quit in 1985...” and that he is “...a recovered alcoholic ...dry date is June 4 1985 16 years ago ...since dealing with problems ...licence does not have one mark against...” (Exhibit # 2)

The Applicant contends that he was “...having a problem with a sleeping disorder, and that’s when ...problems started...” (Exhibit # 2)

In a further letter dated “Jan 20 / 2001” the Applicant re-iterates his previous comments regarding his alleged drug addiction, and requests that his driving privileges be restored on the grounds that he needs his licence as his “...mother is very dependent on my licence for grocery shopping, doctor appointments etc....” (Exhibit # 3)

The Applicant’s mother in a handwritten letter dated “Jan. 27 2001” confirms that the Applicant has no mental problems or addictions that would affect his driving. (Exhibit # 4)

On February 08, 2001, the Tribunal received a handwritten list of the medication prescribed to the Applicant by Physician #1. (Exhibit # 6)

On June 20, 2000, under the letterhead of The St. Catherine's General Hospital, Physician # 2's reports to the Applicant's family physician Physician # 3 as a "*...second opinion requested ...by your self specifically about the question of his desire to get his driver's licence back...*" (Exhibit # 6)

Physician # 2 details the history given him by the Applicant and notes that "*...He is extremely vague about his psychiatric history, and I did not have either Physician # 1's notes, or any from the Welland County General Hospital, to give any more specific about previous psychiatric treatment, or diagnosis...*" (Exhibit # 6)

From his observations and medical examination Physician # 2 concludes that the Applicant was "*...in no distress. His psychomotor rate was normal, and he did not demonstrate objective evidence of parkinsonian side effects of neuroleptics. There certainly was no evidence of mania, suspiciousness, hostility, depressions, or anxiety. He did not express any delusions, and he did not appear to be hallucinating. Insight was poor ...His thinking was concrete, and I would judge him of low average intelligence at best...*" (Exhibit # 6)

Physician # 2 is reluctant to make a recommendation to return the Applicant's driver's licence due to insufficient details about the Applicant's psychiatric history, but does suggest "*...the earliest that I would feel comfortable with him regaining his driver's licence would be 12 months from his last admission ...if he is continuing in full regular outpatient follow-up ...and any other outpatient programs deemed necessary...*". (Exhibit # 6)

On March 20, 2000, Physician # 1 reports to Physician # 3 that he has agreed to write to "*...the Ministry of Transportation ...if necessary.*" (Exhibit # 6)

On May 2, 2000, Physician # 1 forwarded a second letter to the Ministry stating that the Applicant has "*...a severe problem with codeine abuse ...had a few admissions to hospital in acutely psychotic state and has been totally unaware of his surroundings for a number of days...*" (Exhibit # 5 Tab 3)

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS dated "*November 1st, 2000*", completed by Kim Beintema, sets out the Applicant's "*Medical History (Per MTO Documents)*" (Exhibit # 5 Tab 5)

Ms. Beintema verifies that the Applicant's licence was suspended on "*February 8, 2000*" due to "*Codeine abuse, confusion, psychiatric illness.*" Both the date of the diagnosis and the date of the most recent episode are "*Unknown*" with the latter being questioned as having

occurred on “May 2000 as per last report?” (Exhibit # 5 Tab 5)

Exhibit # 5 Tab 7, is a Ministry of Transportation driving Record for the Applicant since 1968, showing a several infractions until October 1980, but none since that date.

The Respondent provided the following Materials and Submissions:

Part I - The Facts: points 1-7

Part II - The Law

Part III - Argument of the Registrar: points 8-19

Section 47 (1) of the Highway Traffic Act

Section referencing Haloperidol (Haldol) from the Canadian Medical Association Guide to Prescription and Over-The-Counter Drugs.

In Part I - the Facts the Respondent described the documentation provided for the hearing filed as Exhibit 5 items 1 through 7.

As Applicable Law - Part II, the Respondent cites: “ Regulation 340/94, section 14; Regulation 340/94, section 17 and 18; Section 32 (12)(b)(i); and Section 50.

The Respondent contends in Part III - The Argument, that *“The Registrar is concerned regarding the Applicant’s insight into his reported condition ...he reports that he does not have a psychiatric illness... Yet the Applicant ...details an admission ...on the Psychiatric floor of Welland Hospital... Physician # 1 reports a few admissions to hospital in an acutely psychotic state. The Registrar questions the Applicant’s understanding of his condition and its affects on his ability to drive safely if he is unwilling to acknowledge the existence of a medical condition ...taking needles for Haldol... According to the Canadian Medical Association Guide to Prescriptions and Over-The-Counter Drugs ...an effective drug in reducing the violent, aggressive manifestations of metal illness such as schizophrenia, mania, dementia and other disorders where hallucinations are experienced...”* (Exhibit 5- Part III - points 12 & 13)

Continuing Part III - the Argument, the Respondent emphasized the fact that *“...There is no evidence on file to indicate that the Applicant’s condition is under control...”* (Exhibit 5- Part III - point 16)

ISSUES:

Should the decision of the Registrar to suspend the Applicant’s licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Notice of Appeal prescribed under the Act, does not state the effective date of suspension. The Tribunal notes the discrepancy between Ms. Beintema's notes in the Administrative Review and Ministry of Transportation. The Tribunal assumes the Ministry of Transportation to be accurate and has used, for the record, the date shown on the Ministry of Transportation Driver's Record.

Prior to reviewing the merits of this matter and setting out the reasons for the decisions the Tribunal must address the issue of the supporting Sections of the *Highway Traffic Act* quoted by the Respondent.

According to the Ministry of Transportation Driver's Record for the Applicant, the Applicant is the holder of a "Class G" licence. Regulation 340/94 section 17 refers to "...an applicant for a holder of a-Class A, B,C,D,E or F..." Section 18 does refer to a "...holder of G, G1, G...", but deals with the individual's visual acuity. The Tribunal fails to see how these two sections are applicable to this matter.

Section 32(12(b)(i) pertains to the driving "*...a motor vehicle ...unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence...*". More specially clause 12 requires that the Applicant "*...submit to the examinations that are authorized by the regulations relating to this section... (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicle.*" Unless there is evidence to which the Tribunal is not privy, the Tribunal finds no requirement to make a finding under this section.

Section 47(1) unquestionably empowers the Registrar to "*...suspend or cancel*" a driver's licence for "*any ...sufficient reason...*". The Registrar originally suspended the Applicant's driver's licence after receiving two unsolicited letters from Physician # 1 informing the Ministry that the Applicant "*...might not be fit to operate a vehicle as he tends to have periods of confusion.*" and has "*...a severe problem with codeine abuse...*" (Exhibit # 5 Tabs 1 & 3 respectively)

Regulation 390/94, Section 14 (a) states that:

"An applicant for a holder of a driver's licence must not,

- a) *suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the*

applicable class safely..."

Thus, at issue is not only the mental competency of the Applicant, but how this condition would prevent the Applicant from safely operating a motor vehicle. The Tribunal finds no evidence that the Applicant's mental state has in any way affected his driving. This statement is corroborated by the fact that the Applicant's record shows no violations since October 1980.

According to the Physician # 1 the Applicant "...*might (italics are the writer's) not be fit to operate a vehicle...*". This statement is ambiguous in that Physician # 1 appears equivocal about the Applicant's ability to drive.

Further, Physician # 1 attributes the Applicant's possible inability to safely operate a motor vehicle to an undefined "...*psychiatric illness...*". The Respondent contends that the medication Physician # 1, prescribed to the Applicant, is used to curb "...*violent, aggressive manifestations of mental illness such as schizophrenia, mania, dementia and other disorders...*". There is absolutely no evidence to substantiate the notion that the Applicant suffers from any of these illnesses. Physician # 1 does not actually specify the "...*psychiatric illness*", and the Tribunal cannot speculate as to why such medication was prescribed. (Exhibit # 5 tab 1 and Part III - point 13)

The Tribunal must then rely on the first hand observations of Physician # 2, who "...*In mental status examination...*" found "...*no evidence of mania, suspiciousness, hostility, depressions, or anxiety ...did not express any delusions ...did not appear to be hallucinating...*" (Exhibit # 6)

The Respondent is also concerned about the Applicant's lack of insight into his condition. Physician # 2 seems to concur that the Applicant's "...*Insight was poor ...*" but accentuates that "...*His thinking was concrete...*". Again, the Tribunal points out that the Applicant's lack of insight does not appear to have been detrimental in the past, as is indicated by the Applicant's driving record. (Exhibit # 6)

Nonetheless, the Tribunal must concur with the Respondent that all evidence submitted in this matter is outdated. Thus, the Tribunal requires that the Applicant obtain a new psychiatric report from Physician # 2.

Under section 47 of the *Highway Traffic Act*, the onus is on the Respondent to establish that the Registrar has sufficient reason to suspend the Applicant's licence. The Respondent decides on how best to gather evidence to support the Respondent's case. The Respondent depended on Physician # 1's letters, but did not to present the Tribunal with a complete medical history of the Applicant including the Applicant's previous hospitalizations. Thus, the Tribunal cannot evaluate the full significance nor possible impact of the Applicant's admissions to the hospital. It is possible that the "*psychotic*" episodes described by Physician # 1 may

have been isolated incidents, which would have no effect on the Applicant's ability to drive.

The Tribunal will now proceed to review the evidence adduced with respect to Section 14 (b) of Regulation 340/94, which reads:

"An applicant for or a holder of a driver's licence must not,

b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

Physician # 1's unsolicited report advised the Ministry that the Applicant "...has a severe problem with codeine abuse..." The Applicant has admitted to a drug and alcohol problem in his youth, yet both the Applicant and his mother state that there is no current drug abuse. Without further details as to incidents leading up to Physician # 1's diagnosis of codeine abuse, the Tribunal must accept the Applicant's evidence.

Based on the evidence before the Tribunal, on a balance of probabilities, it would appear that the Applicant is not currently suffering from a medical condition or an alcohol or drug addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14(a) and (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 18, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar **be set aside**, provided the Applicant obtain and file with the Registrar a current psychiatric report from Physician # 2 confirming that the Applicant does not suffer from a mental nervous or emotional disability likely to significantly interfere with his ability to drive a motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Robert Ehrlich, M.D.,
Member

RELEASED: February 19, 2001

430 - DRUG

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member
Antoine Aouad, M.D., Member

APPEARANCES: F. Claire Rowett,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: February 12, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit # 1 Notice of Appeal Form received at the Tribunal December 13, 2000.
- Exhibit # 2 Letter from The Ministry of Transportation addressed to the Applicant-
received December 13, 2000.
- Exhibit # 3 Ministry of Transportation submissions- tabs 1-7- received January 26, 2001.
- Exhibit # 4 Letter from (Applicant's Mother) - received January 12, 2001.

Exhibit # 5 Medical Copy - "Maintenance of the Human Body" [Unit Four] -
received January 12, 2001.

PRELIMINARY MATTERS:

The Applicant, brought three witnesses, friends of hers - Samantha Knight, Jeff Jessop and Sheena Nerdlay. The witnesses were excluded until required to give evidence.

FACTS:

The Applicant, a nineteen year old student, was applying for a G1 driver's licence when she was informed her licence was under suspension for "medical reasons". She had apparently changed addresses recently and never received the letter of suspension, dated October 17, 2000, from the Registrar of Motor Vehicles. The Ministry had received an unsolicited letter from Physician # 1, the Applicant's family physician, advising that the Applicant had been advised not to drive, until she had been investigated for loss of consciousness. No other information was given.

According to the evidence, the Applicant had been experimenting with drugs, marijuana, ecstasy, crystal and alcohol at house parties during the winter of 2000. Apparently in April, 2000, a friend had a seizure, which was attributed to drugs. The Applicant became frightened and stopped using them and has not taken them since.

In June, 2000, while at her boyfriend's home in Port Dover, the Applicant felt light headed and collapsed. A witness stated she was unconscious for a few seconds, but was quite coherent immediately after. The following day a similar episode occurred, but was longer in duration with possibly a convulsive component. She attributed it to not eating or sleeping properly and low blood pressure, which often effected her when she stood up quickly. She denied having used drugs of any type since April, 2000.

The Applicant did not seek any medical help for two months, until she went to Physician # 1 in August, 2000. Physician # 1 apparently could not determine any medical reasons for the episodes, and ordered a blood profile, a CT scan and an EEG, which were all normal. Physician # 1 reported the Applicant's unconscious episodes to the Ministry on October 22, 2000, without advising the Applicant.

An appointment was made with Physician # 2, a neurologist for November 6, 2000. The Applicant and her mother, in Exhibit # 4, stated that Physician # 2's visit was very short. Four to five minutes according to the mother. The Applicant admitted telling Physician # 2 that she had experimented with drugs, but denied that she had taken any drugs the weekend of the episodes. Physician # 2 stated in his report to Physician # 1 that the Applicant admitted to

bingeing on up to twenty drinks, which the Applicant denies. She states that what she said was, "I don't drink much, because alcohol has no effect on me, even if I had twenty drinks." Physician # 2's impression was that the Applicant had not forgone drug use and is a high risk to return to such behaviour. He felt that addiction counselling with or without the input of a psychiatrist.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (g) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely

or in accordance with this Act, the regulations and other laws relating to highway safety; or

- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "----suspend or cancel" a driver's licence for "any---sufficient reason---." The Registrar suspended the Applicant's driver's licence after receiving an unsolicited note from a family physician, Physician # 1, which stated the Applicant had a spell of unconsciousness.

Evidence was brought out detailing the results of Physician #1's physical examination, complete blood profile, ECG and CT scan of her brain were all negative. Physician # 1 made an appointment for the Applicant to see Physician # 2, a neurologist. A copy of Physician # 2's report to Physician # 1, dated November 6, 2000, was forwarded to the Ministry. It appears from the report that Physician # 2 did not carry out a complete neurological examination, but based his conclusions mainly on discussions with Physician #1 and the Applicant, which was three and five months after the two episodes.

The Applicant categorically denies some of the statements attributed to her in Physician # 2's report. She gave evidence that she had not taken any drugs since April, 2000, almost three months before the episodes. She also stated that she had told Physician # 2 she did not drink very much, because alcohol had no effect on her and she never binged on twenty drinks at any time. She simply, said she could drink twenty drinks and would not feel anything.

Exhibit # 4, a letter from the Applicant's mother confirms that the appointment was very short and questions how Physician # 2 could determine anything valid or definitive in such a short time. This would account for the limited neurological examination results in his report.

The Tribunal was impressed with the Applicant's forthrightness and considered her a credible witness. She admitted to experimenting with drugs, but said all of her "gang" had stopped

drugs, because one of their friends had suffered a seizure, and it had frightened them.

The Applicant has three witnesses, who gave evidence which substantiated much of her story.

The Tribunal is not convinced the diagnosis of the Applicant's "fainting" spells was a result of chemical intoxication or withdrawal. The evidence heard does not support this diagnosis and as a result there is not an acceptable diagnosis. The Tribunal recommends a second opinion after a complete neurological work-up.

DECISION:

Upon the application by Physician #1 (the "Applicant") to appeal the decision dated October 17, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside, provided that the Applicant be re-assessed by a neurologist, who confirms in writing that there are no neurological findings to account for the Applicant's fainting on June 10 and June 11, 2000.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.,
Presiding Member

Antoine Aouad, M.D.,
Member

RELEASED: February 20, 2001

448 - MENT

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Kyle Biel,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: February 14, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

- Exhibit # 1 Notice of Appeal Form received at the Tribunal December 29, 2000.
- Exhibit # 2 Letter of Suspension from The Ministry of Transportation addressed to the Applicant, received December 13, 2000.
- Exhibit # 3 Ministry of Transportation submissions- tabs 1-7, received January 26, 2001.
- Exhibit # 4 Ministry of Transportation Driving Records for the Applicant.

FACTS:

The Applicant, an eighty two year old gentleman, had his licence suspended February 28, 2000 under Section 47(1) of *The Highway Traffic Act*, after receiving an unsolicited letter from the Toronto Police. The Applicant was in a traffic accident on January 19, 2000, involving his car and a TTC bus. According to witnesses, a car was seen entering an intersection against a red light and striking a TTC bus making a right turn. There were no injuries and damage was minimal.

The investigating officer went to the Applicant's residence to continue her investigation. During the interview she noted the Applicant's attention span was extremely limited and he did not seem to comprehend a great deal of what was being explained to him. The officer felt that the Applicant was not mentally fit to operate a motor vehicle any longer.

Following receipt of the suspension notice the Applicant made an appointment with a neurologist, Physician # 1. A diagnosis of mild cognitive impairment was made, but no true dementia. Physician # 1 recommended that if he could pass a formal driving assessment safely, he should be allowed to drive again.

The Applicant's driving skills were tested by "Drivelab", a certified company for Driving Evaluation, on June 15, 2000. The Evaluator's summary was as follows; "Behind the Wheel Assessment, was the Applicant's performance in categories of observation, communication, speed adjustment, vehicle positioning, time and space judgement and vehicle response. Out of 40 performance criteria evaluated, only four were rated with satisfactory performance. The score indicates a very poor rating and a high crash probability at the time of the evaluation."

Recommendations: "based on the in-clinic and Behind the Wheel portions of the driving assessment, the evaluators do not feel it is appropriate for the Applicant to continue operating a motor vehicle at his time."

The Applicant underwent a second assessment at the Bloorview MacMillan Centre on August 2, 2000, after the Ministry refused to re-instate his licence. The recommendations were: "Based on today's performance, the Applicant's medical condition is interfering with his ability to drive safely in today's complex traffic. In particular the evaluators have concern about attention, memory, speed of visual processing and ability to attend to a number of tasks at once. We have concerns for his safety based on today's driving performance and he has been advised he should not drive.

The Applicant's only defence was that he has been driving for sixty five years and this fender bender," was his only accident. He said the evaluator's misinterpreted some of his defensive manoeuvres during his tests. He daims also the light was orange, when he entered the

intersection.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (h) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(a) states " an Applicant for a driver's licence must not suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle-----safely." Section 47(1) empowers the Registrar to "----suspend or cancel" a driver's licence for "any---sufficient reason---".

The Registrar suspended the Applicant's driver's licence after receiving an unsolicited letter from the Toronto Police making the concerns of the investigating officer known. These concerns were confirmed by the two driving evaluators and was obvious during the Appeal Hearing. The Applicant did not appear to comprehend much of the evidence, and his attention span was very short. When asked to present his evidence, he did not seem to understand what was wanted. As a result, he did not present any evidence or any closing remarks per se.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 28, 2000, of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

449- ALCL

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROBERT EHRLICH, M.D., Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: February 19, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit # 1 Notice of Appeal - Dated January 15, 2001.

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation submissions – tab 1 – 10 –
- received February 9, 2001.

PRELIMINARY MATTERS:

The Respondent submitted a file summary, containing an itemized list of the items submitted prior to the hearing, as well as a copy of the Ontario *Highway Traffic Act*. The Respondent also introduced a certified copy of the Applicant's driver's licence.

FACTS:

The Applicant is appealing the suspension of his driving privileges effective 98 08 14 as per Exhibit # 1.

The Applicant came to the attention of the Ministry as a result of an unsolicited letter dated "20.8.98" from Physician # 1 and Associates, informing the Ministry that the Applicant "...should not operate a motor vehicle ...suffers from diabetes and alcoholism and recently had a seizure..." (Exhibit # 2 Tab 1)

A letter signed by Physician # 1 on November 2, 1999 states that the Applicant "...continued to attend ...office regularly ...has had no further seizures since August 1998 ...continues to drink alcohol and has been advised not to do so ...has not had any severe hypoglycemic episodes in the last year..." (Exhibit # 2 Tab 3)

By letter dated June 1/00, Applicant forwarded Ministry "...Diabetic Assessment; Ministry of Transportation Alcohol Assessment Form; Dextrolog results for the period Jan 24/00 - May 14/00..." (Exhibit # 2 Tab 5)

The Diabetic Assessment from "Date of Examination 00 05 0" prepared by Physician # 1 indicates " Most sugars betw. 4 and 10. No lows noted for over 1 year." (Exhibit # 2 Tab 5A)

The MINISTRY OF TRANSPORTATION ASSESSMENT FORM- dated "19/5 /00", completed by Physician # 1, the Applicant's physician since " 93 / 08 /26 " indicates as follows:

“YES” is checked under “Personal Health History” for “metabolic Disorders; Psychiatric Disorders; and Addictions”

Under “Medical Consequences Related to Alcohol Use”, “Seizures” and “Blackouts” are checked as “YES”

According to the “PHYSICAL ASSESSMENT AND LABORATORY EVALUATION”, “Blood Pressure - NORMAL; LIVER; NEUROLOGICAL; GGT; MCV ” are all checked under the category “NORMAL” (Exhibit # 2 Tab 5 B)

Under “Recommended goal for alcohol consumption - Abstinence” is circled. Physician # 1 writes *“Attended Pinewood in Sept / Oct 1998 Continues to drink 4 - 5 beers/Weekends against medical advice.”* (Exhibit # 2 Tab 5 C)

A MEDICAL ADVISORY COMMITTEE CASE STUDY dated JULY 7, 2000 upheld the suspension, requesting abstinence for a period of one year. (Exhibit # 2 Tab 6)

An Administrative Review - Medical Suspension prepared by K. M. Biel on November 3, 2000 details the Applicant’s history as related by the Applicant. The Review Officer states the *“Diabetes under control. Driver being honest when he says that he has a couple of beers on Sat. Afternoon either at home or out. August 1998 seizure ...one time event...”* (Exhibit # 2 Tab 7)

Exhibit # 2 Tab 10, Ministry of Transportation driving Record for the Applicant since 1968, shows one conviction for failure to remain at scene.

At the hearing, the Respondent reiterated the contents of the information contained in the written material provided for the hearing and filed as Exhibit # 2 Tabs 1 through 10.

On his own behalf the Applicant testified that has never and would never drink and drive.

The Applicant admits to having been an alcoholic years ago, but got that under control and now just drinks socially, with his friends on a Saturday afternoon, and has an occasional drink at home.

The Applicant attested that Physician # 1 is a tea tottler and therefore on his case, particularly because of the diabetes. However, the Applicant emphasized that the diabetes are under control.

The Applicant has not been prescribed any medication for seizures, as in fact he believes he

did not have a seizure, but rather a hypoglycemic episode.

The Applicant also related the incident that led to his conviction of leaving the scene of an accident. The Applicant testified that the episode was not alcohol related.

In cross-examination, the Applicant agreed to provide the Ministry with GGT and MCV results on a monthly basis, if necessary.

In closing the Respondent asked that the decision of the Ministry be confirmed.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to “...suspend or cancel” a driver’s licence for “any ...sufficient reason...” The Registrar originally suspended the Applicant’s driver’s licence after receiving an unsolicited letter dated “20.8.98”, from Physician # 1 and Associates, informing the Ministry that the Applicant “...should not operate a motor vehicle ...suffers from diabetes and alcoholism and recently had a seizure...” (Exhibit # 2 Tab 1)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation in suspending the Applicant’s driving privileges based on Physician # 1’s report.

Regulation 390/94, Section 14 (a) is clear in that:

“An applicant for a holder of a driver’s licence must not,

a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely...”

The Tribunal is compelled to consider and accept the latest report written by Physician # 1 who

has been seeing the Applicant on a regular basis. Physician # 1, confirms that Applicant *"...has had no further seizures since August 1998 ...has not had any severe hypoglycemic episodes in the last year..."* (Exhibit # 2 Tab 3)

The Tribunal is satisfied that the Applicant does not suffer from a medical condition *"...likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely..."*

Section 14 (b) of Regulation 340/94 under the HTA, which was also invoked by the Respondent as being applicable, states:

"An applicant for or a holder of a driver's licence must not,

b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

While the Applicant admits that he *"...continues to drink alcohol and has been advised not to do so..."*, he was able to satisfy the Tribunal that his occasional drinking, albeit against doctor's orders, is also not *"...likely to significantly interfere with his or her ability to drive a motor vehicle safely."* (Exhibit # 2 Tab 3)

The Tribunal notes the fact that the Applicant's record is free from drinking and driving occurrences.

In weighing the evidence presented, the Tribunal is satisfied that the Applicant is not suffering from a disability or addiction as described in Regulation 340/94 sections 14(a) & (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 14, 1998 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar **be set aside** and the Applicant's licence re-instated.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Robert Ehrlich, M.D.,
Member

RELEASED: February 26, 2001

ROSEDALE HOMES

627416 ONTARIO LIMITED O/A ROSEDALE HOMES AND
ROSEDALE HOMES (1996) INC.

APPEAL FROM THE PROPOSALS OF THE
REGISTRAR UNDER THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATIONS

TRIBUNAL: TERENCE WARDROP, Vice-Chair, Presiding

APPEARANCES:

BRIAN M. CAMPBELL, Counsel for the Applicants
MICHAEL W. BADER, Counsel for the Registrar, Ontario New Home
Warranty Program

DATE OF HEARING: August 8, 9, 10, 11, 2000 &
September 11, 12, 13, 14, 2000 & January 9, 2001 Windsor

ORDER

WHEREAS the Registrar, Ontario New Home Warranty Program under the *Ontario New Home Warranties Plan Act* (the "Act") has issued a written Notice of Proposal dated November 9, 1999, against 627416 Ontario Limited o/a Rosedale Homes to refuse to renew its registration under the Act, and a proposal dated November 9, 1999, against Rosedale Homes (1996) Inc. to refuse to renew its registration under the Act;

AND WHEREAS the Applicants have appealed the Registrar's proposals, by requesting a hearing before this Tribunal;

AND WHEREAS the hearing was part heard on August 8, 9, 10 and 11, 2000 in Windsor, Ontario, and continued on September 11, 12, 13 and 14, 2000, and was to continue on January 9, 10, 11, and 12, 2001;

AND WHEREAS the hearing commenced on January 9, 2001 and the parties requested that the matter be adjourned in order to discuss a possible settlement;

AND WHEREAS both parties consented to the adjournment;

AND WHEREAS the matter was adjourned to April 2, 3, 4, 5, and 6, 2001, in Windsor, Ontario;

AND WHEREAS the parties advised the Tribunal that they are unable to proceed on the dates of April 2, 3, 4, 5, and 6, 2001;

NOW THEREFORE, this Tribunal Orders that:

- 1) The hearing in this matter is adjourned on consent of both parties to re-commence at the Holiday Inn Select, Kingsville "B" Room, 1855 Huron Church Road, Windsor, Ontario at 9:30 a.m. on Tuesday, May 1, 2001 and to continue May 2, 3 and 4, 2001 and to further continue at the Holiday Inn Select, St. Clair "B" Room, at the above address, at 9:30 a.m. on Monday, June 4, 2001 and to continue June 5, 6, 7 and 8, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Vice-Chair,
Presiding

Released: February 26, 2001

SARKADI/ SARAMO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
KAROLY SARKADI AND KAMILLA SARAMO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

KAROLY SARKADI AND KAMILLA SARAMO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1220608 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 6 and 7, 2000;

AND WHEREAS, upon consent of the parties the hearing was adjourned to November 23 and 24, 2000;

AND WHEREAS, the hearing was scheduled for March 8 and 9, 2001, and due to the illness of the Applicant the matter was adjourned;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, June 26, 2001 and to continue June 27, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 12, 2001

McFADDEN

TERRY McFADDEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: TERENCE A. WARDROP, Vice-Chair

APPEARANCES:

David B. Cousins, Counsel, representing the Appellant
Tim Snell, Counsel, representing the Registrar of the
Real Estate and Business Brokers Act

DATE OF
HEARING:

February 5, 6 and 7, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated the June 13, 2000 issued by the Registrar of *Real Estate and Business Brokers Act* (the "Registrar"), which said Notice contains a proposal (the "Proposal") to revoke the registration of Terry McFadden, (the "Appellant"), as a broker pursuant to Section 9(1) of the *Real Estate and Business Brokers Act*, R.S.O. 1990, Chapter R.4 (the "Act").

The Appellant, by a notice in writing to the Registrar and the Tribunal dated June 30, 2000, appealed the Proposal and requested a hearing by the Tribunal pursuant to Section 9(2) of the Act.

ISSUES:

The Registrar bases the Proposal upon Section 8(2) of the Act whereby the Registrar may revoke the registration of the Appellant as a broker in circumstances which would disentitle the Appellant to such registration if the Appellant were an Appellant for such registration. It is the opinion of the Registrar, as stated in the Proposal, that the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not carry on business in accordance with law and with integrity and honesty as required by Section 6(1)(b) of the Act.

During the course of the hearing before this Tribunal, it is clear that the Proposal was based solely upon the Registrar's opinion that the past conduct of the Appellant with respect to the law disentitled the Appellant to such registration due to the conviction of the Appellant on the charge of simple or common assault under Section 266 of the Criminal Code of Canada, and is not based in anyway on the belief of the Registrar that the Appellant will not carry on business with integrity and honesty as required by the Act.

Also during the course of the hearing before this Tribunal, it became clear that the main issue was the nature and circumstances of the conduct of the Appellant which took place during a five hour period in the late afternoon and early evening of April 14, 1999, and the belief of the Registrar that the nature and circumstances of such conduct would disentitle the Appellant to registration as a broker under the Act were the Appellant an Appellant for such registration.

EVIDENCE:

Yvonne Nandalall, a Senior Registration Officer, of the Real Estate Council of Ontario, was called as a witness by the Registrar and gave evidence as to the documentary evidence which was relied upon by the Registrar in reaching the opinion of the Registrar as contained in the Proposal. She also gave evidence as to two occasions during which she met with the Appellant in dealing with the issues which were before the Registrar. The first occasion was a meeting with the Appellant on August 18, 1999, when the Appellant delivered in person the Judges Reason for Sentencing as requested by her pursuant to Section 13(17) of the Regulations to the Act in her letter to the Appellant dated August 5, 1999. She met the Appellant again on September 16, 1999 on the occasion of the formal interview session with the Registrar and was present with the Registrar at the time of the interview and took notes of the questions and responses of such interview. On both occasions, Yvonne Nandalall found the Appellant to be cooperative, remorseful and very convincing in his explanations. She was impressed with his sincerity and his assurances that such an incident would not reoccur.

The Registrar, Tom Wilson, also gave evidence as to the September 16 interview and his assessment of the difficult situation in which the Appellant had placed himself. He likewise found the Appellant open and sincere in his responses to the questions put to him by the witness. In his cross-examination, Mr. Wilson admitted that there was no question as to the Appellant's integrity or honesty, but only the unfortunate circumstances of the evening of April 14 and the complaint thence issued by the Complainant which resulted in the guilty plea by the Appellant to the charge of simple or common assault.

Mr. Wilson stated in evidence that he had considered at some length whether or not to impose some terms or conditions upon the Appellant's continuing registration as a broker instead of his proposal of revocation contained in the Proposal, but decided that not only were any such terms and conditions impractical or unnecessary in the Appellant's case, but also such would be too difficult to monitor due to a lack of staff able to supervise any such terms or conditions imposed upon the Appellant's continuing registration as a broker.

The Respondent called one other witness to give evidence at the hearing, that being the Complainant in the criminal charge against the Appellant. Both she, and later, the Appellant testified in some considerable detail as to what transpired during the five hours of the ostensible business meeting of April 14, 1999, which gave rise to a charge of sexual assault against the Appellant and the deluge of local media attention to the circumstances of the case. It is apparent that as a result of her relating the facts of the event to her brother-in-law, who was an officer of the Ontario Provincial Police, she later, on April 16, 1999, reported her full complaint to the Bracebridge Detachment of the Ontario Provincial Police, and on February 11, 2000, to Jennifer Benkovic, an inspector of the Real Estate Council of Ontario.

It is notable that the Complainant was a single mother of two children having been separated from her estranged husband, also an officer of the Ontario Provincial Police, for just some six months prior to the events of April 14. The charge of sexual assault was not proceeded with by the prosecution in favour of a plea of guilty by the Appellant to a charge of simple or common assault as hereinbefore noted.

At the conclusion of the Registrar's case with the evidence of the Complainant, the Appellant gave his evidence of what transpired on the evening of April 14 which was not dissimilar to any great degree from that which the Complainant had earlier testified, except perhaps for nuance. It was thus he had accepted the factual statement read into the record by the prosecution at the time of his guilty plea before the Honourable Justice J. Evans of the Ontario Court of Justice on July 13, 1999.

What was not brought out in the evidence of the Complainant however, until cross-examination, was what transpired on the late afternoon and evening of April 9, 1999, when she had previously met with the Appellant for the purpose of viewing residential premises which might be acquired by the Complainant. The evidence of the Appellant of that earlier meeting disclosed a much more inviting Complainant who discussed openly that which she anticipated in a new setting, in a new life, with new people and friends in the Gravenhurst area, free of the constraints of her existing circumstances in her Barrie/Orillia surroundings. According to the testimony of the Appellant, she had inquired of him and learned of his marital circumstances and was eager to meet again the following week when she "would have more time" on her open night depending upon her estranged husband's schedule.

The Appellant testified that they had visited together that evening Prospect Park, and although the Complainant was vague and could not remember much of what transpired on the evening of April 9th, she did admit to such a visit.

It was during cross-examination that the Complainant became defensive and her evidence contrived, and she could not recall using the Appellant's cell phone on April 9, 1999, to call home and to her babysitter's home to inform that she would be late returning home to retrieve her child. The fact that three phone calls were made to the Complainant's home and one to the babysitter's home and corroborated by the telephone records of the Appellant's cell phone, unraveled her clear recollections of what transpired in her earlier testimony and is in contrast to the detailed account she gave in evidence of the April 14th meeting. Not only did the Complainant omit any reference to the earlier meeting of April 9th in her statements to the Ontario Provincial Police and to the inspector investigating the incident on behalf of the Real Estate Council of Ontario, but she gave misinformation and lied at the hearing before this Tribunal when she stated clearly that she had never met the Appellant before being introduced to him on April 14, 1999, by the receptionist at the Remax Real Estate Office at about 5:20 p.m. that afternoon.

Little is to be gained by a further introspection by this Tribunal of the evidence given by the Complainant and the Appellant of what did or did not happen at their ostensible business meetings and phone calls to arrange the same in April of 1999. It is sufficient to state that this Tribunal accepts the testimony of the Appellant where the evidence and nuances differ and rejects the recollections of the Complainant. In summary, the evidence of both the Complainant and the Appellant discloses an unfortunate occurrence between them which was not on a strict business basis and was born out of a conceit on the part of the Appellant of a very successful business and political career with a concomitant miscalculation of the signals from the

Complainant, or the otherwise sudden change of mind by the Complainant in her vulnerable state of a recent marital separation and the care of two children without a spouse. Suffice it to state that the Complainant testified that the Appellant acted consistently as a gentleman throughout, and although forward in approach on occasion, never insisted or pressed any advantage he might have. Indeed, she was quite comfortable in returning to his office alone with him in the later evening of April 14 and utilized his telephone to call her girlfriend.

Counsel for the Appellant completed the case for the Appellant by calling eight witnesses to testify as to the character and reputation of the Appellant, including his wife, Nancy McFadden, his sister, Lisa Speirs, his employer, Roger Kolbuc, and his accountant, Allan Turnbull. The other four character witnesses were:

John Young, Mayor of the Town of Muskoka;
Gordon Adams, Councilor for the District of Muskoka;
Lori Ann McConnell, a longtime family friend; and
Marny Lee Mowat, a former longtime co-worker of the Appellant.

The evidence given by all of the character witnesses as to the reputation and behaviour of the Appellant was indeed impressive and consistently supportive of the exemplary character of the Appellant in the long term. All testified that the unfortunate incident which gave rise to the criminal conviction would not occur again on the part of the Appellant. Those witnesses with political experience, decried the loss of the Appellant in the political arena in the Muskoka area, and his employer/real estate colleague expressed absolute confidence in the Appellant's future as a law abiding potential partner and business associate of integrity and honesty.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Appellant at all relevant times of the circumstances of this case was and is validly registered as a broker under the Act, and as such is a "registrant" within the meaning of section 9 of the Act;
2. The Appellant met with the Complainant on April 9, 1999, for the purposes of providing services as a broker under the Act;
3. The Appellant and the Complainant arranged a further meeting and met on April 14, 1999 at or about 5:20 p.m. for the ostensible purposes of viewing other residential premises which might be acquired by the Complainant, which meeting lasted until shortly after 9:30 p.m.;
4. The Complainant reported her information respecting the demeanor and actions of the Appellant and the circumstances which occurred during the early evening of April 14, 1999, to the Ontario Provincial Police on April 16, 1999, and as a result thereof, on May 13, 1999 the Appellant was charged with sexual assault contrary to section 271(1) of the Criminal Code;

5. The Complainant made a complaint respecting the conduct of the Appellant to the Muskoka Real Estate Board by a letter dated April 27, 1999, which subsequently was brought to the attention of the Registrar;
6. The Appellant entered a plea of guilty to a charge of simple or common assault contrary to section 266 of the Criminal Code, and on July 13, 1999, the original charge was stayed by the Court which convicted the Appellant of the lesser charge of simple or common assault based upon his guilty plea;
7. The facts as stated by the prosecution in the transcript of the record of the trial of the Appellant on July 13, 1999 are admitted by the Appellant to be substantially correct insofar as such support the plea, but otherwise are not found as facts by this Tribunal nor do such facts form the basis of the Appellant's conviction as alleged by the Registrar;
8. The Appellant met with Yvonne Nandalall, a Registration Officer at the Office of the Registrar, on August 18, 1999, and not on August 19, 1999, as alleged by the Registrar;
9. The Appellant complied with a request for an interview (the "Registrar's interview") with the Registrar and met with the Registrar on September 16, 1999, and not on September 9, 1999 as alleged by the Registrar;
10. The Registrar notified the Appellant by letter dated November 8, 1999, that the Registrar has directed the preparation of a proposal to revoke the Appellant's registration as a broker under the Act; and
11. The Registrar served a notice of the Proposal on the Appellant as a registrant on June 13, 1999, stating that the Registrar proposes to revoke the registration of the Appellant as a broker based upon the Appellant's conviction and the opinion of the Registrar that such past conduct affords reasonable grounds for belief that the Appellant will not carry on business in accordance with law and with integrity and honesty.

THE LAW:

Pursuant to section 8(2) of the Act, the Registrar may revoke the registration of the Appellant as a broker for any reason that would disentitle the Appellant to registration under section 6 of the Act:

.....

"8(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an Applicant or where the registrant is in breach of a term or condition of registration."

.....

Pursuant to section 6(1)(b) of the Act, the Appellant is entitled to registration or renewal of registration by the Registrar, inter alia as a broker, except where the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not carry on business lawfully:

"6.(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) ...; or

(b) the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty;"

.....

Based solely upon the above noted conviction of the Appellant, the Registrar has reached the decision that there is reasonable grounds for belief that the Appellant will not carry on business in a lawful manner, and pursuant to section 9(1) and (2) is required to serve a notice on the Appellant:

"9.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the Applicant or registrant.

(2) A notice under subsection (1) shall state that the Applicant or registrant is entitled to a hearing by the Tribunal if the Applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1) , notice in writing requiring a hearing to the Registrar and the Tribunal."

.....

The appeal comes to this Tribunal by virtue of section 9(4) of the Act, which provides:

.....

"9.(4) Where an Applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

.....

Applying the statutory provisions of the Act to the facts of this particular case, the only question to be determined by this Tribunal is whether or not the Registrar's opinion that the past conduct of the Appellant affords reasonable grounds for belief that the Appellant will not in the future carry on business as a broker in accordance with the law. Such an opinion requires an examination into the particular circumstances of the past conduct of the registrant and the likelihood that such conduct will be repeated by the registrant in the future or some other unlawful act. In the opinion of this Tribunal, it is not sufficient to base such an opinion solely upon the conviction of the registrant to a crime, particularly in this instance to an admission of guilt by the Appellant's plea.

Counsel for the Respondent urged on this Tribunal that the guilty plea and the conviction in and of themselves was sufficient to support the opinion of the Registrar and little, if anything, more was required to form such an opinion. Having reviewed the cases cited by Counsel, this Tribunal finds nothing to support this proposition, and indeed in each of such cases the decisions deal in detail with the nature and seriousness of the unlawful activity, the conduct of the accused before, during and after the alleged offense and the general reputation of the accused. Further, if this proposition in law was to result in an automatic or almost automatic disentitlement to registration under the Act, then the Act would have so provided. On the contrary, the Act specifically states that the past conduct, which would include a conviction of a crime, must afford reasonable grounds for belief (emphasis added) that the registrant's (future business) conduct will not be lawful.

The Registrar conducted a short interview with the Appellant on September 16, 1999, the notes from which were entered as evidence, and such formed the basis of the Registrar's opinion beyond the actual conviction of the Appellant on his guilty plea to the charge of simple or common assault. To be sure, the Registrar had before him a cursory statement of the prosecuting counsel respecting alleged facts read into the record at the trial for the purpose of sentencing which do not form the basis of the Appellant's conviction. The Registrar likewise had letters of non-support and letters of support respecting the conduct and reputation of the Appellant for the purpose of the opinion which the Registrar must reach in this case, but there is no evidence that interviews or contact (except acknowledgements) were made with any of the writers of such letters.

In contrast, this Tribunal had almost three days of concentrated testimony involving the Appellant and character witnesses, all supporting the Appellant's case, in addition to the evidence of the Complainant. Other than the Complainant, there was no other witness produced at the hearing to give evidence of a non-supportive nature, and this Tribunal has already commented upon the evidence given at the hearing by the Complainant.

If the question to be decided, therefore, is the likelihood or belief of future unlawful business behavior on the part of the Appellant based upon this single unfortunate incident of past conduct and the resulting conviction of the Appellant upon his guilty plea, this Tribunal is of the contrary opinion from that reached by the Registrar as stated in the Proposal. The test set out in *Brenner v. Registrar of Motor Vehicles, Dealers and Salesmen* (1983) 19 CRAT 58 is unless the Tribunal can find that the past conduct of the Appellant does not afford reasonable grounds for belief that the Appellant will not carry on business in accordance with the law and with integrity and honesty, the Tribunal should not order the Registrar to refrain from carrying out the Proposal. This Tribunal finds, however, that on the facts in this particular case, the past

conduct of the Appellant does not afford such reasonable grounds, and that, with respect, the decision reached by the Registrar was in error for the reasons stated above.

The other cases cited by both counsel support the conclusions reached by the Tribunal in this matter. In all of such other cases, the decisions relied upon the number and severity of the criminal convictions or otherwise depended upon the course of conduct of the accused both before and after conviction and the propensity of any reoccurrence of unlawful conduct on the part of the registrant. The Appellant in this case, given the miscalculation of the signals or intentions of the Complainant, acted honourably throughout even as stated by the Complainant. The Senior Registration Officer of the Registrar and all character witnesses gave assertive testimony that the conduct of the Appellant did not give any such reasonable grounds for such belief of the future misconduct. Indeed, there was no evidence at the hearing which supported the decision of the Registrar as proposed in the Proposal.

It is notable that in entering his plea of guilty to the lesser charge, the Appellant was sensitive to the greater harm which would result to his family and to the Complainant from the expected media exposure were he to enter a defense to the original charge of sexual assault. It was, as he stated in evidence, better to take the full responsibility of the unfortunate incident in an expeditious trial with a plea of guilty during the middle of the summer months than expose his children to schoolyard embarrassment and the probable salacious reporting of the media to the detriment of the Complainant and/or his wife. It was, therefore, with a sense of shame and remorse that the Appellant effected a quick end to the incident of April 14 and expressed his apology to the Complainant through his evidence at the hearing. This was confirmed by the evidence of the Senior Registration Officer and all character witnesses who gave evidence at the hearing.

DECISION AND ORDER:

The onus of proof that the Proposal is correct lies with the Registrar, and this Tribunal finds that this onus has not been discharged in the face of all of the evidence given at the hearing and for the reasons hereinbefore stated. Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the Act, directs the Registrar to refrain from carrying out the Proposal to revoke the registration of the Appellant as a broker under the Act.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C., Vice-Chair

RELEASED: March 16, 2001

JOHNSTON

WILLIAM JOHNSTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BEVERLEY J. READE, Vice-Chair, Presiding

APPEARANCES: BRIAN M. CAMPBELL, Counsel, representing the Applicant
ANDREW LEWIS, Counsel, representing the Ontario New Home
Warranty Program,

DATES OF
HEARING: March 19 & 20, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, William Johnston (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated June 27, 2000;

WHEREAS, the Applicant filed an appeal with the Tribunal, requesting a hearing;

WHEREAS, the hearing was to be heard on March 19-23, 2001 and to continue March 26-28, 2001 at the Tribunal's Chambers;

AND WHEREAS, the hearing commenced on March 19, 2001 and on the second day of hearing on March 20, 2001, Counsel for the Applicant advised the Tribunal that on consent of all parties they have concluded a settlement in terms of which the Applicant has withdrawn his appeal;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair,
Presiding

RELEASED: March 22, 2001

A. TOPPAZZINI CONSTUCTION INC.

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a REGISTRATION by
A. TOPPAZZINI CONSTUCTION INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),

TO REFUSE TO RENEW REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

A. TOPPAZZINI CONSTUCTION INC.

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on March 12-16, 2001 and to continue March 26-29, 2001;

AND WHEREAS, the Tribunal was advised by counsel for the Applicant that his client is not available for the hearing dates of March 12-16, 2001;

WHEREAS, the matter was adjourned to March 26-29, 2001 and to continue April 9-12, 2001;

AND WHEREAS, counsel for the Respondent requested a further adjournment of the March 26-29, 2001 hearing dates;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Best Western Downtown Sudbury Centreville, Room 318, 151 Larch Street, 2nd Floor, Sudbury, Ontario, at 9:30 a.m., on Monday, April 9, 2001, and to continue April 10, 11, and 12, 2001 and to further continue on May 7-10, 2001, at the above address, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 14, 2001

GERRIOR and EASTERN AUTO

MICHAEL GERRIOR and 1080424 ONTARIO LTD., and EASTERN AUTO WHOLESALE INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

MICHAEL GERRIOR, Agent, representing the Applicants
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF HEARING: January 10 & 11, 2001 and
February 19, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated June 28, 2000 proposed to revoke the registration of Michael Gerrior (the "Salesperson"), 1080424 Ontario Ltd. ("1080424") and Eastern Auto Wholesale Inc. ("Eastern") under the Act.

FACTS:

Mr. Michael Gerrior has been a registered salesperson since on or about November 24, 1989.

1080424 Ontario Ltd. ("1080424") has been registered as a motor vehicle dealer since on or about August 5, 1994. Michael Gerrior is an officer and director of 1080424.

Eastern Auto Wholesale Inc. ("Eastern") has been registered as a motor vehicle dealer since on or about August 5, 1994. Mr. Gerrior is an officer and director of Eastern along with Mr. Frank Fisico.

Eurospec Fine Cars (1998) Inc. ("Eurospec 1998") had been registered as a motor vehicle dealer since on or about May 29, 1998 with its registration terminated on May 29, 2000 for failing to renew as well as revoked for failing to comply with a Consent Order of the Commercial Registration Appeal Tribunal (now the Licence Appeal Tribunal) dated June 3, 1998 (the "Consent Order"). Mr. Michael Gerrior was both an officer and director of Eurospec 1998.

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* (the Act) states:

- 3(1) No person shall,
- (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

.....

Section 5 of the Act states:

- 5(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,
- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;

.....

Section 6 of the Act states:

.....

- 6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.
- R.S.O. 1990, c. M.42, s.6.

Section 7 of the Act states:

7(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall service notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

.....

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar out to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar;

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

.....

Section 10 of the Act states:

10(1) The Registrar or any person designated by him or her in writing may at any reasonable time enter upon the business premises of the registrant to make an inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts are being complied with. R.S.O. 1990, c.M.42, s. 10(1).

.....

Section 11 of the Act states:

11(1) Upon an inspection under section 9 or 10, the person inspecting,

(a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection; and

(b) may, upon giving a receipt therefor, remove any material referred to in clause (a) that relates to the purpose of the inspection for the purpose of making a copy thereof, provided that such copying is carried out with reasonable dispatch and the material in question is promptly thereafter returned to the person being inspected,

and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

.....

Section 22 of the *Retail Sales Tax Act* states:

22(1) Any amount collected or collectible as or on account of tax under this Act by a vendor shall be deemed, despite any security interest in the amount so collected or collectible, to be held in trust for Her Majesty in Right of Ontario and separate and apart from the vendor's property and from property held by any secured creditor that but for the security interest would be the vendor's property and shall be paid over by the vendor in the manner and at the time provided under this Act and the regulations.

ISSUE:

Does the Registrar have sufficient grounds for revoking the registration of the salesperson, Michael Gerrior, 1080424 Ontario Ltd. and Eastern Auto Wholesale Inc. under the provisions of the Act?

EVIDENCE:

Jeff Quinn

The first witness on behalf of the Registrar was Mr. Jeff Quinn, Area Manager, of Global Warranty Corporation. Mr. Quinn gave evidence that on or about January 10, 2000, Mr. Michael Gerrior completed a Global Warranty Agreement for a Mr. Carlo Ciampin indicating that the kilometers at the time of the sale of the vehicle to Mr. Ciampin was 100,232 kilometers. Mr. Gerrior had applied on behalf of Mr. Ciampin for a platinum warranty, which had a condition that the kilometers were under 100,000 on any vehicle at the time of the application. Upon examining the Bill of Sale, it was discovered that the actual kilometers on the vehicle at the time of sale was 108,232 and thus the vehicle would not have qualified for the platinum warranty.

On cross-examination by Mr. Gerrior, the witness was questioned as to his knowledge of a meeting between Mr. Gerrior and the president of Global where there was an adjustment in price and the matter was resolved. Mr. Quinn had no knowledge of that meeting and did not know for sure if the warranty was switched from platinum to gold.

As there was not sufficient evidence produced by either party regarding this incident, the Tribunal completely disregards this incident and places no weight on this allegation.

Evidence of Rania Zabeneh

The second witness presented by the Registrar was Miss Rania Zabeneh who was a student at York University. Her evidence was that she bought a 1998 Sunfire motor vehicle from 1080424 carrying on business as Eurospec Fine Cars on September 11, 1998. Mr. Gerrior had told her that the car was in good condition, had been in no accidents and had only travelled 5,500 kilometers. He also stated that it was covered by a GM warranty. On the comment section of the Bill of Sale the words were included Amust be warranty@. She paid \$1,000.00 deposit and \$15,560.00 on delivery, for a total of \$16,560.00 including tax. On September 14, 1998, she picked up her car and when she arrived home and took a closer look at it, she discovered a bubble on one of the tires. She took the car back to Mr. Gerrior who told her she must have hit something on the way home and told her where she could obtain a new tire. She attended at the Tire Depot at Mr. Gerrior-s instructions and obtained a new tire, but she had to pay for it herself and was not reimbursed by Mr. Gerrior. She also purchased a new rim because the car did not drive straight. In February 1999, she took the vehicle to Roy Foss, a GM dealer for warranty work and was told that the warranty on this vehicle was blocked due to the vehicle being a Awrite off@. She returned to speak to Mr. Gerrior about that and requested a refund, which Mr. Gerrior refused. Mr. Gerrior offered her a 1998 Cavalier motor vehicle instead, but that is not what Ms. Zabeneh wanted. Thereafter she contacted the Used Car Dealer Association and the Ontario Motor Vehicle Industry Council, but matters could not be worked out with Mr. Gerrior. She finally obtained a lawyer, commenced an action and obtained Judgment against 1080424 on default for the sum of \$26,609.39, which included costs, pre-judgment interest and punitive damages. Mr. Gerrior would not pay the Judgment, and Ms. Zabeneh was paid the sum of \$15,000.00, plus \$4,762.00 costs from the Motor Vehicle Accident Claims Fund.

On cross-examination, Ms. Zabeneh repeated most of her evidence and Mr. Gerrior produced to her a Vehicle History Search, showing that Eurospec Fine Cars (1998) Inc. had purchased that particular vehicle on September 3, 1998, although her Bill of Sale was from 1080424 carrying on business as Eurospec Fine Cars. Mr. Gerrior tried to establish that Ms. Zabeneh should have known that she sued the wrong Company, because the Bill of Sale that he made out to Ms. Zabeneh was on the wrong Company form. Mr Gerrior also tried to establish through this witness that she had no problem with the GM dealer performing recall work on this vehicle and, therefore, she should not have had any problem with a GM dealer doing warranty work on the vehicle. He tried to establish that when Ms. Zabeneh had taken her vehicle in for recall work that she should have been notified at that time that there was no warranty available on the vehicle and, therefore, she should have brought it back to him sooner than she did.

This Tribunal fails to see how any blame could be shifted from himself to Ms. Zabeneh in the points which Mr. Gerrior tried to establish. Ms. Zabeneh commenced an action against the Company who sold her the vehicle and whose name was on the Bill of Sale only after trying to resolve the matter with Mr. Gerrior and through other means. The action was not defended and she obtained default judgment against 1080424, of which much still remains unpaid. She returned her vehicle to Mr. Gerrior when she was informed by the GM dealer that there was no warranty because the vehicle had been written off as the result of being in a major accident.

Evidence of Douglas Stirrup

The next witness on behalf of the Registrar, was Mr. Douglas Stirrup who was a Collections Manager for the Ministry of Finance. His evidence was that when a *Retail Sales Tax Act* Vendor Permit is issued, the vendor receives return cards which identifies the sales and tax due and which must be remitted to the Minister of Finance with payment on a monthly basis to be deemed to be in compliance. The monies collected by a vendor are trust monies and must be remitted with the return cards. If the Minister of Finance does not receive the return cards or remittance with the return cards, an estimate may be made against the vendor. If the vendor has no sales tax which was collected, the vendor is still required to report this.

1080424 operating as Eurospec Fine Cars, registered under the *Retail Sales Tax Act* on June 14, 1994 and started its business operation on June 30, 1994. An audit was conducted on December 31, 1996 and there was an assessment for tax collected and not remitted. Eastern registered under the *Retail Sales Tax Act* on June 14, 1994 and started its business operation on June 30, 1994. As a result of breaches of the *Retail Sales Tax Act*, both Eastern and 1080424 entered into an agreement with the Ministry of Finance on May 23, 1997. The agreement provided, among other things, that Eastern and 1080424 would file all defaulted returns and commencing with the May 1997 return all future returns, would be filed by the due date with full negotiable payment as required by the Ministry of Finance. The agreement also provided that in default of the agreement, the Minister of Finance may refer the party in default to the Registrar of the Act and the Registrar may issue a proposal to revoke their registration under the Act. In the agreement it was also admitted that Eastern and 1080424 had not met the requirements of the *Retail Sales Tax Act* as to the filing of returns, remitting of tax due and paying of assessments when due. The agreement was signed by Michael Gerrior as president of Eastern Auto Wholesale Inc. and Michael Gerrior as president of 1080424 Ontario Ltd.

On June 3, 1998, a Consent Order was issued by the Commercial Registration Appeal Tribunal (now the Licence Appeal Tribunal) pursuant to an agreement entered into on May 27, 1998. The consent to the registration of Eurospec (1998) as a motor vehicle dealer subject to certain terms and conditions was signed by Michael Gerrior on behalf of 1080424, Michael Gerrior on behalf of Eurospec (1998) and Michael Gerrior. The terms of the Consent Order included:

1. 1080424 Ontario Ltd. o/a Eurospec Fine Cars shall pay the sum of two thousand dollars (\$2,000.00) per month on the 1st of the month to the Ministry of Finance until all arrears including any interest and penalties have been paid in full.
2. The parties agree to file all future returns and pay all remittances on a timely basis in accordance with the *Retail Sales Tax Act*.

3. Michael Gerrior agrees that with respect to all other dealerships in which he has an interest, that said dealerships will comply with the *Retail Sales Tax Act*.

In a report from the Ministry of Finance dated May 31, 2000, the Ministry of Finance reported that, in respect to 1080424, the vendor failed to make the payments of \$2,000.00 per month until the arrears were cleared up as was agreed to in the Consent Order.

Despite numerous phone calls and several collection letters, the vendor did not contact the Ministry of Finance or make any attempt to work out any arrangement for payment.

In respect to Eastern, the vendor had not filed a return since May 31, 1998 and the vendor had not responded to numerous phone calls or collection letters.

In respect to Eurospec (1998), the vendor had never filed a return with payment and several returns were not filed. Despite numerous phone calls and several collection letters, the vendor did not follow through with a payment agreement, and the vendor did not contact the Ministry of Finance to work out any arrangements for payment.

According to the provisions of the *Retail Sales Tax Act*, the Ministry of Finance made an assessment against the three companies of \$55,853.01. Mr. Stirrup stated that Mr. Gerrior contacted the Ministry in December, 2000 and advised that Eurospec (1998) had ceased operations in September 1998. He stated that the Ministry accepted Mr. Gerrior's explanation and as for Eurospec (1998), it was deemed to have filed all returns since September 1998 and the estimate of arrears in retail sales tax was revised to \$25,000.00 outstanding.

Regarding 1080424, Mr. Gerrior attended at the Ministry the day before this hearing commenced to bring the filings up to date. The amount outstanding in non-remitted sales tax at that time was approximately \$4,000.00, however, the late filings made by Mr. Gerrior showed a further \$6,700.00 which should have been paid, but remitted at that time was a cheque for \$500.00, leaving a balance outstanding just over \$10,000.00.

Regarding Eastern, Mr. Gerrior advised the Ministry that it was strictly a holding company and has no taxable sales and, therefore, the Ministry reversed its balance of \$629.26 outstanding to a zero balance. Mr. Stirrup also advised that no filings were made on behalf of Eastern and, therefore, Eastern is still in non-compliance with the Act, which requires filings whether or not there is any tax payable. Therefore, all three companies were not in compliance with the Act and the total owed was over \$35,000.00.

On cross-examination by Mr. Gerrior, he established that the amount that was paid on behalf of 1080424 was close to the amount of the original assessment made in 1996 and the balance outstanding by that company was comprised mostly of interest and penalties. Under the Act, however, interest and penalties form part of the debt.

Evidence of Louise Gingras

The fourth witness on behalf of the Registrar was Louise Gingras of the Ontario Motor Vehicle Industry Council (OMVIC). She testified that she attended at the premises of all three companies which were located at 2116 Lawrence Avenue, Toronto, on behalf of A. Dempsey, who had the original appointment with Mr. Gerrior for that date. She reviewed the garage register and found that it was not up to date. She requested an inspection of the books and records of the companies, but Mr. Gerrior said that they were with his accountant and denied that he had been told to have the last three months of records available. He was advised to update his garage register immediately and told that the books and records of all three companies would have to be made available to be examined as well as the bank statements and cancelled cheques. Mr. Gerrior objected to producing the bank statements and cancelled cheques. He was provided with a copy of the Inspections Findings Notice. He was also advised that although the name of the three businesses were on the outside of the building, they were all operated from one room and, therefore, there would have to be signage inside the building so that patrons would know with which company they were dealing. She made an appointment to return on March 8, 2000 to review the records which she requested. This notice was also provided to Mr. Gerrior in writing.

On March 8, 2000, Ms. Gingras returned to 2116 Lawrence Avenue to conduct the inspection pursuant to the appointment. She met with Mr. Gerrior who stated that he was still not able to supply the records as requested as they were with his accountant and he was very busy. He had three new garage records, however, all of them were blank and he stated that he did not have time to update the records. He provided the Bills of Sale for Eurospec Fine Cars, but not the bank statements and no bank statements were produced for any of the companies. In respect to the identification of the companies and the signage, there was a handwritten piece of paper taped to one desk indicating the name of the business and a second piece of paper taped to the wall behind another desk.

On cross-examination, it was confirmed that the signs outside of the building were in compliance with the Act and the signs that Mr. Gerrior had taped to the desk and the wall above another desk may be in compliance with identifying the companies since this was a gray area. She also confirmed that Mr. Gerrior was advised that he was not in compliance with the Act by not having his books and records located on the premises and by not having the garage register up to date.

Evidence of Mary Jane South

The fifth witness for the Registrar was Mary Jane South, the Deputy Registrar of the Ontario Motor Vehicle Industry Council (OMVIC). OMVIC was created in January of 1997 to administer the *Motor Vehicle Dealers Act* which had previously been administered by the Ministry of Consumer and Commercial Relations. She reviewed how this was a public protection statute administered for the benefit of the public.

She identified the main issues with Mr. Gerrior and his companies. They were the payout by the Compensation Fund with no attempt of reimbursement by Mr. Gerrior, the breaches of the *Retail Sales Tax Act* and the denial of access to the books and records of the companies. She stated that Eurospec (1998) had already been suspended so was not involved in this procedure except by reference to Mr. Gerrior as an officer and director of that company and that the Act required that corporate veil be pierced to hold officers and directors of a company responsible for its actions. She produced corporate searches showing Michael Gerrior as officer and director of all companies involved in this proceeding as well as Eurospec (1998). She reviewed the terms of the Consent Order leading to the revocation of the licence of Eurospec (1998). These terms included that Mr. Gerrior and his companies failed to pay the \$2,000.00 on arrears which he had agreed to, the failure to file retail sales tax returns on time or with the proper amount of payment as required under the *Retail Sales Tax Act* and the failure of the condition that Mr. Gerrior's dealerships would comply with the *Retail Sales Tax Act*. She stated that the Registrar had no belief that Mr. Gerrior would act in good faith because of his failure to abide by prior agreements.

Ms. South described the Motor Vehicle Dealers Compensation Fund, which was established to compensate consumers who suffer financial loss from the purchase of a motor vehicle from a registered dealer. To obtain payment, a claimant must have obtained a judgment against a registered dealer which remained unpaid. The Compensation Fund would pay the judgment up to the sum of \$15,000.00, plus costs and the registered dealer would then be obligated to reimburse the Compensation Fund. Payment was made to Ms. Zabeneh, but no reimbursement was made to the Fund. If an officer and director of a company does not reimburse the Fund and is an officer and director of another company, as is the case with Mr. Gerrior, this shows financial irresponsibility.

In the case of Ms. Zabeneh, the sum of \$15,000.00, plus \$4,762.00 was paid out by the Compensation Fund and since there was no reimbursement, the vehicle was sold for \$8,500.00 and the balance is still outstanding to the Compensation Fund. She referred to a letter dated November 2, 1999 addressed to the Motor Vehicle Dealers Compensation Fund (MVDCF) from Mr. Gerrior's Lawyer stating that the claim was only made against 1080424 and since Mr. Gerrior was no longer making transactions through that company, except in very specific circumstances, that when the claim was made against that company with respect to the Zabeneh transaction, there was no defence filed.

In regard to retail sales tax, Ms. South stated that when consumers pay the retail sales tax, it becomes trust money in the dealer's hand and, therefore, if the dealer does not remit the retail sales tax, they are in breach of trust as the money does not belong to the dealer.

Regarding access to books and records, she stated that this is a very important part of the Act. All books and records of the dealer are to be kept at the dealership's registered premises. Under Sections 10 and 11 of the Act, the Registrar may enter upon the premises at any reasonable time and is entitled to free access to all books, records and bank accounts of the registered company. Access to these documents was denied by Mr. Gerrior. By this denial, the Registrar had no means to ensure that the registered dealer was in compliance with the Act and that the public was being protected.

On cross-examination by Mr. Gerrior, the Deputy Registrar reviewed the Consent Order and how it resulted from a breach of the voluntary arrangement that Mr. Gerrior made with the Ministry of Finance. She also reviewed how Section 22 of the *Retail Sales Tax Act* provided that all amounts collected by a vendor are to be held in trust and kept separate from the vendor's property. She also reviewed the figures on how the compensation was calculated for Ms. Zabeneh under the dealers Compensation Fund. Mr. Gerrior asked her if the Registrar would now make another deal with him, and Ms. South stated that since he had breached all previous agreements he could no longer be trusted to comply with any terms of any other agreement.

On re-examination, Ms. South stated that it was not normal to renegotiate after a Consent Order of this Tribunal had been made and breached. She also stated that Mr. Gerrior never came to OMVIC to renegotiate before this time or state that he had any problem with the payment schedule which he had agreed to. Those terms became part of an Order through mutual agreement including the agreement on the amount of the monthly payment.

Evidence of Amanda Lee Demsey

The sixth witness for the Registrar was Amanda Lee Dempsey who is Manager of Inspections for OMVIC. She stated that she visited Mr. Gerrior for the first time on July 13, 1998 when he was located at 7557 Woodbine Avenue, Toronto. Mr. Gerrior was not there so she left her Inspection Findings Report with a request for Mr. Gerrior to contact her within two days. On October 27, 1998, she again attended at Mr. Gerrior's premises and he was again absent from the premises, so she left a further Inspection Findings Report with a request for him to contact her within the next two days. On her third attendance at the premises, she found the building empty and Mr. Gerrior had not advised OMVIC of his new address at that time. The Inspection Report which she left for Mr. Gerrior indicated that he must have all books and records on the premises for inspection. Mr. Gerrior did contact her, and she advised him that the next scheduled inspection was February 23, 2000 and the purpose of the inspection was to inspect all books and records of the companies on that day and they were to be on the premises. On February 23, 2000, Ms. Dempsey could not attend, and Louise Gingras attended in her place. There was no cross-examination by Mr. Gerrior of Amanda Lee Dempsey. The Registrar then closed its case.

Evidence of Frank Fisico

The first witness called by Mr. Gerrior was Mr. Frank Fisico. His evidence was that Mr. Gerrior had sold him a car and asked him to invest with him in a car dealership and as a result he invested \$500,000.00. He became a director of Eastern. His occupation was a builder and developer and this was just an investment for him without the need for daily participation. He really did not have that much to do with the business and did not know much of what went on. He did know that the rents that the registrant was paying at its Lawrence Avenue address were extremely high, as were his other expenses. He met with Ms. Zabeneh on one occasion and talked to her, but nothing came of it. He did not receive regular statements and ended up losing about \$250,000.00.

In cross-examination, Mr. Fisico stated that he started in the business by investing with Mr. Gerrior around 1997, but he did not pay that much attention to the business as he was too busy. He became an officer and director of Eurospec (1998) on February 18, 1998. He also had a company called A Frank Fisico Car Sales, but it was not an active company. He had a few cars and credit at the auction. Mr. Gerrior had authority to buy cars for Frank Fisico Car Sales. He was not going to bother to sue Mr. Gerrior for his losses as he knows that he has no money.

Evidence of Rosalba D'Angelo

The second witness for the registrant was Rosalba D'Angelo, who had been an employee of Eurospec (1998). Her office duties included updating the garage registry. She said that there was no problem with that while she was there. She obtained her salesperson licence and was selling cars, as well as managing the office. She stated that they had 50 to 60 cars in the inventory on Woodbine Avenue when all four companies were there. Expenses were about \$30,000.00 per month. She remembers one month that nearly 45 cars were sold. She feels that Mr. Gerrior treated people professionally, although there was a large turnover in staff. They had meetings every Saturday morning to discuss issues.

Regarding the Zabeneh vehicle, she had originally written out the Bill of Sale and Mr. Gerrior signed it. She was dealing with the customer but found her difficult, so she turned the customer over to Mr. Gerrior. There were two cars on the lot that were very similar, except that one was a year older. She had given Ms. Zabeneh a price for the older vehicle with the higher mileage, but the bill was written up for the newer vehicle. She thinks that she recalls that this was what happened, but she was not sure. She recalls Mr. Gerrior calling several people to try and correct the problem with the Zabeneh vehicle. She now owns her own dealership.

On cross-examination, she gave evidence that she was with Mr. Gerrior until the company wound down in 1999. There were financial problems with all of the companies, and people from the bank were there often. Frank Fisico paid the rent for all of the companies. Mr. Gerrior was the boss, and she took instructions from him. Although she acted as an Office Manager, no one had any responsibility to report to her.

On redirect, she could not explain how the financial problems affected any of the other companies. She said that Eurospec (1998) was supposed to have most of the deals and that the Zabeneh sale should have gone through that company instead of 1080424.

Evidence of Michael Gerrior

Michael Gerrior gave evidence on behalf of himself and his companies. He stated that he is the sole director of 1080424 which was set up as a holding company to receive payments for consulting fees and other things from the Eurospec (1998). If things did not work out with his new partner, Frank Fisico, he could operate under the 1080424 name. Mr. Fisico had his own company, Frank Fisico Car Sales for a similar purpose. Both companies would work with an operating company, Eurospec Fine Cars (1998) Inc., of which 50% was owned by 1080424 and 50% by Frank Fisico Car Sales.

Eastern was a shell company with Gerrior as sole director, and both companies had OMVIC licences. There were not a large number of transactions under Eastern. Frank Fisico Car Sales did not operate out of the same premises as the other companies.

Mr. Gerrior admitted that he was responsible on a daily basis for management of the companies, and Frank Fisico's participation was only financial. Mr. Fisico had guaranteed a line of credit at the auction and had a \$450,000.00 floor plan with a \$50,000.00 operating loan with the Bank of Nova Scotia.

Eastern was only a flow-through company which took older cars that were traded in, which he did not want on the lot of Eurospec (1998).

1080424 was totally his company and Eastern was owned 50% by him and 50% by Frank Fisico. This was set up according to advice which he received from his Accountants. He admitted that he was an officer and the directing mind of all three corporations, 1080424, Eastern and Eurospec (1998), although Frank Fisico was his partner in Eurospec (1998) and Eastern.

Regarding the sale of the vehicle to Raina Zabeneh, he admitted that the facts set out by the Registrar in paragraph 7 of the Notice of Proposal were correct, except that this sale should have gone through Eurospec (1998) and not his holding company 1080424. When he heard the complaint of Ms. Zabeneh that the car had no warranty as it was written off, he called his lawyer who then called several people. He tried to resolve the matter with the customer and with OMVIC, and he offered to pay \$9,000.00 or \$10,000.00 because that is what Can Auction offered as the vehicle's value. He had no idea that the car had been in an accident and said that he would have to sue the dealership which sold him the car, although he has not yet done so. He offered to pay for a rear axle for the car if the customer kept it, but the customer would not agree. He also offered an after market warranty, which would be as good as the GM warranty, but the customer refused. He offered the customer another car of the same year, but the customer again refused, and he thought that this was very unfair. He did not appeal the customer's judgment against him because he talked to his lawyer who had advised him that it would be cheaper for him to let OMVIC pay the \$15,000.00 less the salvage value of the vehicle. He did not refund the customer's money and take the car back because Frank Fisico had removed his name as a signing authority on Eurospec (1998) by that time and that is the company from which the car should have come. He was considering an action against Frank Fisico.

He was aware that the Motor Vehicle Dealer Compensation Fund paid the purchaser \$15,000.00, plus costs of \$4,762.59. 1080424 refused to repay the Compensation Fund or the purchaser the balance of the judgment because he did not know that the Compensation Fund would pay costs in addition to the \$15,000.00.

He stated that all the companies were moved from the previous address to the Lawrence Avenue address but by that time 1080424 was the only company that was operating. He did not have interior signage for the different companies as his interpretation of the Act was that this was a gray area. He stated that OMVIC had agreed with him on that point.

Regarding the Global Warranty agreement for Carlo Ciampin, he admitted that the number of kilometers which he wrote down on the application for the warranty was incorrect, however, he said that was just an error on his part in transposing the information. He then called the president of Global and paid an extra amount to make sure that the customer received the warranty.

He admitted that on or about February 1, 2000, he purchased a vehicle on behalf of Frank Fisico Car Sales, despite the fact that he was not a registered sales person of Frank Fisico Car Sales. He explained that he signed for it on Frank Fisico's line of credit and that it was only an internal document for financing and was never intended to be registered in the name of Frank Fisico Car Sales.

Regarding the debt owed to the Ministry of Finance, he agreed with the circumstances set out in paragraph 13 of the Notice of Proposal, including the fact that 1080424 was indebted to the Ministry of Finance in the amount of \$8,650.56 as of May 30, 2000. He also admitted the agreement of May 23, 1997 which included a term that all future returns would be filed in accordance with the *Retail Sales Tax Act* and all remittances would be paid on a timely basis. He also admitted to the terms of the Consent Order which included the statement that all dealerships in which he had an interest would be comply with the *Retail Sales Tax Act* and that 1080424 would pay \$2,000.00 a month to clear off the arrears of Eurospec (1998). He explained these agreements as being very aggressive and made by him assuming that he could pay for it, but he ran short of money. He stated that he had paid down quite a bit of the debt, although it just increased again the day before the commencement of this hearing when he filed the last overdue returns with a cheque for only \$500.00 when the amount was increased by about \$6,000.00 with the filing of the late returns. He explained that to his knowledge there were only three NSF cheques, he thinks, but that he "had to put resources to whichever fire was the biggest". He had other problems that he was dealing with and had to allocate his resources. He admitted that he did not contact the Ministry and advise them of any of these problems as he did not know that he could do this. He did not deny any of the allegations, but stated that he did the best he could with the resources available to him.

In regard to Eurospec (1998), the original assessment was \$55,853.01, but after he advised the Ministry that Eurospec (1998) had stopped carrying on business, this amount was reduced to \$24,000.00 owing. He intended to pay this from the GST rebate he expected, but he has not received it yet. He stated that perhaps some other cheques that were pre-written by him had been returned "NSF" by the bank, but he did not know.

He objected to paying the entire amount of \$24,000.00 for Eurospec (1998) as that company was no longer in business and should not be a part of these proceedings. He said that whatever happened, the amount should not be taken into account because the company is no longer operating. Since Frank Fisico was also a director of that company and had revoked his signing privileges for that company, Mr. Gerrior should be liable for half. He testified that he had called the *Retail Sales Tax Act* office and was told that he would only be liable for half of the \$24,000.00 because there was one other director.

Regarding 1080424, Mr. Gerrior was president and sole director. That company received consulting fees of \$1,000.00 a week from Eurospec (1998) which was his salary. He was drawing personal expenses from 1080424. 1080424 would pay other expenses, including the \$2,000.00 a month to retail sales tax under the previous agreement. He had sent in post-dated cheques, but some did come back "NSF" and then there were penalties which were assessed which increased the amount owing. When his filings were brought up to date the day before this hearing commenced, amount owing had increased to \$10,500.00, but he did pay \$500.00 at that time.

Mr. Gerrior did not dispute the amount of \$55,000.00 estimated at the time of the estimate given by the Ministry for non-filed returns for the reason that he could not get his records back from his accountant because he was not paying his accountant's fees. In any event, he straightened this out with the Retail Sales Tax office when he advised that Eurospec 1998 had not been operating for some time. The amount was then revised to \$24,000.00 outstanding of which he felt he was only liable for half.

In respect to the indebtedness of Eastern to the Ministry of Finance in the amount of \$628.26, Mr. Gerrior advised that Eastern was not in the retail business and was not required to pay any tax. The amount owing resulted from a sale of a car from Frank Fisico to his niece. He said that the taxes should have been remitted and if they are owing they will eventually be paid. He stated that he did not file nil returns on behalf of Eastern as required by the Act, however, the day before this hearing commenced, he did file all of the nil returns up to date although he did not pay the \$629.26 assessed against Eastern.

Mr. Gerrior confirmed the terms of the agreement between Eastern and 1080424 with the Ontario Ministry of Finance on May 23, 1997 and admitted that he had breached that agreement. He was also aware that keeping the terms of the agreement was a condition of keeping his licence. He stated at that time he was willing to make whatever arrangement that were required to keep his licence.

Mr. Gerrior admitted that he did make appointments with the Ministry to provide his books and records but the reason that he did not provide them was that his accountant would not give them back because he did not pay his account. He also admitted that his garage registry was not up to date, but it was up to date to a certain point. He had hired a girl who did that for a time, but when she ceased working for him the accountant was supposed to do it but the accountant had not entered the transactions, and he did not have a list available to transpose to the garage register.

Regarding the signage, it was Mr. Gerrior's impression that only signage was needed outside of the building to identify the business premises. After he was warned about it, he tried to be in compliance by taping a sign to one desk and one on the wall over another desk, but he did not separate the desks. He did not identify the cars on the lot of the business premises as to which company owned them because since he moved on August 19, 1999, he usually had no cars in inventory except what he was driving. He would go to the auctions every day and buy a few cars and wholesale them so there was no inventory on the lot. He kept a physical office there just to keep up with the requirements of keeping his licence. There was another dealership not related to him which carried on business on the same premises. As he was on the road all day, he did not know who would be sitting at his desk because there was also a car rental company there which was run by a friend of his.

On cross-examination, Mr. Gerrior admitted that when he entered into the Consent Order of May 27, 1998, issued by the Commercial Registration Appeal Tribunal on June 3, 1998, he was represented by Counsel and entered into the agreement on the advice of his lawyer. Pursuant to payments made under that Order, there were three cheques which were returned "NSF" and he replaced them with his own personal cheques which were also returned "NSF".

When questioning Mr. Gerrior's 50% ownership of Eurospec (1998), Counsel for the Registrar presented a handwritten note signed by Mr. Gerrior and dated March 13, 1998 stating that Michael E. Gerrior has more than a 55% interest in Eurospec Fine Cars (1998) Inc. Mr. Gerrior explained that he had gone to OMVIC to read their regulations on how to dual his licence and had talked to his lawyer about it, 5% of Eurospec (1998) was put into trust so that he complied with the requirements for obtaining a dual licence. He agreed that this gave him a controlling interest in Eurospec (1998), but in reality the profit split was 50-50. His explanation for the cheques that were returned said that "NSF" was that his signing authority was revoked by Frank Fisico for Eurospec (1998) in November 1998, and everything was up to date with the Ministry of Finance until that date. He did not explain why the Ministry of Finance records stated that many returns were not filed and that returns were filed without remittances, but he did agree that Eurospec (1998) owes \$24,000.00 to the Ministry of Finance.

Mr. Gerrior testified that he did not file the returns for Eastern for a two year period because Eastern's business was wholesale and they had nothing to report. He did, however, file nil returns up to the day before the hearing commenced.

When asked where all of the money went that was collected for retail sales tax, Mr. Gerrior stated that he put it into his general account and used it to pay his business expenses.

In relation to the Zabeneh claim, Mr. Gerrior denied that he knew about the claim until after the judgment. It was only after the judgment that he went to his lawyer to have him correspond and settle the matter. He had three meetings with the customer and Frank Fisico was negotiating to take the car back, refund the money and pay the customer \$3,000.00 more, although that was never done. He admitted that he has not paid anything to the customer and that the Compensation Fund recouped some its money by selling the vehicle for \$8,900.00. He has not made any payments to the Compensation Fund to repay it. He stated that he did not appeal the judgment against him for nearly \$30,000.00 because he thought it was better to let the Compensation Fund pay out the maximum of \$15,000.00, less the salvage value so that he would only have to repay the \$6,000.00 balance to the Compensation Fund. He did not think about having to pay the customer anything further for the balance of the judgment above what she received from the Compensation Fund. He also did said he not appeal because the judgment was against his other company which had no assets.

Mr. Gerrior was specifically asked by Counsel for the Registrar if he or any of his former companies were ever charged or convicted of any offences under the *Retail Sales Tax Act*. Mr. Gerrior responded "possibly", but he could not really recall. His memory improved when he was presented with a letter from the Ministry of Finance, Special Investigations Branch, indicating that there was a prosecution of Eurospec Fine Cars Inc. and its president, Michael Gerrior in 1994. His former company was charged under Section 13 of the *Retail Sales Tax Act* with failing to remit retail sales tax collections in the amount of \$57,522.76 and failing to file Retail Sales Tax Returns. Michael Gerrior was charged with assenting to, acquiescing in or participating in the commission of the corporation's offences pursuant to Section 42 of the Act. Pleas of "not guilty" were entered by Mr. Gerrior on behalf of the company and himself and

after trial, both were convicted on March 7, 1994 and fined. Mr. Gerrior objected to that evidence being introduced or the matter even being raised since he said that his former company, Eurospec Fine Cars Inc. ceased operating in 1993 and, therefore, that should have no relevance to the present proceedings.

During Mr. Gerrior's summation, the Tribunal was disturbed by Mr. Gerrior's comment that had he known the procedure, he would have brought more witnesses with him that day. This was disturbing as Mr. Gerrior was represented by and received advice from legal counsel until shortly before the hearing. He was also advised by the Tribunal during the first two days of the hearing being January 10 and 11, 2001 that he could produce any witnesses which he chose to bring and the Tribunal would hear them. He did, in fact, produce two witnesses on January 11, and the Tribunal advised him then, that on the resumption of the third day of hearing on February 19, 2001, he should bring any other witnesses that he wanted to give evidence on his behalf.

FACTS FOUND PROVEN:

Michael Gerrior was president of the former company, Eurospec Fine Cars Inc., which company ceased operating in 1993. Both Mr. Gerrior and his company were charged with breaches of the *Retail Sales Tax Act*, which included failing to file sales tax returns and failing to remit sales tax collections. Both entered pleas of Not guilty and both were convicted at Trial on March 7, 1994 and fined.

1080424 was registered as a motor vehicle dealer on or about August 5, 1994. Michael Gerrior is an officer and director of 1080424.

Eastern was registered as a motor vehicle dealer on or about August 5, 1994. Mr. Gerrior is an officer and director of Eastern, along with Frank Fisico.

Eurospec (1998) was registered as a motor vehicle dealer on or about May 29, 1998. Mr. Gerrior is an officer and director of Eurospec (1998).

Mr. Gerrior was the directing mind of all three corporations.

As a result of Eastern and 1080424 not meeting the requirements of the *Retail Sales Tax Act* as to filing of returns, remitting of tax due and paying assessments when due, Mr. Gerrior as president of both companies, entered into an agreement with the Minister of Finance on May 23, 1997. One of the terms of the agreement was that Eastern and 1080424 would file all future returns by the due date with full negotiable payment as required by the Ministry of Finance. That agreement was breached by Mr. Gerrior in not fulfilling its conditions.

As a result of further breaches of the *Retail Sales Tax Act* by 1080424 and Michael Gerrior, they entered into a Consent Order before the Commercial Registration Appeal Tribunal (now the Licence Appeal Tribunal). The consent to the Order was signed by Michael Gerrior on behalf of 1080424, Michael Gerrior, and Michael Gerrior on behalf of Eurospec (1998). The consent to the order was negotiated by the registrants who were represented by legal counsel.

The Order provided, inter alia, that 1080424 would pay the sum of \$2,000.00 per month to the Ministry of Finance until all arrears, including interest and penalties have been paid in full. The registrants breached that condition. The Order also provided that the parties agreed to file all future returns and pay all remittances on a timely basis in accordance with the *Retail Sales Tax Act*. The registrants breached that condition. The Order also provided that Michael Gerrior agreed that in respect to all other dealerships in which he had an interest, the dealerships would comply with the *Retail Sales Tax Act*. Michael Gerrior breached that condition.

As a result of failing to comply with the Consent Order dated June 3, 1998 and for failing to renew, the registration of Eurospec (1998) was terminated on May 29, 2000.

On September 11, 1998, Mr. Gerrior signed, on behalf of 1080424, a Bill of Sale for a 1998 Sunfire motor vehicle to Ms. Rania Zabeneh. He represented to the customer that the car had not been in any accidents and was covered by a GM warranty. When the customer found that the vehicle had been in an accident and ~~Awritten off~~ so that there was no longer any GM warranty available, she advised Mr. Gerrior and asked for a refund, which he refused. Despite the intervention of the Used Car Dealer Association and OMVIC, no resolution was reached. The customer was forced to take legal action against 1080424, which action was not defended, and she obtained Judgment in the sum of \$26,609.39. Mr. Gerrior was aware of the Judgment, but made no effort to make any payments on it. Mr. Gerrior was aware that the Motor Vehicle Accident Claims Fund paid the sum of \$15,000.00, plus \$4,762.00 costs to the customer, and he failed to reimburse the Motor Vehicle Accident Claims Fund.

Michael Gerrior failed to keep the books and records of his companies on the business premises and failed to provide same for inspection by OMVIC, despite several verbal and written notices to do so.

Michael Gerrior failed to keep the garage registers up to date, contrary to the Act, despite several warnings to do so.

In respect of all the registrants, they failed to respond to numerous phone calls and collection letters from the Ministry of Finance or to live up to their obligations under the *Retail Sales Tax Act*. In regard to Eurospec (1998), it had never filed a return with proper payment and several returns were not filed at all. Mr. Gerrior failed to advise the Ministry until December 2000, that Eurospec (1998) had ceased operation since September of 1998. It has not paid approximately \$25,000.00 still owing to the Ministry of Finance.

In respect to Eastern, a return has not been filed since May 31, 1998, and Eastern is in non-compliance with the Act.

Regarding 1080424, the filings on that company were not made by Mr. Gerrior until the day before this hearing commenced. The proper payments were not remitted with the returns and the company has a balance owing to the Ministry of Finance of approximately \$10,000.00.

Michael Gerrior took the sales tax which was collected from customers as trust funds and deposited it into his general account and used the money to pay business expenses.

APPLICATION OF LAW TO FACTS:

Under Section 6 of the Act, the Registrar may refuse to renew or may suspend or revoke a registration where the applicant, under Section 5, can not reasonably be expected to be financially responsible in the conduct of business or the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty. In the case of a corporation, the Registrar may refuse to renew or may suspend or revoke under Section 5 if the corporation can not reasonably be expected to be financially responsible in the conduct of its business or, the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty.

Under Section 22 of the *Retail Sales Tax Act*, any amount collected on account of tax by a vendor is deemed to be held in trust for Her Majesty in Right of Ontario and separate and apart from the vendor's property and it is to be paid over by the vendor in the manner and at the time provided under the Act and regulations.

The *Motor Vehicle Dealers Act* is a public protection statute and as such, adherence to its requirements are necessary in order to obtain or to maintain registration under the Act. Mr. Gerrior's failure to allow OMVIC to inspect the books and records of its company denied OMVIC the opportunity to ensure that the objects of the Act were being met and the public was being protected. This in itself was a major breach of the Act and could not be excused on the basis that his Accountant would not give back his records until his account was paid.

Mr. Gerrior made no attempt to retrieve the books and records for the inspection by OMVIC to comply with the Act.

Mr. Gerrior's misrepresentation to a customer regarding a vehicle he sold not having been in a prior motor vehicle accident and being covered by a GM warranty and his failure to reimburse either the customer or the Compensation Fund, go directly to the issues of financial responsibility in the conduct of his business and to integrity and honesty.

Mr. Gerrior's failure to comply with the *Retail Sales Tax Act* and make filings on time or with the proper remittances, combined with the continued breaches of both the agreement that he entered into with the Ministry of Finance and the Consent Order, goes directly to the issue of whether the applicant could reasonably be expected to carry on business in accordance with law and with integrity and honesty. This is also reflected in the failure to remit monies held in trust which he had intermingled with his company's general account and spent for his company's business purposes.

Mr. Gerrior was not a novice in the requirements of the *Retail Sales Tax Act*. His own prior conviction under that Act, along with the conviction of one of his former companies goes directly to the issue of the past conduct of an officer or director and whether that past conduct affords reasonable grounds or belief that the business of the companies will not be carried on in accordance with law and with integrity and honesty.

Several other statutes, such as the Real Estate and Business Brokers Act have similar wording to the Motor Vehicle Dealers Act. In two matters decided under that Act, Chopra (1993) 25 CRAT 514 and Griese (1993) 25 CRAT 765, it was emphasized that the Tribunal must consider the cumulative affect of the applicant's past conduct. This was also decided in Boce (1998) O.C.R.A.T.D. No. 114, which was a Decision under the Motor Vehicle Dealers Act, where it was stated that the emphasizes must be on Apast conduct@.

The Tribunal was also directed to the matter of Reznisk (1990) 20 CRAT 65 as referred to in Udell (1995) CRAT No. 4, which stated that judgments against an applicant which remain unpaid provide evidence that the applicant is not capable of satisfying the test of financial responsibility set forth in Section 5 (1)(a) of the Act.

As was stated in Brenner (1983) 19 CRAT 58 (Div.Ct.), the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks that the Registrar is in error in concluding that the past conduct of the applicant affords reasonable grounds for belief that the Applicant will not act in accordance with the law and with integrity and honesty. This was a decision under the *Motor Vehicle Dealers Act*, R.S.O. 1980, Chapter 299.

The Tribunal is aware of the serious consequences of the Registrar's proposal which will result in the denial of a person to earn an income in that person's chosen business. It must carefully consider all of the evidence before deciding if the Registrar has established the grounds necessary under the Act for the Registrar to come to the conclusion set out in the Registrar's proposal.

In the present case the Tribunal has no hesitation in finding that the Registrar has established the grounds to direct the Proposal to be carried out. Mr. Gerrior has shown that he is a stranger, not only to the truth, but to the acceptance of the consequences of his own acts. He felt that his past conviction under the *Retail Sales Tax Act* and his failure to adhere to the terms of his own agreement and with the prior Consent Order should have no bearing on these proceedings as the companies that were involved are no longer carrying on business. He blamed his accountant for his not being able to produce the books and records of his companies, even though he had not paid his accountant. He blamed his office staff and his accountant for not keeping the garage registers up to date, even though he was in charge of the companies. He blamed his financial partner for not continuing to provide enough funding for him to make payments to which he had obligated himself and his companies. He blamed his lawyer for not providing him with proper legal advice. He blamed his sales staff for writing a Bill of Sale on the wrong company when he was the one that signed the Bill of Sale. He blamed his landlord for charging too much rent, when he was the one who agreed to the rent. He blamed OMVIC for requiring him to pay his arrears of retail sales tax in payments as too much per month, even though he was represented by legal counsel and the Consent Order was the result of a negotiated amount. In summary, Mr. Gerrior exhibited no remorse and accepted no responsibility for his past conduct. His complete disregard for the law and for keeping his own agreements justified the Registrars reasonable belief that neither he nor his companies would carry on business in accordance with the law and with integrity and honesty.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar to carry out the Proposal dated June 28, 2000, to revoke the registration of the salesperson, Michael Gerrior, 1080424 Ontario Ltd. and Eastern Auto Wholesale Inc.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice Chair, Presiding

RELEASED: March 9, 2001

LACIKA

EDUARD AND JOZEFINA LACIKA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

EDUARD LACIKA, representing himself and Jozefina
Lacika

MICHAEL BADER Q.C., Counsel, representing the Ontario New
Home Warranty Program

DON POCOCK CONSTRUCTION LIMITED, the Added Party, was
not represented

DATES OF

HEARING: February 12 & 13, 2001 and March 2, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Eduard and Jozefina Lacika (the "Applicants") from a decision of the Ontario New Home Warranty Program ("the Program") set out in a written decision dated July 14, 2000.

The Applicants' appeal relates to three complaints which are:

1. Water penetration into the basement of the Applicants' home at the foundation on the south-east corner of the breakfast nook.
2. Water hammering that occurs in the main floor bathroom plumbing and the lower floor bathroom plumbing due to the absence of air chambers.
3. Insufficient clearances in the masonry chimney serving the lower level wood stove constituting a violation of the Ontario Building Code.

The Applicants appeal is based upon Section 14(1)(b) of the *Ontario New Home Warranties Plan Act* which reads as follows:

(1) Where,

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; ...

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

THE EVIDENCE:

The evidence for the Applicants

The only witness for the Applicants was Eduard Lacika ("Lacika") whose testimony on the three complaints was as follows.

1. Water Penetration

Lacika confirmed that the date of possession of his home was November 15, 1997.

On November 15, 1997 Lacika addressed a letter to the Program. The initial paragraph of that letter reads as follows:

"My one year new home warranty is going to expire on November 21, 1997, and as of today, November 15, 1997, I have deficiencies and uncompleted items on my house. I am filing these with the Ontario New Home Warranty Program."
(Exhibit 2, page 60)

On January 19, 1998 both Applicants signed a conciliation request form in which they requested a conciliation inspection relating to a list of items. (Exhibit 3, pages 58 and 59) All the items were contained in the two pages sent by the Applicants together with the conciliation request form. (Exhibit 3, pages 60 and 61)

On the conciliation request form and the list of complaints that accompanied it there was mention of neither water penetration into the basement of the home nor water penetration at the southeast corner of the breakfast nook. Lacika confirmed under cross-examination that between November 1997 and January 19, 1998 there was no water penetration into the basement.

On February 17, 1998 a conciliation inspection took place with the Program's representative Tony Allegranza. A conciliation inspection report was completed and dated February 17, 1998 which report was sent by mail to Lacika with a letter dated February 24, 1998.

By letter dated April 17, 1998 over his signature, Lacika wrote to the Program as follows:

"Subject: Expert Advice Request from ONHWP (for item 7 on page 2)

Builder attempted repairs to east garage and utility room east walls without success.

The water leaks are worse after repairs. A new water leak(after repairs) occurred in the utility room, where water is dripping from the 3rd joint (counted from east). If there is rain and wind from east.

Pls. advise builder how to repair above leaks." (Exhibit 3, page 42)

Lacika in his testimony confirmed that "item 7 on page 2" referred to in his above letter was in reference to item 7 of the conciliation inspection report of February 17, 1998, which read as follows:

" **7. Complaint**

Garage – dampness observed along east wall

Seals for bottom of doors should be upgraded (gap observable).

Man door back of garage, water penetration through sill plate.

Overhead doors require reinforcing before using automatic opener.

Observation/Comment:

A water test could not be conducted to determine point of water entry, the builder is asked to address at spring time.

The builder is also asked to reinforce the top of the garage doors.

Reason:

Decision not rendered, seasonal item unable to be determined at this time."

Lacika confirmed that in his letter of April 17, 1998 he made no comment or reference to water hammer. Lacika stated under cross-examination that his next communication with the Program was his letter of August 31, 1998. In that letter Lacika listed eight items which he stated were outstanding items that required repair by the builder. The eighth item reads as follows:

"Following is a list of outstanding items required to be repaired by the builder:

...

8) The builder carried out repairs to the east walls and windows in May, 1998 to stop water leaks in that area. There has not been a rain storm with wind from the east since May 1998, and thus no standpoint can be taken regarding the effectiveness of these repairs." (Exhibit 3, page 57)

Lacika requested a reinspection of the home by the Program and such reinspection was carried out by Allegranza on November 2, 1998. On the memorandum dated December 15, 1998 prepared by Allegranza regarding his reinspection, he notes that item eight of Lacika's letter of August 31, 1998 had been resolved. Under cross-examination Lacika stated that when Allegranza attended at the reinspection on November 2, 1998, at which Lacika was present, he did not report any water problems.

Lacika confirmed in his testimony that on March 8, 1999 he addressed a letter to the Program under the heading "Subject: status of repairs". In this letter Lacika states:

"1. The following items listed in my letter dated August 31, 1998 were repaired by the builder: 1, 2, 3, 6, and 8.

...

3. A storm window was installed on the East window of the breakfast nook on March 9, 1999 to stop rain from leaking into the basement (Item 8)."
(Exhibit 4, page 41)

The next written communication from Lacika to the Program was on October 21, 1999. Lacika testified that on that date he wrote to the Program to report that water leaked into his basement pursuant to a rain storm on October 13 and 14, 1999 and requested repairs be arranged as soon as possible. On December 28, 1999 the Applicants completed and signed a conciliation request form requesting conciliation of all three issues complained about. (Exhibit 4, page 36)

On March 29, 2000 a reinspection of the Applicants' home took place, and on April 27, 2000 a written conciliation report was signed by Chad Foresheew, a warranty representative of the program who had taken over the investigation of the Applicants' complaints from Allegranza who had left the Program. (Exhibit 4, page 28 through 32)

The Program determined in the conciliation report that the water leak complained of by the Applicants was not covered under warranty and accordingly denied Applicants' complaint. The report relating to this complaint reads as follows:

" **1. Complaint:** Water leaks into my basement (item 3 in the letter dated March 8, 1999, and item 8 in the letter dated August 31, 1998) – Ref. No. 4171-841767-WCRO. I faxed a letter to ONHWP (Mr. Tony Allegranza) regarding this item on October 21, 1999.

Observation/Comment: The owner indicated this refers to the southeast corner of the breakfast nook foundation. Water penetration in this area was first reported in writing to ONHWP on April 17, 1998. The owner subsequently advised ONHWP on March 8, 1999, that the builder's repairs (brickwork) done in May 1998 were successful

However, the owner explained that between May 1998 and March 1999 other leaks occurred in this area but he did not make any written reports of these leaks to ONHWP. On March 9, 1999, the window manufacturer installed a storm window on the south breakfast nook windows, which has apparently significantly reduced the leakage.

On October 21, 1999, the owner again reported water penetration to ONHWP; this occurred eleven months after the statutory water penetration warranty expired. At the time of the inspection, the basement insulation was removed from the foundation wall in the southeast breakfast nook corner and the wall was dry. Due to the owner's tight schedule, a short water test was performed at this location focusing on the HRV vent hoods and brick veneer flashing, but no water penetration was observed. The exterior caulking appeared in good condition and there were no significant cracks in the brick veneer that could allow water to penetrate the building envelope. The grade slopes toward the house at this corner.

Reason: ONHWP has not observed water penetration at any time in this home. However, the builder has responded several times to make repairs. ONHWP does not provide warranty beyond the statutory warranty on items that have not been warranted by ONHWP. Section 13(4) of the Ontario New Home Warranties Plan Act (the "Act") and Section 4(1) of Regulation 892 require written notice to be received within the applicable warranty period. Therefore the October 21, 1999 complaint is late because it was not received within the two-year warranty period for water penetration. No defect in workmanship or material resulting in water penetration is noted. Subsidence of soil around the house is excluded from warranty in Section 13(2)(h) of the Act." (Exhibit 4, page 30)

In cross-examination, Lacika stated that between the date in May 1998 of window installation and repairs and March 1999 when he wrote that the leaking into the basement had been repaired he "had no problem with water penetration". Lacika further stated that between November 2, 1998 when Allegranza reinspected the house and December 1999 he had not written to the program regarding water leaks.

2. Water Hammering in main floor bathroom and lower floor bathroom – absence of air chambers

On Exhibit 3 page 61 the Applicants note the water hammer complaint and that they required an "air chamber" to deal with this complaint.

On February 17, 1998 a conciliation inspection took place with the Program's representative Allegranza. A conciliation inspection report was completed and dated February 17, 1998. This report was sent under cover of a letter dated February 24, 1998 to Lacika.

In the report the complaint of Lacika regarding water hammer was referred to as an item "not covered under warranty" with the comment that this item (as well as certain other items) was "done prior to conciliation and considered resolved." (Exhibit 3, page 49)

Lacika stated under cross-examination that he did not communicate with Allegranza, the author of the report, to dispute the statement quoted above.

Lacika testified that there was no provision made by the builder regarding air chambers to prevent water hammer occurring in the plumbing in the home. The first complaint made by Lacika to the program was by letter dated November 15, 1997 in which he noted that "water hammer observed – air chamber required".

Lacika contended that under the Ontario Building Code ("O.B.C. or Code") water hammer arresters or air chambers should be installed by the builder so as to prevent water hammer (Article 7.6.1.13 of the O.B.C. 1993 as amended). The lack of air chambers or water hammer arresters was a violation of the O.B.C.

Lacika stated in his testimony that a conciliation inspection of the home was carried out on February 17, 1998 when both Applicants and the Program's warranty representative, Allegranza, were present. In the conciliation inspection report issued by Allegranza pursuant to the inspection there were nine complaints. All nine complaints were noted as "not covered under warranty"; the reason given was that all nine complaints had been "resolved. One of such complaints was "water hammer observed in plumbing." (Exhibit 3, page 49)

Lacika conceded that he received this conciliation inspection report from the Program and did not dispute that the report said that the complaint of water hammer had been resolved.

Under cross-examination Lacika stated that the complaint of water hammer was not raised in his letter of April 17, 1998 addressed to the Program wherein he wrote regarding the conciliation inspection report of February 17, 1998. In that letter he only mentioned the complaint regarding water leaks. Lacika testified further under cross-examination that the next letter he addressed to the Program was that of August 31, 1998 in which he made no mention of this particular complaint although he listed eight other "outstanding items that required to be repaired by the builder". Lacika states that "at this time" he was not experiencing water hammer problems and that that complaint was "only a minor item" of "no alarming emergency".

Lacika went on to state that on October 27, 1999 an inspection at his home was carried out by himself and a municipal inspector that he had called in to determine the cause of water hammer that he had observed. At this inspection it was found that there was an absence of air chambers on the plumbing in the main bathroom and lower floor bathroom. On November 2, 1999 Lacika then addressed a letter to the builder advising of this inspection and the findings pursuant to that inspection. A copy of this letter was also addressed to the Program. (Exhibit 3, page 31)

Lacika testified that during an inspection of the home by the Program's warranty representative, he was requested by the representative to open a hole in a bulkhead to assist in determining the cause of the water hammering problem. Lacika refused to allow a hole to be made as he felt there were safety issues involved in exposing services that may be located in the bulkhead.

3. Insufficient clearances from combustibles to the masonry chimney serving the lower level wood stove.

At the conciliation reinspection held at the home on November 2, 1998, Lacika testified that this issue was pointed out to the Program's warranty representative, Allegranza. Lacika considered this issue to pose a safety and fire issue.

Lacika further testified that at the beginning of 1998 he pointed out to Don Pocock of the builder that there was a violation of the O.B.C. because there was not a 2" clearance to combustibles for the interior masonry chimney. He was assured by Pocock that he need not worry as there was a metal plate and by using a metal plate there was no safety issue.

Lacika further testified that he knew that warranty protection under the *Ontario New Home Warranties Plan Act* (the "Act") was limited to two years when there are violations of the O.B.C.'s health and safety provisions. He knew of this from having read the Program's documents which he, like all new homeowners, had received from the Program upon obtaining possession of the home. He also testified that it was not until December 9, 1999 that he first notified the Program of this particular complaint in writing.

Under cross-examination, Lacika was questioned regarding the letter dated August 16, 1999 he had written to the Program (Exhibit 4, page 56). Lacika stated that in that letter he was only requesting disclosure of documents by the builder and was informing the Program of such request which he had directed to the builder. He stated that he wished to have disclosed to him a document regarding the "minimum clearances for wood stove chimney" and conceded he did not mention he was making any claim in regard to a chimney. He stated he was merely requesting documents and was indicating nothing more.

The evidence for the Program

The first witness for the program was Chadwick Russel Foreshew ("Foreshew").

Foreshew testified that he has been employed by the Program as a warranty representative for the past six and one half years. Prior to that he was employed as a building official with the Municipality of Peterborough and before that was a plan examiner and building inspector in the Municipality of Aurora. He also testified that he has a college diploma in civil engineering.

Foresheew went on to state that he became involved in this matter in March 2000 upon the retirement of warranty representative Allegranza. At that time, as a result of a conciliation inspection request by Lacika, he arranged an appointment for a conciliation inspection to take place on March 29, 2000. There were three issues involved in the inspection which are the issues that form the basis of the Applicants' claims. Foresheew informed the builder of the date and place of the inspection and the three issues involved. The builder however did not attend the conciliation meeting on March 29, 2000. Foresheew and Lance Gibson, also a warranty representative, attended on behalf of the Program and Lacika represented the Applicants.

While in attendance, Foresheew made written notes of his observations on a "Field Report". (Exhibit 3, pages 10 and 11) This was his normal practice when attending a conciliation inspection.

Foresheew dealt with the three issues as follows.

1. Water Penetration

Foresheew testified he took certain photographs of the home at the time of inspection and described what the photographs depicted.

Photograph identified as #4 (Exhibit 8) depicts the southeast corner of the home's breakfast area where Lacika indicated to Foresheew that the water penetration occurred.

Photographs #3 and #5 (Exhibits 7 and 9 respectively) depict the interior of the home's basement at the south east corner of the basement. These two photographs were taken after a water test had been undertaken on the day of inspection.

Foresheew further stated he conducted water tests at the home during the inspection. He directed water from a garden hose onto the exterior of the home as depicted in photograph #4 (Exhibit 8) where the breakfast nook on the east side of the home is situated. Lacika was positioned inside of the home's basement during the water test and reported to Foresheew that he observed no water penetration into the basement either during or after the test.

Foresheew further testified that at the time of his inspection the insulation for some 2 feet above the floor in the corner of the basement had been peeled back for about four feet on either side of the south-east corner of the basement. This had afforded him an excellent opportunity to view any water penetration. Lacika confirmed to Foresheew that he himself had observed no water penetration on that day.

Foresheew testified that he had inspected the exterior brickwork of the home at its south-east corner as well as the caulking around the windows in that area and the vents from the basement to the exterior (Photograph #4 Exhibit 8). The brick work caulking and the vents all appeared to be in good order and there was no defect in workmanship or materials. The weep holes at the base of the brick veneer at the southeast corner were found to be clear.

Insofar as the conciliation inspection of March 29, 2000 and the report of April 27, 2000 are concerned, Foresheew confirmed he attended the inspection and authored the report. He further stated that he had at no time observed water penetration into the home. Foresheew also stated that at no stage has Lacika furnished the program with a report by a third party regarding water penetration or matters generally related to the three issues involved in this hearing.

Foresheew contended that no defect in workmanship or materials was observed that would have resulted in water penetration.

Foresheew testified further that on August 31, 1998 Lacika wrote to the Program listing outstanding items in the home that required repairs. (Exhibit 4, page 42) In that letter, he stated that the builder had carried out repairs to the east walls and windows of the home in May 1998 to stop water leaks in that area. That the effectiveness of the repairs could not be determined as there had since that date been no rain storm with wind from the east. Subsequently, on March 8, 1999 Lacika again wrote to the Program under the heading of "status of repairs" (Exhibit 4, page 41) in which he stated:

"1. The following items listed in my letter dated August 31, 1998 were repaired by the builder: 1,2,3,6 and 8.

.....

3. A storm window was installed on the east window of the breakfast nook on March 9, 1999 to stop the rain from leaking into the basement (item 8)".

Foresheew further stated that the next letter received by the Program from Lacika was dated October 21, 1999. (Exhibit 4, page 40) This letter stated as follows:

"Subject: water leaks into my basement (item 3 in my letter dated March 8, 1999 and item 8 in my letter dated August 31, 1998.)

There was a rain storm with winds from the east on October 13 and 14, 1999, and water leaked into my utility area of my basement".

Foresheew stated that the letter of Lacika dated October 21, 1999 clearly indicated that the water penetration reported by Lacika as having occurred on October 13 and 14, 1999, took place some eleven months after the statutory period for water penetration warranty expired.

2. Water Hammering

Foresheew drew the Tribunal's notice to certain photographs he had taken at the home at the time of the conciliation inspection.

Photographs #1 and #11 (Exhibit 10) (which are, in fact, one and the same photograph) depict a then existing hole in the walk-in closet in a bedroom through which copper piping could be seen which services the shower on the opposite side of the wall.

Photographs #9 and #10 depict holes in a wall, but it was not possible to determine whether there were air chambers installed as the holes were too small to allow adequate viewing.

Foresheew testified that Article 7.6.1.13 of the Code states as follows:

"Provision shall be made to protect the water distribution system from the adverse effects of water hammer".

He stated that there is no requirement under the Code to have water hammer arresters or air chambers on every faucet and that air chambers or arresters are generally installed on the furthest faucets from the pressure tank. He stated that Article 7.6.1.13. is intended to protect the system from adverse effects of water hammer. He noted that there were air chambers on each side of the shower faucet. This was observed by removal of escutcheon plates. However, due to limited observation areas through the escutcheon plates it was not possible to ascertain if they were installed in other locations. Lacika had refused to allow a hole or holes to be made in a drywall bulkhead to better view whether air chambers had been installed elsewhere.

Mr. Foresheew testified that only minor rattling or vibrations were observed in the vicinity of the bulkhead when the faucet was suddenly closed and these minor aspects could not be investigated due to the insistence by Lacika that there was to be no inspection hole made in the bulkhead. When at least three faucets were closed normally, no rattling or vibration was observed. No damage or adverse effects were observed to the piping that was inspected when the faucets were operated normally. Foresheew accordingly did not warrant this item having found the rattling or vibration to be minor and only observable when there was a sudden closing of a faucet. There was, according to Foresheew, no defect in workmanship or material and there was no violation of the Code as it does not require prevention of water hammer but only the protection of the water distribution system from the adverse effects of water hammer.

3. Masonry Chimney - Insufficient Clearance

Foresheew testified that the masonry chimney which serves the lower level wood stove contains a flue liner and the first floor joists are installed tight to the chimney with sheet metal sandwiched in between. (Exhibit 10, photograph 8). Foresheew conceded that Article 9.21.5.1.(1) of the Code requires a minimum of 2" clearance to combustibles for interior masonry chimneys and that there has been a clear violation of this article due to insufficient clearance. However, Foresheew stated that this issue was raised with the Program for the first time by Lacika in his letter to the Program dated August 16, 1999. (Exhibit 4, page 56) According to Foresheew, this was the first time Lacika made any mention to the Program of "minimum clearance for wood stove chimney", and Lacika's letter was a request for documentation on chimney clearances and in no way indicated a claim in regard to a chimney. This letter was the first indication of this issue and was not received by the Program within the two-year warranty period.

FACTS FOUND PROVEN:

Based upon the evidence presented to the Tribunal, the following are the facts found proven in this matter.

1. The date of possession by the Applicants of the home was November 21, 1996.
2. Water penetration at the south-east corner of the home was initially reported by Lacika in writing to the Program on April 17, 1998.
3. On August 31, 1998, Lacika advised the Program in writing that the builder had carried out repairs in May 1998 in order to stop water leaks in the east walls and windows of the home and that the effectiveness of such repairs could not be determined at that time due to no rain storm and wind having occurred since May 1998.
4. On March 8, 1999, Lacika advised the Program in writing that the water leaks at the south-east corner of the home had been repaired by the builder and that a storm window had been installed by the builder to stop rain from penetrating into the home's basement.
5. On October 21, 1999, Lacika advised the Program that water leaked into the home's basement on October 13 and 14, 1999.
6. At no time did the warranty representatives of the Program observe water leakage into the Applicants' basement.
7. The first occasion that water hammer was reported to the Program was by Lacika's letter to it dated November 15, 1997.
8. Certain air chambers in the home's water distribution system had been provided for by the builder to protect the system from the adverse effects of water hammer.
9. When the home's faucets are operated under normal conditions, there is no noticeable adverse effects of water hammer. Only when faucets in the main and lower floor bathroom showers were abruptly shut was minor rattling observed in the drywall bulkhead.
10. No damage was noted or observed to the water supply piping and there was no violation of the Code in the construction of the piping. The piping was observed to be constructed in a workmanlike manner and is free of defects in material.
11. The masonry chimney serving the lower level floor wood stove was constructed in violation of Article 9.21.5.1(1) of the Code as it failed to have the required minimum 2" clearance to combustibles for interior masonry chimneys.
12. The Applicants first reported in writing the complaint of insufficient clearance regarding the masonry chimney to the Program on August 17, 1999.

THE LAW:

The Act's relevant portions are:

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such warranties as are prescribed by the regulations.

.....

13.(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

.....

14.(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

Regulation 892 to the Act states as follows:

4.(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

.....

14. Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the home is completed for possession.

15.(2) Every vendor of a new home warrants to the owner

(a) that the home is constructed in a workmanlike manner and is free from defects in materials including windows, doors and caulking such that the building envelope of the home prevents water penetration;

.....

(d) that the home is free from violations of Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy; and

.....

(3) The warranties described in subsection (2) apply only in respect of claims made within two years after the home was completed for possession, in respect of homes that were enrolled, or should have been enrolled, after the 31st day of December, 1990.

.....

APPLICATION OF LAW TO FACTS:

The onus of proof on a balance of probabilities rests upon the Applicant.

Under section 14(1)(6) of the Act, the Applicants must prove that there is a cause of action for damages against the builder resulting from breach of warranty by the builder and must prove the amount of such damage for which he is entitled to be paid by the guarantee fund subject to the limits as fixed by the regulations to the Act.

The Applicant has three claims:

- (a) water penetration into the home's basement;
- (b) water hammering in the main and lower floor bathroom; and
- (c) insufficient clearances from combustibles to the masonry chimney serving the lower level wood stove.

Before dealing with each of the Applicant's individual claims, the Tribunal records that there was no evidence given on behalf of the Applicant in regard to damages. No evidence, whether expert or otherwise, was placed before the Tribunal to prove damages and thereby discharge that onus. Considerable anger and resentment was shown towards the Program during the Applicant's testimony, so much so that despite the repeated urging of the Tribunal that Lacika address the issues involved, he repeatedly testified to what he saw as a lack of ethics on the Program's part, lack of guidelines for and control by the Program of its warranty representatives and lack of ethics when dealing with the issues. Despite the Tribunal ruling on the irrelevance of these aspects, the Applicant repeatedly raised them, ignored the Tribunal's rulings, failed to deal with the issues at hand, and presented no evidence to prove damages.

On the issues before the Tribunal, the evidence of the Applicant and of the warranty representative Foresheew representative diverged on many occasions. The Tribunal, after observing the demeanor of Lacika and Foresheew when they testified, preferred the evidence of Foresheew who gave his testimony in a straight forward, clear and concise manner. Additionally, Foresheew displayed a considerable knowledge on home construction and made reasoned statements on the issues involved. In contrast, the Applicant displayed little or no knowledge regarding technical aspects of the issues involved.

Water Penetration

Sections 15(2)(a) and section 15(3) of Regulation 892 to the Act provide that the vendor (builder) of a home warrants that the home is constructed in a workmanlike manner and "is free from defects in materials..... such that the building envelope of the home prevents water penetration" and that such warranty applies "only in respect of claims made within two years after the home was completed for possession....."

The Applicants' home was completed for possession on November 21, 1996 and the water penetration warranty therefore expired on November 20, 1998. Neither the Act nor the regulations thereto provide warranties after two years of taking possession of a home. In this instance, repairs regarding water penetration were carried out by the builder during the two-year warranty period. Subsequent thereto, Lacika acknowledged in writing to the Program that water leakage into the home's basement had been "repaired by the builder." (Exhibit 4, page 4). Water penetration into the home subsequent to the two-year warranty period falls outside section 15(3) of Regulation 892. The water penetration reported by Lacika in October 1999 fell outside the two-year warranty period; accordingly, the Applicants' claim under this heading must fail.

The onus of proof is on the Applicants to prove their damages under section 14(1)(b) of the Act. Even had the Applicants complied with section 15(3) of the Act (which is not the case), they placed before the Tribunal, no evidence, documentary or otherwise, regarding damages. On the evidence before the Tribunal, it is clear that after October 1999 no water penetration occurred or was reported in writing to the Program.

Water Hammering

The Tribunal finds that water hammer was initially reported in writing to the Program on November 15, 1997 (Exhibit 3, pages 60 and 61). When warranty representative Allegranza held a conciliation inspection on February 17, 1998 nine items were reported to him by the Applicants as having been "resolved". Accordingly, on Allegranza's conciliation report of February 17, 1998 (Exhibit 3, pages 47 to 51) under "items not covered under the warranty" these nine items were recorded as "resolved". The seventh item recorded as "resolved" on the conciliation report was the Applicants' complaint of "water hammer observed in plumbing". This report was sent to the Applicants, and they did not contest Allegranza's statement that this aspect had been resolved.

When Lacika wrote the Program on August 31, 1998 (Exhibit 3, page 57) under the heading of "status of repairs" of the eight "outstanding" items listed as requiring repairs, water hammering was not mentioned. Under cross-examination, Lacika stated that he considered this issue as "a minor item".

The Tribunal accepts the evidence of Foresheew as to his observations of the plumbing when he attended on inspection at the home. Operated normally, there was no problem that he noticed. When certain faucets were suddenly shut, a minor rattle was heard in an overhead bulkhead. Water hammer arresters were seen by Foresheew where escutcheon plates were removed to permit observation. Where plumbing lines could not be observed, Foresheew was not permitted by Lacika to make openings to allow viewing. On the basis of Foresheew's observations, the Tribunal finds there was, at most, a minor rattle heard when certain faucets were suddenly closed. The Applicants provided no independent evidence contesting the incorporation of hammer arresters in the plumbing.

The Tribunal further finds that the Code calls for the protection of the water distribution system from the adverse effects of water hammer (underlining is that of the Tribunal). No adverse effects or damage were shown to exist by Lacika. The minor rattle heard when certain faucets were suddenly opened or shut does not indicate a violation of the Code or damage being caused due to there being no hammer arresters. The Applicants have not shown a violation of the Code and have introduced no evidence of defective workmanship or materials used in the plumbing of the home.

The Tribunal appreciates that Applicants have a significant interest in the quality of their homes, but the warranties under the Act have limits. As stated by the Tribunal in *Mark Teitelman* (1987) 16 CRAT at page 181:

The Teitelmans were not the authors of the defects and the Tribunal understands that they are a constant source of irritation to them. However, they must accept the fact that no house new or old is perfect or is warranted to be perfect. Floors in stairs will squeak, wood will shrink and wall cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonable acceptable levels. The limited warranty provided by the *Ontario New Home Warranties Plan Act* recognize these facts and this Tribunal is obligated to make findings in accordance with the statutory provisions and not otherwise.

The Tribunal stated in the decision of *Saporita* released on July 28, 1999:

Those few complaints that were not resolved and which have now come before this hearing indicate to the Tribunal that the Applicants were seeking unrealistic standards of perfection and were not always reasonable in their expectations. Perfection and nothing less than perfection is not a reasonable expectation when dealing with what can be termed a standard home. One does not live in a perfect world and allowances must be made for minor imperfections. If imperfections exist in the Applicants' home they are, from the evidence tendered, minor in nature and do not result in aesthetically displeasing results.

Masonry Chimney

The Applicants have established a clear violation of the Code; there is no minimum clearance of 2" as required by Article 9.21.5.1(1) of the Code.

The uncontroverted evidence of Foreshow was that for the first time on August 16, 1999 Lacika in a letter addressed to the Program, mentioned that the builder had been requested to provide documents concerning "minimum clearances for wood stove chimney". (Exhibit 4, page 56) However, this letter is not notification of a claim being made, neither under section 4(1) of Regulation 892 to the Act as read with section 15(2)(d) and (3) of that regulation or otherwise. The letter is nothing more than a request for disclosure. Nowhere in the letter is there an indication of a claim being made regarding the wood stove chimney's clearance.

Accordingly, the Tribunal finds that the requisite notice under the Act and regulations was not given to the Program and there is no warrantable claim.

DECISION:

By virtue of authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claims.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: March 19, 2001

NORTH YORK AUTO AND ALI REZA KATEB SAFA

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NORTH YORK AUTO GALLERY LIMITED AND ALI REZA KATEB SAFA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: August 1, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NORTH YORK AUTO GALLERY LIMITED AND
ALI REZA KATEB SAFA

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 6, 2000;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to December 18 and 19, 2000;

AND WHEREAS, following attendances at the hearing on December 18, 2000, the parties agreed to adjourn the hearing till March 26, 27 and 28, 2001;

AND WHEREAS, counsel for the Applicants have requested a further adjournment due to the illness of one of the Applicants;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., on Monday, June 18, 2001, and to continue at 9:30 a.m., on June 19 and 20, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 26, 2001

ALPHA CLUB TRAVEL

ALPHA CLUB TRAVEL

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

JEFF UNO & TERESA SALEIRO, Agents representing the Applicant
DORIAN WERDA, Agent, representing the Travel Industry Council of
Ontario

DATE OF
HEARING:

November 23, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal brought by Alpha Club Travel from a decision of the Ontario Travel Industry Council of Ontario (the "Respondent") contained in the Respondent's Decision Letter of September 1, 2000. The letter refused the Applicant reimbursement from the Ontario Travel Industry Compensation Fund ("the Fund"). The basis of the refusal was that the Applicant's claim was not been within 6 months from the date giving rise to the claim as required by Section 53 of Regulation 806/93 of the *Travel Industry Act* ("the Act").

FACTS:

The Applicant is a duly registered travel agent under the Act. The Applicant claimed reimbursement from the Fund respecting travel services contracted for by a travel wholesaler Premium Holidays. The travel services contracted for and for which reimbursement is sought was a "air and land" package worth \$3,105.68. The event giving rise to the claim was the bankruptcy of Premium Travel on January 31, 2000. As the time for filing a claim began running from this bankruptcy date, the Applicant had until August 1, 2000 to files its claim with the Respondent. The Applicant delivered its claim to the offices of the Travel Industry Council of Ontario on August 10, 2000.

The Applicant submitted its claim for compensation on a Travel Agent Claim Form. Printed prominently upon the form is a warning to the effect that claims must be submitted within six months of the event giving rise to the claim.

There was no evidence adduced of bad faith or improper conduct on behalf of either party, and the reason for the Applicant missing the filing deadline was simple oversight due to personnel problems within its office. The evidence indicates that the Respondent attempted to warn the Applicant of the approach of the six-month deadline.

THE LAW:

The legislative scheme allowing for the payment of compensation to the traveling public and to retail and wholesale registrants under the Act flows from Section 27:

27. The Lieutenant Governor in Council may make regulations,

.....

(n) providing for the establishment, maintenance and administration of a compensation fund in trust by travel agents and travel wholesalers and prescribing the form and terms of the trust;

(o) providing for the payment of levies into the compensation fund by travel agents and travel wholesalers and prescribing the amounts thereof;

(p) providing for payment out of the compensation fund of claims and procedures to be followed in respect thereto;

(q) requiring participation in the compensation fund by travel agents and travel wholesalers;

.....

The operations of the Compensation Fund are found in Part III of Regulation 806/93:

44.1 The Council shall administer and manage the affairs of the Compensation Fund.

The handling of claims under Part III of the Act is contained in Section 49:

49. The board of directors shall determine whether a claim, or a part of one, meets the requirements of this Part and shall determine the eligible amount of the claim.

The entitlement of a travel agent to be compensated from the Fund is found in section 51 of Part III of Regulation 806/93:

51.(1) A travel agent is entitled to be reimbursed for money paid by the travel agent to reimburse a customer or to provide alternative travel services to the customer if the customer paid the travel agent and if,

- (a) the travel agent acted in good faith and at arm's length with a travel wholesaler;
- (b) the travel agent passed all or part of the customer's money to the travel wholesaler; and
- (c) the travel services were not provided to the customer.

.....

The time limitation imposed upon filing claims is found in Section 53 of Regulation 806/93:

53. A customer or registrant shall make a claim for reimbursement in writing to the board of directors within six months after the event that gave rise to the claim for reimbursement.

ISSUE:

Is the Applicant entitled to compensation from the Compensation Fund when the Applicant's claim was filed with the Respondent after the expiry of the prescribed six month limitation period?

APPLICATION OF LAW TO FACTS:

A request was made by the Tribunal to the Program for further representations as the authority under the Act for the Lieutenant Governor in Council to enact subordinate legislation setting out limitation periods for the submissions of claims for compensation.

The parties duly forwarded submissions for which the Tribunal is grateful.

The Respondent directed the Tribunal to the various subsections of Section 27 listed above. While these subsections delegate legislative authority to set up a compensation scheme they do not expressly grant authority to impose limitation periods upon persons wishing to claim against the Fund. Indeed, the delegated authority in Section 27 does not grant the Lieutenant Governor in Council authority to specify persons eligible for compensation, but only those who have to pay into the Fund. Ordinarily, if rights are to be created, they should not be abridged by subordinate legislation unless specific authority to do so is granted in the governing legislation. Here, rights to compensation are being abridged by the imposition of a limitation period. For effect to be given to that restriction, the authority for that restriction must be inferred from the intent of the governing legislation.

The Respondent's position is that the *Travel Industry Act* contains the legislative intent necessary to support the imposition of a limitation period. The Act provides for a scheme to regulate the industry for the benefit of the users of travel services. Part of that scheme is to compensate persons such as the Applicant who find themselves out of pocket as a result of certain defaults. The Fund providing such compensation is established by the authority granted the Lieutenant Governor in Council by Section 27(n) and (o). That delegation of authority is explicit and clear. Section 27(p) deals with the authority to regulate payments out of the Fund and, it was argued, the authority to pay such compensation implies limits or restrictions on that payment. Such inferences can be drawn, in the Applicant's submissions,

from the implied necessity of having a coherent method of managing the Fund. If, for example there were no time limits within which claimants had to submit their claims, the management of the Fund would be seriously hampered. As long as the time limit is not on its face unreasonable and does not offend the overall legislative scheme, the time limit is authorized by the Act. The six month time limit under Section 53 of Regulation. 806/93 the Respondent submitted, is such an authorized limitation on the Applicant's right to compensation.

The Tribunal agrees with the submissions of the Respondent.

DECISION:

The Tribunal is satisfied that the establishment of the six-month limitation period in Section 53 of Regulation 806/93 is necessary and ancillary to the regulatory authority granted to establish and maintain the Compensation Fund as contemplated by Section 27 of the Act. The Applicant having failed to comply with that requirement, the Applicant's claim must be disallowed.

Accordingly, the Tribunal finds that the Respondent was correct in denying the Applicants claim for compensation.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: March 21, 2001

SHALFOROSHZADEH

EHSAN SHALFOROSHZADEH

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

LISA ORIENTE, Student-At-Law, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: January 18, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a notice of proposal dated October 10, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Ehsan Shalforoshzadeh (the "Applicant") as a motor vehicle salesperson under the provisions of the Act. By notice of appeal dated October 17, 2000, the Applicant gave notice that he wished to appeal the proposal of the Registrar to the Licence Appeal Tribunal (the "Tribunal").

REGISTRAR'S POSITION

It is the Registrar's position that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. In response to Question 9 on the application for registration as a salesperson of the Applicant made on or about August 24, 2000 (the "Application"), which question asks: "Have you ever been found guilty or convicted of an offense under any law or are there any charges pending?", the Applicant answered "Yes" and disclosed that he was "charged & convicted when I was 14 or 15 and now I'm 18 so it's a young offenders Record." No further disclosure on the application was provided.
2. After conducting a criminal history background check, it came to the Registrar's attention that the Applicant has the following convictions:
 - (a) robbery - December 4, 1995;
 - (b) break and enter and theft - March 7, 1996;

- (c) mischief under \$5,000.00 - March 7, 1996;
- (d) fraud under \$5,000.00 - March 25, 1997;
- (e) robbery - May 19, 1998; and
- (f) assault - May 19, 1998.

APPLICANT'S POSITION

It is the Applicant's position that his application was not given fair consideration given his age at the time of the convictions and the subsequent period without convictions. The Applicant contends that the existence of a criminal record in his situation does not provide reasonable grounds for believing that this Applicant will not act with honesty and integrity.

THE EVIDENCE:

Mary Jane South, was called to give evidence in support of the Registrar and identified herself as Deputy Registrar for the Ontario Motor Vehicle Industry Council ("OMVIC") who, in that position, oversees the registration program including the prescreening of applications and refusals.

Ms. South identified the Notice of Proposal to Refuse the Registration of the Applicant appearing at Tab 1 of the Book of Disclosure which was entered as Exhibit 3 in these proceedings. She confirmed the Registrar's position that the Application was refused, first because of the incomplete answer given on the Application, and second due to the types of convictions which include robbery, theft and fraud.

Ms. South identified the Application appearing at Tab 3 of Exhibit 3 and noted that although the Application was not date-stamped, there is the notation in the handwriting of a staff member that on 8/3/2000 the staff member spoke to the Applicant who was to call back. Ms. South then referred to Question 9 on the Application at Tab 3, Exhibit 3 and stated that the answer to Question 9 suggested that the Applicant was referring to a single offence which occurred when the Applicant was a youth and that there were not other disclosures.

Ms. South testified that a criminal record check was requested but when OMVIC was unable to obtain a clearance for the Applicant, a staff member contacted the sponsoring dealer on or about September 5, 2000 and the criminal record check appearing at Tab 4 of Exhibit 3 was received from the Applicant. It was Ms. South's position that the criminal record check contradicts the information provided by the Applicant on the Application.

Ms. South stated that there was also a concern that certain of the convictions involved economic matters and the fraud conviction showed an element of deceit in the Applicant's past conduct.

Ms. South stated that the Application is the first test of the Applicant's readiness to make disclosure. As the industry is one based on disclosure, it is considered very important that the Applicant demonstrate a willingness to make full disclosure.

On cross-examination, Ms. South was questioned as to the basis for her belief that the Applicant's statement on the Application in answer to Question 9 suggested that the Applicant was implying there was a single offence. Ms. South advised that it was her perception that the wording of the response suggested only one occurrence.

When asked about the handwritten notation at the top of the Application noting the date of October 31, 2000, Ms. South advised that the handwriting belonged to Mary Tanga a cash clerk with OMVIC and acknowledged that Ms. South did not know what the note related to but concluded that it related to the payment of the fee for the Application.

Ms. South testified that it was a staff member, Indu Gurn, who, according to OMVIC records, contacted Tannaz Shirazi, the owner of the dealership sponsoring the Applicant to advise that OMVIC required a criminal record clearance for the Applicant. Ms. South acknowledged that OMVIC did not have the details of the Applicant's criminal record until the Applicant provided the particulars by way of the document at Tab 4, Exhibit 3.

The Applicant testified that he was presently 18 years of age and employed with Ontario Auto Re-Sell as a lot man who did detailing and delivering of cars. The Applicant stated that his employer was happy with his work and wanted the Applicant to become a salesperson.

The Applicant testified that he had never had any trouble with his employer and that his job responsibilities included taking cheques to the bank and opening and closing the dealership.

The Applicant produced a letter from Ontario Auto Re-Sell signed by Tannaz Shirazi advising that the Applicant demonstrated great potential to become a sales representative and that he was an extremely hard worker who the dealer felt would be an asset to his establishment. This letter was entered as Exhibit 4 in these proceedings.

The Applicant testified that he had worked for Startach Computers. When he first applied to Startach Computers he was told that there was no job available but the Applicant said that he was prepared to work for nothing just to get experience. The Applicant was hired as a non-salaried employee, did the banking and picked up parts valued at between \$20,000.00 and \$50,000.00 for Startach Computers. The Applicant produced a letter from Startach Computers which was entered as Exhibit 5.

The Applicant stated that he paid rent at his parents' house where he resided, he contributed to the groceries and did the snow shoveling.

With respect to the Application, the Applicant testified that it was his understanding that the offences were young offender offences and that he did not believe he had to disclose the actual convictions.

The Applicant stated that after having received a call from OMVIC about his criminal record, he went the next day and obtained the criminal record appearing at Tab 4, Exhibit 3 and delivered it to OMVIC. The Applicant testified that it had not been his intention when completing his answer to Question 9 on the Application to imply that there had only been one offence.

The Applicant testified that the handwriting on the right-hand side of the document appearing at Tab 4 belonged to the Applicant and that he made the notation to show that the dates appearing on the far left-hand side of the document were the conviction dates, not the offence dates.

The Applicant stated that the last offence took place in 1996 and took 1½ years before he was convicted.

The Applicant testified that while at Zion Heights High School he became involved with the "wrong crowd" which led to these problems, however, the Applicant did accept responsibility for his record.

The Applicant stated that he was 15 years old at the time of the last offence and since then has changed his friends and his life style.

The Applicant stated that he believed that he would act with integrity and honesty and that his long term plan was to work to establish a good credit record so that he might borrow sufficient moneys to open his own dealership.

The Applicant planned to attend night school to take courses in business management and that if his Application were denied he would lose the opportunity of pursuing this career.

On cross-examination, the Applicant stated that he had personally filled out the Application and that it was his signature that appeared in the middle of page 4 of the Application. The Applicant confirmed that he had carefully read the Application and that he had no problems with the English language.

When asked why the Applicant had not disclosed his involvement with Startach Computers, on page 2 under "Employment or other Activities", the Applicant stated that he had not really been an employee. When asked about how Exhibit 5 came into existence, the Applicant stated that he had asked for the letter and picked it up at the business of Startach Computers. He believed that it was prepared by the party who signed it.

The Applicant testified that he believed that by answering "Yes" to Question 9, he had satisfied his obligation because at the time of the convictions, he was a young offender.

The Applicant stated that it was his belief that if OMVIC needed more information, they would contract the Applicant.

The Applicant stated that he called OMVIC several times to see why the Application was taking so long and as a result of one such call, provided the document at Tab 4.

The Applicant acknowledged that he understood that the Registrar would rely upon the Application.

The Applicant testified that he had made disclosure to his employer of his criminal record to the extent of advising that he had been in trouble when he was younger but had not provided any specifics. The Applicant stated that his employer was not relying upon the Application for the purposes of his employment.

With respect to the various convictions, the Applicant testified that the fraud charge arose when he was youngster involved with older boys who were fooling around in a Wal-Mart store and did something with various receipts involving between \$200.00 and \$300.00 and that gave rise to the charge of fraud.

With respect to the first conviction for robbery, the Applicant testified that this arose from an occurrence at a mall and arose out of a fight between various individuals as a result of which some change went missing and he was charged with robbery.

The Applicant stated that the conviction in 1996 arose from his grabbing something from a locker at school and that the 1998 convictions were as a result of grabbing a hat from another student which led to pushing for which he charged. The Applicant stated that the cause of his problems was because he had bad friends and that he had served five days because he had outstanding charges for break and enter, thief and mischief. With respect to the fraud charge, only the Applicant was charged however in the robbery and assault charges other people involved were charged.

The Applicant stated that after he delivered the criminal record at Tab 4, he called OMVIC several times to see how his Application was proceeding.

In reply, Ms. South produced a IntraWeb system print out which records telephone calls to and from OMVIC which was entered as Exhibit 6 in these proceedings. Ms. South testified that the OMVIC staff was trained to record calls in and out and although there may be some missed, it was unlikely that there would be repeatedly unrecorded calls. She stated that according to the print out there were no incoming calls to OMVIC from the Applicant.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant did not fully disclose on his Application the extent of his criminal record.
2. The Applicant has been convicted of six various offences including robbery, theft and fraud.
3. Upon being requested to do so by OMVIC, the Applicant provided a copy of his criminal record and that at the time of the offences, the Applicant was 15 years of age or younger.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to refuse the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of Ehsan Shalforoshzadeh should be refused.

The question to be determined is whether the Applicant's convictions on the charges of robbery, theft and fraud and the Applicant's failure to make full disclosure on the Application provides the Registrar with reasonable grounds to believe that the Applicant will not carry on business as required by section 5(1)(b) of the Act. It is the Registrar's belief which is at issue in these proceedings not that of the Tribunal.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

In the leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in this case, Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

“The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051, the Court held:

“It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.”

APPLICATION OF LAW TO FACTS:

The Registrar based his refusal on two grounds. First, the failure of the Applicant to fully disclose his criminal record and second the nature of the criminal offenses which were ultimately disclosed.

The Applicant said that he thought that by answering “Yes” to the question and making reference the *Young Offenders Act*, he had met his obligation to disclose. Further, when requested to provide a copy of his criminal record, the Applicant did so immediately.

The Tribunal is not persuaded that it was the intention of the Applicant to mislead the Registrar when completing the Application or to attempt to avoid disclosure.

Counsel for the Registrar directed the Tribunal's attention to the case of *Moodie* [1998] O.C.R.A.T.D. No. 120, a decision of this Tribunal refusing registration where the applicant failed to disclose fully and completely his criminal record. Particular attention was drawn to the following statement contained at Page 4 of that decision:

"While the subsequent failure to provide complete disclosure may also have been due to a lack of thoroughness on the part of the Applicant rather than an attempt to mislead, this too raises doubts about the Applicant's ability to carry on the business of a salesperson in accordance with the law."

As stated above, it is the finding of the Tribunal that the Applicant adequately explained the reasons for his failure to fully disclose, and therefore the present situation can be distinguished from the *Moodie* case.

The Registrar's second ground is the type of convictions against the Applicant which involved robbery, theft and fraud and the second robbery conviction in May 1988. Counsel for the Registrar made reference to the decision of *Cooke* [1999] O.C.R.A.T.D. No. 4 and particularly Page 6 of that decision which reads as follows:

"The convictions for forgery, theft, false pretenses, uttering and the fraudulent use of credit cards are by no stretch of the imagination other than convictions that directly relate to a lack of honesty and integrity on the part of the Applicant. In fact, convictions relating to such offences clearly indicate a non-acceptance of the rule of an ordered society - a society that accepts and embraces the rule of law."

Although the Applicant's convictions are not as numerous nor of the same nature as those of the applicant in the *Cooke* decision, it is of concern that someone of the age of the Applicant has shown a casualness toward the law as indicated by the Applicant's criminal record. Counsel for the Applicant suggests that attention should be given to the period of time that has elapsed since the last conviction which the Applicant testified occurred in 1996. The Tribunal does not accept that the passage of four years from the offence date, but only two years from the date of conviction, is a sufficient period of time to demonstrate that the Applicant has forsaken those tendencies which got him into trouble previously. The Tribunal finds that the Applicant's previous criminal record does provide reasonable grounds for the Registrar's belief in this matter.

ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out the Registrar's proposal dated October 10, 2000, to refuse the registration of Ehsan Shalforoshzadeh as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: March 21, 2001

ACE TRAVEL AGENCY2

ACE TRAVEL AGENCY

APPEAL FROM A DECISION OF THE BOARD OF DIRECTORS
OF THE TRAVEL INDUSTRY COUNCIL OF ONTARIO

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

MOHAMMED SOBHAN, Agent, representing the Applicant
TREVOR BRANION, Counsel, representing the Travel Industry Council of
Ontario

DATE OF
HEARING: February 19, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from a decision of the Board of Directors of the Travel Industry Council of Ontario ("TICO") at a meeting held on September 26, 2000 and reported to the Applicant by letter dated October 10, 2000.

The Applicant, a travel wholesaler, had claimed for compensation of \$9,684.00 against A-Plus Travel. The claim was denied on the basis that the requirements of sections 52, 50 and 54 of Ontario Regulation 806/93 as amended under the *Travel Industry Act* had not been met.

The Applicant contested this decision by his letter of October 25, 2000 requesting an appeal before the Licence Appeal Tribunal. A hearing was held on February 19, 2001 with both parties in attendance.

ISSUE:

Does the claim of the Applicant meet the requirements for compensation under Regulation 806/93 of the *Travel Industry Act*?

EVIDENCE:

The Applicant in his opening statement explained that he was a wholesaler for airlines. He had done business with A-Plus Travel in the past. He was owed \$9,684.00 by A-Plus Travel. Now A-Plus Travel was out of business, and he made his claim under the Compensation Fund.

Counsel for the Travel Industry Council of Ontario stated that it was their position that the Applicant did not meet the requirements for compensation under the Act and its Regulation.

Testimony of Mohammed Sobhan:

Mr. Sobhan testified that he acts as a wholesaler for airlines and issues tickets to travel agencies. He had been doing business with A-Plus Travel for approximately 8 or 9 months prior to the matter in question.

He testified that A-Plus Travel contacted him to issue ten tickets to Karachi, Pakistan for a total of \$9,684.00 in late October, 2000. He received a cheque dated November 2, 2000 from A-Plus Travel in the amount of \$1270.00. He would not release the tickets without full payment. There was a second cheque from A-Plus Travel dated November 3, 2000 in the amount of \$4,540.00 and a third cheque on November 5, 2000 from A-Plus Travel in the amount of \$4000.00. After receipt of the third cheque the tickets were released.

There was some conflict in Mr. Sobhan's testimony concerning when the tickets were released and when the family used the tickets. Initially, Mr. Sobhan testified that the family were flying on November 12, 2000, but in cross-examination he stated that he gave the tickets to the travel agent on November 5, 2000 once he had the third cheque but before he had deposited it into his bank account as the family were flying the afternoon of November 5, 2000. There was also conflict in his testimony about exactly when he received these cheques. In his statement to the Travel Industry Council of Ontario, he stated that he received all three cheques on October 29, 2000. His initial testimony was that he got the cheques separately over a number of days. But under cross-examination Mr. Sobhan stated he received the cheques on November 1, 2000 which was the date that the tickets were issued.

Mr. Sobhan testified that he had to issue the tickets on November 1 in order to get the discounted fare for this family. But he did not release the tickets to the travel agent until November 5, 2000.

Mr. Sobhan stated that first two cheques were dishonoured by his bank on November 4, 2000 and the third cheque was dishonoured by his bank on November 8, 2000. At the time that he released the tickets on November 5, 2000 he was not aware that the first two cheques had been dishonoured. His bank sends him the dishonoured cheques by mail. He stated that if he had known about the NSF cheques he would not have released the tickets to the travel agent on November 5, 2000.

At the time that he realized that A-Plus Travel had not paid him for the tickets, a representative from the Travel Industry Council of Ontario was in his office checking on his bookkeeping. He mentioned to this representative about his problem, and he stated that the representative said she would try to help him.

Mr. Sobhan testified that he kept after A-Plus Travel for months afterwards to collect his money. He was made promises by the owner of A-Plus Travel, but nothing ever happened. Mr. Sobhan stated that he did no further business with A-Plus Travel after this incident. He discovered that A-Plus Travel had closed its offices in approximately March/April, 2001. He had not received his money from them.

Mr. Sobhan stated that he informed the Travel Industry Council of Ontario about this problem and commenced his claim under the compensation Fund. He felt that the Travel Industry Council of Ontario could have acted earlier, prior to A-Plus Travel going out of business, to collect his debt.

Under cross-examination, Mr. Sobhan stated that prior to this incident he had done approximately \$200,000.00 worth of business with A-Plus Travel. He would get about twenty dollars commission per ticket.

Mr. Sobhan stated that he had no documents from A-Plus Travel to show that A-Plus Travel had collected any funds from the customers. All he knew was that a representative from A-Plus Travel verbally told him that the owner had received all of the monies from the customers. He told the Travel Industry Council of Ontario about this conversation.

Testimony of Bakir Telia:

Mr. Telia is the accountant/bookkeeper for Ace Travel agency. After his employer was owed this money, Mr. Telia went personally to A-Plus Travel and asked for reimbursement. He had been promised the funds, but nothing ever happened.

Mr. Telia verified that the dishonoured cheques were sent to them from their bank through the mail. He said that Ace Travel Agency did not have knowledge of the NSF cheques when it released the tickets to A-Plus Travel on November 5, 2000.

Mr. Telia stated that Ace Travel Agency often dealt with the travel agents on trust and gave them tickets. He was not aware of any policy statement from the TICO regarding payment by cheque.

Mr. Telia stated that on November 11 or 12, 2000 he had told Maria, the TICO representative attending at their business, about this problem, and she said she would look into it for them. She took copies of the cheques. Mr. Telia thought that TICO was investigating this internally for them.

When A-Plus Travel closed its doors, Mr. Telia contacted TICO to learn about their procedures for making a claim. Then he helped Mr. Sobhan prepare the claim application to the Compensation Fund.

Testimony of Lori Furlan:

Ms. Furlan testified that she is the claims coordinator for the Travel Industry Council of Ontario. She had dealt with the application of Ace Travel Agency for compensation under the Act and its regulation. She reviewed the application, investigated the situation and considered the applicability of the Regulation.

She stated that under section 52(2) of Regulation 806/93 under the Act, the wholesaler has to give proof of the customer payment. Otherwise she is unsure if the travel agency did or did not pass any of the monies on to the wholesaler.

She testified that this claim is contrary to section 52(3) of the Regulation as the clients did have the tickets and did travel so the clients do not have a claim against the Compensation Fund. She also referred to section 52(5), section 50 and section 54 of the Regulation.

Ms. Furlan testified that section 55(2) deals with credit arrangements. In this case, TICO is stating that the wholesaler extended credit to the travel agent by giving the travel agent the tickets prior to the cheque clearing the bank.

Ms. Furlan stated that TICO does not intervene between travel wholesalers and travel agents as to their business dealings. Here, Ace Travel Agency had to wait until A-Plus Travel had closed its doors before it could file a claim under the Compensation Fund.

Under cross-examination, Ms. Furlan explained that TICO receives monies from agents and wholesalers for the benefits of the travel customers. TICO does not deal with the business arrangements between wholesalers and agents. It is up to the wholesaler to ensure that the cheque clears prior to releasing any tickets.

Closing statements:

By Applicant:

Mr. Sobhan stated that he has to conduct his business. He cannot survive in business if he has to abide by the precautions as stated by Ms. Furlan.

By Counsel for the TICO:

Counsel stated that TICO agrees that the Applicant did not get their monies from A-Plus Travel. But it is the position of TICO that the Applicant does not qualify for compensation from the Compensation Fund under the Regulation. Section 52 of Regulation 806/93 deals with wholesaler claims to the Compensation Fund. Counsel stated that there is no evidence that the customer did pay the travel agent. In this case, the customer did use the tickets so the customer does not have a claim against the Compensation Fund. Counsel referred to the cases of General Tours CRAT, released April 15, 1998; Sunquest Vacations Ltd. CRAT, released July 7, 1998; and Aventours Inc. CRAT, released September 22, 1998. Counsel stated that it was the position of the TICO that the Applicant was providing credit to the travel agent because the tickets were issued before the final cheque for payment was deposited by the Applicant in the bank.

LEGISLATION:

Regulation 806/93 of the *Travel Industry Act* deals with the Compensation Fund.

Section 50 (3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

1. For a claim arising out of the failure of an end supplier to provide the travel services.

2. For losses or damages incurred by a customer as a result of a failure of an end supplier to provide the travel services.
3. For a payment to a registrant for any travel services that were provided or for which alternate travel services were provided or made available.
4. For a payment, including a non refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.
5. If the travel services were received as a prize, an award or a goodwill gesture.
6. If the customer used a voucher, certificate, coupon or other similar document to obtain the travel services or did not pay for the travel services with cash or by cheque, credit card or other similar cash payment method.
7. For any taxes, fees or levies imposed by a government or a government body.
8. For any insurance premiums.
9. If the claim is based on the cost, value or quality of the travel services or alternate travel services that were provided.
10. If the traveller received travel services pursuant to section 60 or 61.

Section 52(1) A travel wholesaler is entitled to be reimbursed for money paid by the travel wholesaler to reimburse a customer for travel services paid for but not provided or to provide the customer with travel services for which the travel wholesaler has not been paid by the travel agent if,

- (a) the travel wholesaler has acted in good faith and at arm's length with a registrant who is a travel agent;
 - (b) the travel agent has failed to pass all or part of the customer's money to the travel wholesaler;
 - (c) the travel wholesaler has had no dealing with the travel agent in which the travel agent has failed to pass the customer's money to the travel wholesaler in respect of travel services or has otherwise been in default in dealing with the travel wholesaler; and
- (d) the travel wholesaler has taken reasonable measures in the circumstances to ensure that the travel agent is reliable and financially responsible.

- (2) The travel wholesaler is entitled to be reimbursed only for the portion of the customer's money received by the travel agent that the travel agent has failed to pass on to the travel wholesaler.
- (3) The travel wholesaler is entitled to be reimbursed only if it can reasonably be established that the travel agent has received the customer's money and the customer would otherwise have had a claim against the Compensation fund.
- (4) The travel wholesaler is not entitled to be reimbursed for an portion of the money owing from the travel agent that represents a commission.
- (5) A travel wholesaler who receives a cheque from a travel agent for travel services that are provided is entitled to be reimbursed if,
 - (a) the cheque is received by the travel wholesaler within seven days before the commencement of the travel services;
 - (b) the cheque is promptly deposited by the travel wholesaler in an account maintained in a financial institution referred to in section 19;
 - (c) the cheque is returned to the travel wholesaler by the financial institution for reasons of insufficient funds; and
 - (d) the travel wholesaler is otherwise entitled to be reimbursed.
- (6) A travel wholesaler who makes a claim for reimbursement under subsection (5) is not entitled to be reimbursed for any portion of the claim that exceeds the travel wholesaler's volume of business with the travel agent for a normal week based on established trading patterns within the twelve month period that immediately preceded the commencement of the travel services.
- (7) A travel wholesaler is not entitled to be reimbursed for any payment made by credit card if the travel agent or travel wholesaler did not obtain prior approval for the payment from the customer and from the card issuer in accordance with the agreement between the card issuer and the registrant who processed the payment.

.....

Section 55 (2) A travel wholesaler is not entitled to be reimbursed if the travel wholesaler was involved in a credit arrangement with a travel agent, another travel wholesaler or an end supplier in order to provide the travel services to which the claim relates.

.....

ANALYSIS:

This is an unfortunate situation for the travel wholesaler, Ace Travel Agency. It had a series of business dealings with the travel agent, A-Plus Travel, for a number of months. Then in late October/early November, 2000 the Applicant was involved in another business dealing with A-Plus Travel which resulted in the loss to the Applicant of a considerable sum of money, \$9,684.00. The travel agency closed its doors and the Applicant thought he would be reimbursed through the Compensation Fund. Obviously the Applicant has paid into this Fund and this was his first claim against it.

What is evident here is that this Applicant, and probably many others, do not understand the intent of the Compensation Fund. It was created mainly to protect the travelling public from fraudulent travel agents, wholesalers and suppliers. It is not to work as a debt collection agency if business dealings between travel agents, travel wholesalers and travel suppliers should fail. As stated clearly by Ms Furlan of TICO, the purpose of the fund is to protect the customers, not to regulate business dealings between agents, wholesalers and suppliers in the travel industry.

The Applicant's failure to understand the purpose of the fund meant he did not pursue his legal remedies at a time when the travel agency was still in operation. His account of how he tried to collect from this travel agency is woefully inadequate. He explains his actions by stating that it is the duty of TICO to collect on his debts, particularly when a TICO representative knew of his problems.

The Applicant must fail in his request for compensation from the Fund as he does not meet the requirements as set out in the legislation. The Tribunal cannot go behind this legislation. The applicable Regulation sets out many limitations on the rights of travel wholesaler to collect under the compensation fund and the language used is complicated.

There is no doubt that the Applicant acted in good faith. There is no doubt that the Applicant has sustained a considerable financial loss. But the facts do not permit this Tribunal to compensate the Applicant under the Regulation to the *Travel Industry Act*.

The Applicant cannot prove that the customer paid the travel agent. Without this kind of proof how can TICO even know what would be the amount payable to the travel wholesaler? It was the obligation of the Applicant to obtain from the travel agent in the months prior to this travel agent ceasing business some document which stated that the customer had paid in full for the ten tickets to Karachi. Failure to do so means this claim must be denied.

There is the fact that the customer did use the tickets and did fly to Karachi. Under the legislation the Applicant also fails as this is in violation of section 50(3) of the Regulation. The customer has no claim against the fund as the customer received the travel services. Under section 52 of the Regulation this precludes the Applicant from obtaining reimbursement.

A further item of concern is that the Applicant permitted the travel agent to have the tickets without having first ascertained that the payments by the travel agent had successfully gone through his account. By doing that, the Applicant has provided informal credit arrangements to the travel agency. The Applicant then takes on the risk that he will not be paid for those credit arrangements. That is a business risk and a resulting loss is not compensated under the fund.

ORDER:

Pursuant to the authority vested in it by section 62(6)(b) of Regulation 806 made under the *Travel Industry Act*, the Tribunal directs the Travel Industry Council of Ontario to disallow the claim of the Applicant, Ace Travel Agency.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

Released: March 5, 2001

MARTINAKIS

PREHEARING

ANGELO MARTINAKIS

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

No one appearing for the Applicant
LARRY A. BANACK, Counsel, representing the Board of Trustees of the
Ontario Motor Vehicle Dealers Compensation Fund

DATE OF

PREHEARING: February 22, 2001

Toronto

ORDER

Following the attendance on February 22, 2001 at a prehearing before the Licence Appeal Tribunal of Larry A. Banack, Counsel for the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund (the "Respondent"), No appearance from Angelo Martinakis (the "Applicant"), although having notified the Tribunal that due to a sudden illness, he was unable to attend;

The Tribunal makes the following Order:

- 1) The prehearing in this matter is adjourned to commence on Wednesday, April 25, 2001, at 8:30 a.m., at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: March 2, 2001

ZAYAT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CYRVILLE STAR TOP AUTO SALES INC. AND HASSAN ZAYAT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: October 24, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CYRVILLE STAR TOP AUTO SALES INC. AND
HASSAN ZAYAT

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 12, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Tuesday, May 15, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 8, 2001

MATTE AND STOTYN

PREHEARING

ELIZABETH MATTE AND CAL STOTYN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: KENT McCLURE, Chair

APPEARANCES:

MARK HABIB, Counsel, representing the Applicants, with Elizabeth
Matte,
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program, with Paul Picard
MARTIN BLACK, Counsel, representing 1189534 Ontario Inc., Added
Party, with Erica Smith

DATE OF
PRE-HEARING: March 12, 2001

By teleconference

ORDER

FOLLOWING attendances on March 12, 2001 at a prehearing by *teleconference* before the Tribunal of Mark Habib, Counsel on behalf of Elizabeth Matte and Cal Stotyn (the "Applicants"), with Elizabeth Matte; and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program"), with Paul Picard; and Martin Black, Counsel on behalf of 1189534 Ontario Inc. (the "Added Party"), with Erica Smith;

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, March 26, 2001 at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario and to continue if necessary on March 27, 28, 29, and 30, 2001, and to further continue on Monday, April 2, 2001 and 3, 2001, at 9:30 a.m., at the above address;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. The Applicants abandoned certain claims. Using the Program's decision letter dated October 26, 2000 as a reference, the Applicants abandoned:

Under "Items not covered under warranty" (starting at page 4)

"4. Claim: Hardwood floor uneven at hallway/kitchen joint". (pages 4-5)

"6. Claim: Spring missing first floor sliding door". (page 5)

"7. Claim: Return extra tiles to V.I.P. after work finished". (pages 5-6)

"9. Claim: Fence location between two properties". (page 6)

"12. Claim: We request ONHWP to conciliate between us and Rosewood concerning the double billing of some materials and work". (page 8)

Under "GST Rebate" (starting at page 9)

"1. Claim: GST rebate to be remitted to owner". (pages 9-10)

3. The claims to be dealt with at the hearing are those set out in the balance of the Program's decision letter of October 26, 2000.
4. The Parties agreed to the certain facts.

Using the Program's decision letter dated October 26, 2000 as a reference, under "Items covered under warranty" (starting at page 2), the parties agreed that:

- (1) \$15, 900.00 is the cost of the items set out in the Applicants' claims identified as:

Claims 1 to 16 inclusive
Claims 18 to 32 inclusive
Claims 34 and 35;

- (2) \$3,000.00 is the cash amount for the claim identified as Claim 17, "Credit \$3,000 air conditioning and corrections to air quality system";
- (3) \$2,000.00 is the cash amount for the claim identified as Claim 33, "Credit \$2000 for landscaping" which the Applicant is claiming for trees, shrubs and grass only; and
- (4) the \$3,000 in (2) above and \$2,000 in (3) above were credits to be paid from the holdback amount in dispute between the Applicants and the Added Party.

5. The Parties indicated whom they propose to call to testify at the hearing:

The witnesses for the Applicants will be:

- (1) Elizabeth Matte, Applicant
- (2) Cal Stotyn, Applicant
- (3) Michael Wong, Solicitor
- (4) Marilyn Van Adel, Real Estate Agent
- (5) Jeffrey Arthurs, Building Inspector, City of Ottawa
- (6) Barry Humpries, Real Estate Agent
- (7) Rick Locatelli, Real Estate Agent
- (8) Chris Jaltoczy, Designer
- (9) George White, Fungal Detection Specialist
- (10) Paul Manner, V.I.P. employee

The witness for the Program will be:

- (1) Paul Picard, employee of the Program

The witnesses for the Added Party will be:

- (1) Erica Smith, employee of Added Party
- (2) Helene Amyotte, employee of Added Party
- (3) a realtor, yet to be determined
- (4) an appraiser, yet to be determined

All parties reserved their right to object to any witness being called by another party as an expert without complying with Rule 6.4 of the Tribunal's Rules of Practice.

6. The parties to the hearing were referred to the Rules of Practice of this Tribunal, particularly the disclosure requirements set out in Rule 6. The Applicant's counsel stated that all documents on which the Applicants intend to rely at the hearing would be sent to the other parties by Thursday, March 15, 2001. All parties reserved their right to object to any disclosure made contrary to the Tribunal's Rules of Practice.
7. The Applicants requested that the issues raised in the Program's supplemental decision letter dated March 6, 2001 be heard at the hearing before this Tribunal commencing March 26, 2001. The Tribunal not having received an appeal of the supplemental decision letter, the Tribunal declined to deal with the Applicants' request in this prehearing.
8. The parties agreed that the hearing will use the scheduled hearing dates of March 26, 27, 28, 29, 30, 2001 and April 2 and 3, 2001.
9. A copy of this prehearing order is to be sent by facsimile transmission to:
 10. Mark Habib - (613) 820-8818
 11. Elizabeth Matte - (613) 947-1764
 12. Netanus Rutherford - (416) 229-3858
 13. Mark Friedman - (613) 235-4430
 14. Martin Black (613) 722-5932

LICENCE APPEAL TRIBUNAL

Kent McClure,
Chair

Released: March 14, 2001

DENIS AND WARDEN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
REJEAN DENIS AND PATRICIA WARDEN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

REJEAN DENIS AND PATRICIA WARDEN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

905155 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 12-15, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, April 18, 2001, and to continue April 19 and 20, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

DENIS AND WARDEN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
REJEAN DENIS AND PATRICIA WARDEN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

REJEAN DENIS AND PATRICIA WARDEN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

905155 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on March 8, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Added Party* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 10:30 a.m., on Monday, March 26, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 13, 2001

DENIS AND WARDEN

PREHEARING

REJEAN DENIS AND PATRICIA WARDEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO
NEW HOME WARRANTY PROGRAM

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

GEORGE S. GAGE, Counsel, representing Rejean Denis and Patricia Warden (the "Applicants")

NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program (the "Respondent")

TERRY GARMAN, Counsel, representing 905155 Ontario Limited operating as McMaster Construction (the "Added Party")

DATE OF

PREHEARING: March 26, 2001

Toronto

ORDER

Following attendance before the Licence Appeal Tribunal (the "Tribunal") on March 26, 2001 at a prehearing of George S. Gage, Counsel for the Applicants, Rejean Denis, one of the Applicants, Netanus Rutherford, Counsel for the Respondent, Richard Johnston on behalf of the Respondent and Terry Garman, Counsel for the Added Party;

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was no resolution of the issues in this matter at this time.
- 2) The prehearing of this matter is adjourned to June 5, 2001 at 10:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario for one day.
- 3) The hearing in this matter is rescheduled for 9:30 a.m. on September 5, 6, 7, 10, 11, 12, 13 and 14, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
- 4) Counsel for the Applicants shall notify the Respondent and the Tribunal on or before April 3, 2001, whether or not the Applicants intend to make a claim for breach of warranty under section 14(1)(b) of the *Ontario New Home Warranties Plan Act*.

- 5) The Applicants' shall provide to the Respondent on or before April 11, 2001, all pleadings in the civil action commenced by the Applicants against the Added Party.
- 6) The Applicants' shall provide to the Respondent and Counsel for the Added Party on or before April 11, 2001, a damages brief which shall include the following:
 - (a) a summary or index page referencing the various sections of the damages brief;
 - (b) a statement of the amounts being claimed by the Applicants;
 - (c) copies of all invoices supporting the claim of the Applicants divided into appropriate subsections;
 - (d) copies of all inspection reports including the inspection report of Mark Viser with any addendums and the plumbing report;
 - (e) all estimates for outstanding work; and
 - (f) all contact documents.
- 7) The Applicants shall provide to the Respondent and Counsel for the Added Party by April 11, 2001, a copy of the plans for the subject house.
- 8) Counsel for the Applicants shall by April 17, 2001, deliver to Counsel for the Added Party a draft agreed statement of facts and Counsel for the Added Party shall provide its response to the draft agreed statement of facts to Counsel for the Applicants by April 24, 2001. The final form of the agreed statement of facts or, if no statement of facts can be agreed upon a chronology of events shall be forwarded to the Respondent and the Tribunal on or before May 1, 2001.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: March 28, 2001

PREHEARING

OLEKSANDR EVANIUK O/A ALEX EVANIUK

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
REAL ESTATE AND BUSINESS BROKERS ACT
R.S.O. 1990, CHAPTER R.4 AS AMENDED

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

GARY JOEL WISE, counsel, representing the Applicant
TIM SNELL, counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
PREHEARING: March 9, 2001

Toronto

ORDER

Following attendances on March 9, 2001 at a prehearing before this Tribunal of Gary Joel Wise, counsel on behalf of Oleksandr Evaniuk o/a Alex Evaniuk (the "Applicant") and Tim Snell, counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Tuesday, April 24, 2001, and thereafter, if necessary, to continue at 9:30 a.m. on Wednesday, April 25, 2001, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties recorded that there had been no resolution of any of the issues in this matter.
2. The parties to the hearing are the Applicant and the Registrar.
3. The issues to be dealt with at the hearing are contained in the Proposal of the Registrar.
4. The Applicant admits the allegations contained in paragraphs 6 and 9 of the Registrar's Notice of Proposal dated November 6, 2000.
5. The Applicant admits that two civil judgments were registered against the Applicant, one in favour of Lena Preje and the other in favour of Bruce Murray.

6. The Applicant does not admit that at the date of his November 1, 1999 Application for registration as a salesperson the aforesaid Bruce Murray judgment was in existence.
7. The Applicant admits the allegations contained in paragraphs 11 and 12 of the Registrar's Notice of Proposal.
8. The Applicant does not admit, and puts the Registrar to the proof thereof, that the Applicant's past conduct affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.
9. The Applicant does not admit, having regard to his financial position that he cannot reasonably be expected to be financially responsible in the conduct of business.
10. The Applicant intends to call four or five witnesses to testify at the hearing of this matter.
11. The Registrar intends to call four witnesses to testify at the hearing of this matter.
12. Both parties to the hearing shall comply with Rule 6.3 of the Rules of Practice of this Tribunal. Notwithstanding the aforesaid, both parties undertake at this time to disclose every document and thing now in their possession or under their control that they will refer to or tender in evidence at the hearing, and to deliver a copy of such document to the other party.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: March 12, 2001

WORLD-WIDE CONTINENTAL TRAVEL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
WORLD-WIDE CONTINENTAL TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 17, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WORLD-WIDE CONTINENTAL TRAVEL INC.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by World-Wide Continental Travel Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 2, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

WORLD-WIDE CONTINENTAL TRAVEL INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. World-Wide Continental Travel Inc. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 1810500/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **October 8, 1983**. The Registrant has a fiscal year end of **May 31st**.
2. The Registrant is subject to the prescribed terms and conditions of registration as are set out in sections 8 to 35 of Regulation 806/93 made under the Act (hereinafter "the Regulation") and additional terms and conditions to which the Registrant consented on **January 11, 1998**, including the requirement to file financial statements within 3 months of the Registrant's fiscal year end.

FILING FINANCIAL STATEMENTS- THE GROUNDS FOR THE PROPOSAL

3. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
4. By letter dated **May 18, 2000**, the Travel Industry Council of Ontario ("TICO") requested the Registrant to file its financial statements for its year-ended **May 31, 2000** by **August 31, 2000**.
5. On **September 18, 2000**, TICO sent a "reminder letter" to the Registrant giving a further due date of **October 4, 2000**.
6. By letter dated **October 17, 2000**, the Registrar, *Travel Industry Act*, sent a final request to the Registrant with a deadline to submit the required filing by **October 31, 2000** failing which the Registrar would issue a proposal to revoke the Registrant's registration.
7. By **November 17, 2000**, the Registrant had failed to file its financial statements. On that date, the Registrar, *Travel Industry Act* issued a Proposal to Revoke the Registrant's Registration.
8. To date, the Registrant's financial statements for its year-ended **May 31, 2000**, which were due by **August 31, 2000**, remain outstanding.

COMPLIANCE HISTORY

1997

9. By letter dated **April 9, 1997**, the Registrant was requested to file its financial statements for its fiscal year-ended **May 31, 1997** by **August 31, 1997**.
10. On **September 17, 1997**, TICO sent a second request to the Registrant for its financial statements.
11. On **November 5, 1997**, the Registrar, *Travel Industry Act* sent a final request to the Registrant, providing the Registrant with a **November 20, 1997** deadline to submit the required filing.
12. By **December 3, 1997**, the Registrant had failed to submit its required financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
13. On **December 5, 1997**, the Registrant filed its financial statements for its year-ended **May 31, 1997**, which were due by **August 31, 1997**. TICO's review of the statements revealed a working capital shortfall of \$14,148.00.
14. By letter dated **December 11, 1997**, the Registrant was informed of the working capital shortfall and told to advise TICO of what steps it had taken to address the shortfall. The Registrant was also told to provide a letter from its bank confirming the designation of a "Travel Industry Act Trust Account" and sign an Acknowledgement and Consent to Terms and Conditions of Registration by **January 8, 1998**.

1998

15. On **January 11, 1998**, the Registrant consented to Terms and Conditions of Registration, which included the following:
 - a. *World-Wide Continental Travel Inc o/a Continental Travel Agency shall hold all monies that it receives from the public for travel services, in trust in Ontario, and Section 36 of Ontario Regulation 806/93 (copy of which is attached to these Terms and Conditions), as amended by Ontario Regulation 570/94, shall apply to World-Wide Continental Travel Inc o/a Continental Travel Agency, effective from the signed and witnessed date of these Terms and Conditions. World-Wide Continental Travel Inc o/a Continental Travel Agency shall operate trust account(s) in accordance with Section 36 of Ontario Regulation 806/93, as amended by Ontario Regulation 570/94, and the attached guidelines for trust accounting prepared by the Ontario Travel Industry Inspections Office;*
 - b. *World-Wide Continental Travel Inc o/a Continental Travel Agency shall, at all times, maintain the following minimum working capital requirements: on gross sales of less than \$1.5 million - \$5000; on gross sales of \$1.5 million to \$10.0 million - \$25,000; on gross sales of \$10.0 million to \$20.0 million - \$50,000; on gross sales over \$20.0 million - \$100,000;*
 - c. *World-Wide Continental Travel Inc o/a Continental Travel Agency shall file with the Ontario Travel Industry Inspections Office financial statements **REVIEWED BY A LICENSED PUBLIC ACCOUNTANT** within 3 months of the registrant's year-end, in accordance with Section 15(1) of the Act and Section 24 of Ontario Regulation 806/93.*
16. On **January 21, 1998**, the Registrar, *Travel Industry Act* withdrew the Proposal to Revoke Registration dated **December 3, 1997** and cautioned the Registrant that any subsequent proposal may not be withdrawn, even if there is compliance after the proposal has been issued.

17. On **October 15, 1998**, the Registrant filed its financial statements for its fiscal year-ended **May 31, 1998**, which were due by **August 31, 1998**. TICO's review of these financial statements revealed a working capital shortage of \$2,131.00.
18. By letter dated **October 23, 1998**, TICO advised the Registrant to address the working capital shortage by **November 6, 1998**. On **November 2, 1998**, TICO received information that the Registrant had corrected its working capital shortage.

1999

19. On **October 1, 1999**, the Registrant filed its financial statements for its fiscal year-ended **May 31, 1999**, which were due by **August 31, 1999**.

2000

20. On **April 27, 2000**, TICO conducted an inspection of the Registrant. The inspection revealed that the Registrant was not adhering to the trust accounting requirements of the Regulation and to which the Registrant had consented on **January 11, 1998**. Both travel and non-travel expenses were being paid through the Registrant's General Account. The Registrant was advised that the Trust Account must be used for customer deposits, payments to travel suppliers, and customer refunds.
21. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **November 17, 2000**;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation, for its fiscal year-ended **May 31, 2000**, no later than **March 23, 2001**;
 - (b) If the above-noted financial statements as filed reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail;
 - (c) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **May 31, 2001**, no later than **August 31, 2001**;
 - (d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **May 31, 2002**, no later than **August 31, 2002**;
 - (e) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **May 31, 2003**, no later than **August 31, 2003**;
 - (f) If the financial statements referred to in paragraphs (c) through (e) as filed reveal an insufficient working capital amount or are otherwise deficient, the Registrant will have 30 days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail.

- (g) By **April 1, 2001**, the Registrant shall establish a trust account to protect customer funds in accordance with section 36 of the Regulation and provide evidence of the same to the Registrar. Thereafter, the Registrant shall maintain a proper trust account and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (h) The Registrant shall submit a monthly trust account reconciliation to the Registrar on or before the last business day of each month for the preceding month, beginning on **May 1, 2001**, for the month of **April, 2001**, for so long as the Registrar shall so require; and
 - (i) If the above-noted trust account reconciliations as filed according to (ii)(g) are incomplete or reveal a customer deposit deficiency, the Registrant will have **ten (10) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (i) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of February, 2001

Mr. Elio Rodrigues
World-Wide Continental Travel Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1288847 ONTARIO INC.

1288847 ONTARIO INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JULIA COOK, Agent, representing the Applicant
CAROL STREET, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING: March 19 & 20, 2001 Toronto

ORDER

WHEREAS a written Notice of Proposal dated November 30, 2000 and a Supplemental Notice of Proposal dated December 14, 2000, to refuse to renew the registration of 1288847 Ontario Inc. (the Applicant) were issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal which appeal was to be heard in Toronto on March 19, and 20, 2001;

AND WHEREAS in the course of the second day of hearing on March 20, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: March 21, 2001

RENAUD HOMES INC.

PREHEARING

RENAUD HOMES INC.

APPEAL FROM A PROPOSAL OF REGISTRAR OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL : BEVERLEY J. READE, Vice-Chair, Presiding

APPEARANCES:

MS. SANDS-KELLER, Student-At-Law, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF

PRE-HEARING: March 6, 2001

By Teleconference

ORDER

Following attendances *by teleconference* on March 6, 2001 at a prehearing before the Licence Appeal Tribunal of Ms. Sands-Keller, Student-At-Law, representing Renaud Homes Inc. (the "Applicant"), and Netanus Rutherford, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent");

WHEREAS, the pre-hearing commenced on March 6, 2001, but was adjourned;

NOW THEREFORE, the Tribunal makes the following Order:

- 1) The prehearing in this matter is adjourned to re-commence on Wednesday, March 21, 2001, at 1:15 p.m., by teleconference at telephone numbers to be confirmed by the Registrar of the Tribunal.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair,
Presiding

RELEASED: March 7, 2001

RENAUD HOMES INC.

PREHEARING

RENAUD HOMES INC.

APPEAL FROM A PROPOSAL OF REGISTRAR OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL : BEVERLEY J. READE, Vice-Chair, Presiding

APPEARANCES:

T. JAMES BENNETT, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF

PRE-HEARING: March 6 and March 21, 2001

By Teleconference

ORDER

Following attendances *by teleconference* on March 6, 2001 and March 21, 2001 at a prehearing before the Licence Appeal Tribunal of T. James Bennett, Counsel, representing Renaud Homes Inc. (the "Applicant"), and Netanus Rutherford, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, May 7, 2001 at a venue to be determined by the Tribunal, and to continue if necessary on May 8, 9, 10 and 11, 2001 at 9:30 a.m.

1. The Parties present at the prehearing recorded that there had been no resolution of the issues for determination in this matter.
2. The Parties to the hearing are the Applicant and the Program.
3. The issues to be dealt with at the hearing are contained in the Program's Notice of Proposal dated November 24, 2000 and the Supplemental Notice of Proposal dated February 9, 2001 to refuse to renew the registration of the Applicant.
4. The Parties were not able to indicate at this stage whom they propose to call to testify at the hearing nor were they able to indicate how long they believe the hearing will last.

5. All Parties to the hearing shall comply with the Tribunal's Rules of Practice, and in particular the requirements respecting disclosure set out in Rule 6.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair,
Presiding

RELEASED: March 22, 2001

COLLECTION AUTO INC.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
COLLECTION AUTO INC.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 29, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

COLLECTION AUTO INC.

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Collection Auto Inc., Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 15, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: Collection Auto Inc.
2375 Steeles Ave West #33
North York, ON M3J 3A8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Collection Auto Inc., (hereafter the "Dealer") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to its registration as a motor vehicle dealer:

- a) The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
- b) The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
- c) The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Dealer further agrees to store its books and records at the location approved by the Registrar.
- d) The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify their registered name and the address of the location approved by the Registrar.
- e) The Dealer agrees not to invite the public to deal at a place other than their approved location.
- f) The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar.

- g) The Dealer agrees to store all books and records at the registered premises and to provide access to books and records to representatives of the Registrar.
- h) The Dealer agrees to display a sign that is visible to the public, stating the dealership name.
- i) The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
- j) The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
- k) The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- l) The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
- m) The Dealer agrees to comply with all financial obligations, and in particular with the requirements of the Retail Sales Tax Act.
- n) The Dealer agrees that it is under a positive obligation to disclose in writing, all material facts about the vehicles it sells to its customers. Material facts such as; but not limited to, salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
- o) The Dealer shall comply with the OMVIC Code of Ethics and Standards of Business Practice.
- p) The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- q) The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
- r) The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- s) The Dealer agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked.

- t) The Dealer hereby withdraws his appeal to the Licence Appeal Tribunal.
- u) The Dealer hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of , 200 .

(Signature) Collection Auto Inc.
I have authority to bind the corporation.

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

JOHNSON

PREHEARING

DALTON G. JOHNSON

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND
TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, VICE-CHAIR

APPEARANCES:

PETER ABRAHAMS, Counsel, representing Dalton G. Johnson (the
"Applicant")

LARRY A. BANACK, representing the Board of Trustees of the Ontario
Motor Vehicle Dealers Compensation Fund

DATE OF
PREHEARING: February 22, 2001

Toronto

ORDER

Following the attendance on February 22, 2001 at a prehearing before the Licence Appeal Tribunal of Peter Abrahams, Counsel for the Applicant and Larry A. Banack, Counsel for the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund (the "Respondent");

The Tribunal makes the following Order:

- 1) The parties present at the prehearing recorded that there was no resolution of the issues in this matter at this time.
- 2) The hearing of this matter is scheduled to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Friday, April 27, 2001 for one day.
- 3) The Applicant shall provide to Counsel for the Respondent the names and addresses of all witnesses to be called by the Applicant together with any additional documents not provided to the Respondent as of the date of this prehearing which the Applicant intends to tender as evidence at the hearing by March 27, 2001.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: March 2, 2001

584745 ONTARIO LIMITED

PREHEARING

584745 ONTARIO LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES: RICHARD M. VAN BUSKIRK, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing Registrar, Ontario
New Home Warranty Program

DATE OF
PRE HEARING: March 22, 2001 Toronto

ORDER

WHEREAS a written Notice of Proposal dated December 4, 2000 to refuse to renew the registration of 584745 Ontario Limited (the Applicant) were issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal and a prehearing was to be heard in Toronto on March 22, 2001;

AND WHEREAS prior to the commencement of the prehearing on March 22, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: March 22, 2001

ABDULKADIR SALAD ALI O/A TRAVEL ROUTE

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
ABDULKADIR SALAD ALI O/A TRAVEL ROUTE
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: December 8, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ABDULKADIR SALAD ALI O/A TRAVEL ROUTE

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

PURSUANT to the provisions of the *Travel Industry Act* R.S.O. 1990, Chapter T. 19 (the "Act"), Abdulkadir Salad Ali o/a Travel Route (the "Applicant") appealed a proposal of the Registrar under the Act dated December 8, 2000 in terms of which the Registrar proposed to revoke the registration of the Applicant as a travel agent;

AND WHEREAS, following the attendance on March 12, 2001, at the hearing before the Licence Appeal Tribunal of Said Farah, Agent for the Applicant, and Trevor Branion, Counsel for the Registrar, *Travel Industry Act* (the "Registrar"), the parties had come to an agreement to settle prior to the hearing today, with an order to issue on consent with terms and conditions agreed to in Schedule "A";

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: March 13, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

ABDULKADIR SALAD ALI O/A TRAVEL ROUTE

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Abdulkadir Salad Ali o/a Travel Route (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 4634895/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **October 2, 1998**. The Registrant has a fiscal year end of **December 31st**.
2. On **September 17, 1998**, the Registrant agreed to comply with the prescribed terms and conditions of registration as are set out in the Act and Regulation 806/93 made under the Act (hereinafter "the Regulation"). Among the terms and conditions to which the Registrant agreed was the requirement to file financial statements in accordance with section 24 of the Regulation and the requirement to comply with the trust accounting requirements under section 36 of the Regulation.

TRUST ACCOUNTING- THE GROUNDS FOR THE PROPOSAL

3. On **May 17, 2000**, the Travel Industry Council of Ontario ("TICO") conducted an inspection of the Registrant. During the inspection, it was revealed that the Registrant's "Travel Industry Trust Account" was overdrawn several times per month. TICO's inspector explained to the Registrant the procedures for proper maintenance of the trust account. The Registrant signed the "Inspection Findings" indicating that it was aware that the trust account must never be overdrawn, if properly managed. During this inspection, the Registrant agreed to fax TICO copies of its July 2000 trust account bank statement to show proper maintenance and compliance.
4. By letter dated **August 29, 2000**, the Registrar, *Travel Industry Act* reminded the Registrant that if a trust account is handled properly, there will never be a deficiency. A deficiency indicates that funds have been improperly paid out of the trust account. The Registrar requested the Registrant to provide TICO with customer deposit reconciliations accompanied by a copy of the Registrant's trust account bank statements for the months of July, August and September 2000 to be submitted by August 31st, September 30th, and October 31st respectively. The Registrar advised the Registrant that failure to do so may result in administrative action, including a proposal to revoke registration.

5. On **November 22 and 23, 2000**, TICO conducted a further inspection of the Registrant. This inspection revealed that the Registrant's trust account was overdrawn on 64 days during the five-month period from June to October 2000. As at **September 30, 2000**, the Registrant's account was overdrawn by \$12,312.64. The Registrant acknowledged that the trust account should never be overdrawn. To correct the trust account deficit, the Registrant agreed to submit to TICO by **November 30, 2000** one of the following:
 - a. An immediate cash injection of \$12,312.64;
 - b. Additional proof of other trust assets which would be acceptable to the Registrar; or
 - c. A customer deposit reconciliation as at **October 31, 2000**. If there was a customer deposit deficiency and it was less than the deficiency shown on the **September 30, 2000** bank statement, the Registrant would deposit the lesser amount in the trust account.
6. By letter dated **November 27, 2000**, the Registrar required the Registrant to submit a trust account reconciliation for the month of October 2000 accompanied by the "Travel Industry Act Trust Account" for the same period no later than **December 4, 2000**. Failure to do so would result in administrative action.
7. By an undated fax, on a copy of the Registrar's **November 27, 2000** letter, the Registrant advised TICO that the required information would be submitted by **December 6, 2000**.
8. By **December 8, 2000**, the Registrant had failed to file the required information as evidence that it had corrected the deficiencies revealed in its trust account during TICO's inspections. On that date, the Registrar issued the Proposal to Revoke Registration.
9. Following the Proposal to Revoke Registration, the Registrant provided TICO with a deposit slip for its trust account showing that it had deposited \$7,000.00 on **December 13, 2000** to correct its trust account deficiencies.

COMPLIANCE HISTORY- PREVIOUS PROPOSAL

10. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
11. By letter dated **September 8, 1999**, TICO requested that the Registrant file its financial statements for its fiscal year end, which according to TICO's records was **October 31, 1999**, by **January 31, 2000**.
12. On **March 1, 2000**, TICO sent a second request for the Registrant's financial statements.
13. By letter dated **March 6, 2000**, the Registrar informed the Registrant that if it did not provide its financial statements by **March 24, 2000**, the Registrar would initiate administrative action including a proposal to revoke registration.
14. By facsimile dated **March 24, 2000**, the Registrant's accountant informed TICO that since the Registrant was a sole proprietorship, its fiscal year end should be **December 31, 1999**. The accountant indicated that he had not received the finalized books of accounts from the Registrant and would need an extension until **April 24, 2000** to provide the financial statements.
15. By letter dated **May 5, 2000**, the Registrar informed the Registrant that if it did not provide its financial statements by **May 19, 2000**, the Registrar would initiate administrative action including a proposal to revoke registration.

16. By **June 15, 2000**, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
17. On **June 29, 2000**, the Registrant filed its financial statements for its fiscal year ended **December 31, 1999**, which were due by **March 31, 2000**.
18. On **September 15, 2000**, the Registrar withdrew his Proposal to Revoke the Registrant's Registration dated **June 15, 2000**.
19. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

20. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **December 8, 2000**;
21. the Registrant's registration is to be subject to the following terms and conditions:
 - (j) The Registrant shall maintain a properly designated "Travel Industry Act Trust Account" and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time and as explained in the Travel Industry Council of Ontario Trust Accounting Guidelines, a copy of which is attached as Appendix "A";
 - (k) The Registrant shall not disburse or withdraw any money held in a trust account designated as a "Travel Industry Act Trust Account" pursuant to section 36 of the Regulation until payment is made to the supplier of the travel services for which the money was received, except to provide a refund to the customer from whom the money was received;
 - (l) The Registrant shall ensure that it will not disburse consumer funds from its designated "Travel Industry Act Trust Account(s)" to pay suppliers for risk contracts or otherwise unless such payments relate directly to travel services for which the consumer funds were entrusted to the Registrant. Any payments for which consumer deposits have not been received are NOT to be disbursed from the said trust account(s);
 - (m) The Registrant shall submit a monthly trust account reconciliation to the Registrar beginning with the month of **March, 2001**, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
 - (n) If the above-noted trust account reconciliations as filed according to paragraph (2)(l) are incomplete or reveal a customer deposit deficiency, the Registrant will have **ten (10) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail;
 - (o) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **December 31, 2001**, no later than **March 31, 2002**;
 - (p) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **December 31, 2002**, no later than **March 31, 2003**;

(q) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant.

22. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (h) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.

23. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2001

Mr. Ali Abdulkadir Salad
Travel Route
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

1146736 ONTARIO LTD. O/A HIRA TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1146736 ONTARIO LTD. O/A HIRA TRAVEL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: March 3, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1146736 ONTARIO LTD. O/A HIRA TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1146736 Ontario Ltd. o/a Hira Travel, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 1, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

1146736 ONTARIO LTD. O/A HIRA TRAVEL

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1146736 Ontario Ltd. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent operating as Hira Travel (registration number 4461521/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **September 6, 1996**. The Registrant was also registered as a travel wholesaler operating as Sun Stop Holidays (registration number 4461539/W) from **September 6, 1996** to **September 6, 2000** at which time its registration as a travel wholesaler lapsed.
2. The Registrant is subject to the prescribed terms and conditions of registration as are set out in sections 8 to 35 of Regulation 806/93 made under the Act (hereinafter "the Regulation").

FORM 1 FILING- THE GROUNDS FOR THE PROPOSAL

3. Section 47 of the Regulation states that within forty-five days after the end of the Registrant's fiscal year and fiscal half-year the Registrant shall make payments to the Ontario Travel Industry Compensation Fund and said payment shall be accompanied by a completed return, in the form ("Form 1") provided by the Travel Industry Council of Ontario ("TICO") indicating the sales of the Registrant for the reporting period and the amount owing to TICO.
4. By letter dated **December 29, 1999**, TICO advised the Registrant that it had failed to file its Form 1 for its fiscal year year-ended **October 30, 1999**, and to make the required payment to TICO and submit the required filing by **January 12, 2000**.
5. A final request was sent to the Registrant on **January 12, 2000** providing the Registrant with a **January 26, 2000** deadline to submit the required payment and filing, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
6. By **March 3, 2000**, the Registrant had failed to file its Form 1 with the required payment. On that date, the Registrar issued the Proposal to Revoke the Registrant's Registration.
7. By letter dated **March 8, 2000**, the Registrant notified TICO of its intention to appeal the Registrar's Proposal to Revoke Registration. This appeal was not perfected until **January 4, 2001**.

8. On **March 20, 2000**, the Registrant filed its Form 1 and paid TICO \$331.16 based on sales of \$720,000.00.

COMPLIANCE HISTORY

9. By letter dated **October 23, 1997**, TICO requested that the Registrant file its financial statements for its year-ended **October 31, 1997** by **January 31, 1998**.
10. On **January 19, 1998**, TICO sent the Registrant a second request to file its financial statements for its year-ended **October 31, 1997** by **January 31, 1998**.
11. On **March 2, 1998**, a final request was sent to the Registrant providing the Registrant with a deadline of **March 13, 1998** to submit its financial statements.
12. By **March 26, 1998**, the Registrant failed to file its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
13. On **March 30, 1998**, the Registrant filed its financial statements for its year-ended **October 31, 1997**, which were due by **January 31, 1998**.
14. On **May 14, 1998**, the Registrar withdrew the Proposal to Revoke Registration dated **March 26, 1998**. The Registrant was cautioned that any subsequent proposal might not be withdrawn, even if there is compliance after the proposal has been issued.
15. On **September 8, 1999**, TICO requested that the Registrant file its financial statements for its year-ended **October 31, 1999** by **January 31, 2000**.
16. On **March 1, 2000**, TICO sent a second request to the Registrant to file its financial statements for its year-ended **October 31, 1999**.
17. On **January 2, 2001**, the Registrant filed its financial statements for its year-ended **October 31, 1999**, which were due by **January 31, 2000**.
18. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

19. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **March 3, 2000**;
20. the Registrant's registration is to be subject to the following terms and conditions:
 - (r) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **October 31, 2001**, no later than **January 31, 2002**;
 - (s) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **October 31, 2002**, no later than **January 31, 2003**;
 - (t) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **October 31, 2003**, no later than **January 31, 2004**;

- (u) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (v) The Registrant shall complete its Form 1 filing for its fiscal half year ending **April 30, 2001** and make all applicable payments to TICO by **June 15, 2001**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (w) The Registrant shall complete its Form 1 filing for its fiscal year ending **October 31, 2001** and make all applicable payments to TICO by **December 15, 2001**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (x) The Registrant shall complete its Form 1 filing for its fiscal half year ending **April 30, 2002** and make all applicable payments to TICO by **June 15, 2002**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (y) The Registrant shall complete its Form 1 filing for its fiscal year ending **October 31, 2002** and make all applicable payments to TICO by **December 15, 2002**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time; and
 - (z) The Registrant shall complete its Form 1 filing for its fiscal half year ending **April 30, 2003** and make all applicable payments to TICO by **June 15, 2003**, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.
- 21.** Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (i) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- 22.** This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of February, 2001

Mr. Dil Muhammad
1146736 Ontario Ltd. o/a Hira Travel
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

LURKAN HOMES INC.

PREHEARING

LURKAN HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RICHARD LUTZER, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing Registrar, Ontario
New Home Warranty Program

DATE OF

PRE HEARING: March 23, 2001

Toronto

ORDER

Following attendances on March 23, 2001 at a prehearing before this Tribunal of Richard Lutzer, agent on behalf of Lurkan Homes Inc. (the "Applicant") and Netanus Rutherford, counsel on behalf of the Registrar, Ontario New Home Warranty Program (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Thursday, April 26, 2001, and thereafter, if necessary, to continue at 9:30 a.m. on Friday, April 27, 2001, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties, by consent, agree that the attached undertaking by the Applicant, marked Schedule "A" is to be made an order of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: March 26, 2001

CARAVAN IMPORTS & TRAVEL LTD.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
CARAVAN IMPORTS & TRAVEL LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: May 26, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CARAVAN IMPORTS & TRAVEL LTD.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Caravan Imports & Travel Ltd., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 7, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

CARAVAN IMPORTS & TRAVEL LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Caravan Imports & Travel Ltd. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent (registration number 1827512/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **October 6, 1983**. The Registrant has a fiscal year end of **October 31st**.
2. The Registrant is subject to the prescribed terms and conditions of registration as are set out in sections 8 to 35 of Regulation 806/93 made under the *Act* (hereinafter "the Regulation").

FILING FINANCIAL STATEMENTS- THE GROUNDS FOR THE PROPOSAL

3. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
4. By letter dated **September 8, 1999**, the Travel Industry Council of Ontario ("TICO") requested the Registrant to file its financial statements for its year-ended **October 31, 1999** by **January 31, 2000**.
5. On **March 1, 2000**, TICO sent a second request for the Registrant's financial statements.
6. By letter dated **March 6, 2000**, the Registrar, *Travel Industry Act*, sent a final request to the Registrant with a deadline to submit the required filing by **March 24, 2000** failing which the Registrar would issue a proposal to revoke the Registrant's registration.
7. By **May 26, 2000**, the Registrant had failed to file its financial statements. On that date, the Registrar, *Travel Industry Act* issued a Proposal to Revoke the Registrant's Registration.
8. On **June 5, 2000**, the Registrant notified TICO of its intention to appeal the Registrar's Proposal to Revoke Registration. The appeal was perfected in **January 2001**.

EVENTS SUBSEQUENT TO THE ISSUANCE OF THE PROPOSAL

9. The Registrant filed its financial statements for its year-ended **October 31, 1999**, which were due by **January 31, 2000**, on **July 10, 2000**. TICO's review of the financial statements revealed a working capital deficiency of \$41,048.00 or a total working capital shortfall of \$46,048.00, taking into account the requirement, under section 25 of the Regulation, for all registrants with sales of less than \$1.5 million to maintain a minimum working capital of \$5,000.00.
10. By letter dated **July 14, 2000**, TICO advised the Registrant that it had received the Registrant's financial statements and that they revealed a working capital shortage of \$46,048.00. The Registrant was told to advise TICO of what steps it had taken to address the shortage by **July 28, 2000**.
11. On **August 17, 2000**, the Registrant filed interim financial statements for the eight months ended **June 30, 2000**. These statements revealed that the working capital shortage had been reduced to \$20,945.00.
12. By letter dated **August 25, 2000**, TICO advised the Registrant that an improvement of \$20,945.00 was required to attain the minimum working capital. This could be achieved by means of a shareholder advance.
13. On **September 11, 2000**, the Registrant's accountant called TICO and advised that the Registrant was working on acquiring additional funding.
14. By letter dated **October 24, 2000**, TICO requested the Registrant to file its financial statements for its year-ended **October 31, 2000** by **January 31, 2001**.
15. On **February 5, 2001**, TICO sent a second request for the Registrant's financial statements.
16. The Registrant filed its financial statements for its year-ended **October 31, 2000**, which were due by **January 31, 2001**, on **February 26, 2001**. TICO's review of the financial statements revealed a working capital deficiency of \$5,154.00 or a total working capital shortfall of \$10,514.00.
17. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

18. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **May 26, 2000**;
19. the Registrant's registration is to be subject to the following terms and conditions:
 - (aa) The Registrant shall correct any and all working capital deficiencies and provide proof of such correction, to the satisfaction of the Registrar, by **April 30, 2001**. At all times thereafter, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (bb) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **October 31, 2001**, no later than **January 31, 2002**;
 - (cc) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **October 31, 2002**, no later than **January 31, 2003**;

(dd) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **October 31, 2003**, no later than **January 31, 2004**;

(ee) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant.

20. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (e) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.

21. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2001

Ms Karin Colbalchini
Caravan Imports & Travel Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

PREHEARING

ANGIE'S ALL SEASONS TRAVEL INC.O/A WORLDWIDE RESORTS
TRAVEL/BEACHES AND DREAMS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT

TO REVOKE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

NO ONE APPEARING for the Applicant
TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF

PRE-HEARING: February 19, 2001

Toronto

ORDER

WHEREAS, a Notice of Proposal was issued by the Registrar under the *Travel Industry Act* (the "Registrar"), dated November 23, 2000, to Revoke the Registration of Angie's All Seasons Travel Inc. o/a Worldwide Resorts Travel/Beaches and Dreams (the "Applicant");

AND WHEREAS, the Applicant appealed the Notice of Proposal to the Tribunal;

AND WHEREAS, the Applicant's appeal was set down for a prehearing before the Tribunal, on February 19, 2001, at 1:30 p.m. at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS, Counsel for the Registrar, was present at the hearing on February 19, 2001, and no one appeared for the Applicant;

NOW THEREFORE, this Tribunal orders that:

1. The prehearing in this matter could not proceed and is concluded.

2. The hearing in this matter will proceed as scheduled to commence on Thursday, March 15, 2001, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: March 7, 2001

ANGIE'S ALL SEASONS TRAVEL INC. O/A WORLDWIDE RESORTS
TRAVEL/BEACHES AND DREAMS

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
ANGIE'S ALL SEASONS TRAVEL INC. O/A WORLDWIDE RESORTS
TRAVEL/BEACHES AND DREAMS

as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 23, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANGIE'S ALL SEASONS TRAVEL INC. O/A WORLDWIDE
RESORTS TRAVEL/BEACHES AND DREAMS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Angie's All Seasons Travel Inc. o/a Worldwide Resorts Travel/Beaches and Dreams, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 13, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

ANGIE'S ALL SEASONS TRAVEL O/A WORLDWIDE RESORTS TRAVEL/ BEACHES AND DREAMS
Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Angie's All Seasons Travel Inc. (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 3127887/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **October 6, 1989**. The Registrant has a fiscal year end of **June 30th**.
2. The Registrant is subject to the terms and conditions of registration prescribed by the Act and Regulation 806/93 made under the Act (hereinafter "the Regulation") and to which the Registrant consented on **March 26, 1998**. Among the terms and conditions to which the Registrant agreed was the requirement to file financial statements within three months of its fiscal year end in accordance with section 24 of the Regulation.

FAILURE TO FILE FINANCIAL STATEMENTS- THE GROUNDS FOR THE PROPOSAL

3. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
4. By letter dated **May 31, 2000**, TICO requested the Registrant to file financial statements for its fiscal year ended **June 30, 2000** by **September 30, 2000**.
5. On **October 16, 2000**, TICO issued a "reminder letter" giving the Registrant a further due date of **October 31, 2000** to file its financial statements.
6. By letter dated **November 2, 2000**, the Registrar, *Travel Industry Act* informed the Registrant that failure to submit the financial statements by **November 16, 2000** would result in administrative action including a proposal to revoke registration.
7. By **November 23, 2000**, the Registrant had failed to submit the required financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
8. The Registrant filed its financial statements for its fiscal year ended **June 30, 2000**, which were due by **September 30, 2000**, on **March 7, 2001**.

COMPLIANCE HISTORY

9. The Registrant has a history of non-compliance with the Act and the Regulation, including failure to file its financial statements on time and failure to provide timely responses to TICO's requests for information, as summarized in paragraphs 10 through 38.

1995

10. By letter dated **October 27, 1995**, the Registrar, *Travel Industry Act* informed the Registrant that it had failed to file its financial statements for its fiscal year ended **June 30, 1995**. If the Registrant failed to provide the financial statements by **November 13, 1995**, the Registrar would initiate administrative action including revocation of registration under the Act.
11. On **November 2, 1995**, the Registrant filed its financial statements for its fiscal year ended, which were due by **September 30, 1995**.

1996

12. On **December 4, 1996**, the Registrant filed its financial statements for its fiscal year ended **June 30, 1996**, which were due by **September 30, 1996**.

1997

13. By letter dated **May 16, 1997**, the Registrant was requested to provide its financial statements for its fiscal year ended **June 30, 1997** on or before **September 30, 1997**.
14. On **October 28, 1997** TICO sent a second request for the Registrant's financial statements.
15. By letter dated **November 5, 1997**, the Registrar informed the Registrant that if it did not file its financial statements on or before **November 20, 1997**, he would have no alternative but to initiate administrative action, including revocation of registration under the Act.
16. By **December 12, 1997**, the Registrant had failed to file its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration. The Registrant did not exercise its right to appeal to the Commercial Registration Appeal Tribunal.

1998

17. On **March 6, 1998**, the Registrar issued a Final Notice to the Registrant that he was revoking its registration.
18. On **March 11, 1998**, the Registrar spoke to the Registrant and informed the Registrant that it must provide its financial statements and address all outstanding matters before the Registrar would consider reinstating the Registrant's registration.
19. On **March 23, 1998**, the Registrant filed its financial statements for its year ended **June 30, 1997**, which were due by **September 30, 1997**.
20. On **March 26, 1998**, the Registrant applied to be reinstated as a travel agent and agreed to the following terms and conditions to its registration:

- a. *Angie's All Seasons Travel Inc. shall, at all times, maintain the following minimum working capital requirements: on gross sales of less than \$1.5 million - \$5,000; on gross sales of \$1.5 to \$10.0 million - \$25,000; on gross sales of \$10.0 million to \$20.0 million - \$50,000; on gross sales over \$20.0 million - \$100,000;*
 - b. *Angie's All Seasons Travel Inc. shall hold all monies that it receives from the public for travel services in trust in Ontario, and Section 36 of Ontario Regulation 806/93, as amended by Ontario Regulation 570/94, shall apply to Angie's All Seasons Travel Inc., effective from the date of registration. Angie's All Seasons Travel Inc. shall operate the trust account(s) in accordance with section 36 of Ontario Regulation 806/93, as amended by Ontario Regulation 570/94, and the attached Guidelines for trust accounting prepared by the Ontario Travel Industry Inspections Office;*
 - c. *Angie's All Seasons Travel Inc. shall file with the Ontario Travel Industry Inspections Office financial statements REVIEWED BY A LICENSED PUBLIC ACCOUNTANT within 3 months of the Registrant's fiscal year-end, in accordance with section 15(1) of the Act and Section 24 of Ontario Regulation 806/93; and*
 - d. *Angie's All Seasons Travel Inc. shall ensure shareholders loans and/or advances to Angie's All Seasons Travel Inc. will not be withdrawn until such time as it can be done without reducing working capital below the minimum amount required by the Regulation, Travel Industry Act. In the event the shareholder(s) decide to discontinue operations, any claims against the Ontario Travel Industry Compensation Fund Corporation are to be fully satisfied before shareholder(s) loan(s) then in existence are to be repaid.*
21. The Registrant filed its financial statements for its fiscal year ended **June 30, 1998** on **September 30, 1998**. TICO's review of these financial statements revealed a working capital deficiency of \$40,381.00 or a total working capital shortfall of \$45,381.00. The financial statements also revealed a customer deposit deficit of \$41,439.00.
 22. By letter dated **October 6, 1998**, TICO advised the Registrant of the working capital shortfall and the customer deposit deficit and required the Registrant to correct these matters by **October 21, 1998**.
 23. On **October 21, 1998**, the Registrant provided TICO with copies of bank deposits totaling \$46,000.00 to correct the working capital shortfall.
- 1999**
24. On **February 18, 1999**, TICO conducted an inspection of the Registrant and discovered that on **July 24, 1998**, it issued a cheque to Ms Angela Comella, which had the effect of increasing the Registrant's working capital shortfall from \$45,381.00 to \$75,381.00. Consequently, the Registrant's October 1998 injections did not cover the entire working capital shortfall.
 25. By letter dated **March 8, 1999**, TICO advised the Registrant that to comply with the terms and conditions of its registration, it was required to make an additional improvement of \$29,381.00 in its working capital. Additionally, the Registrant was required to submit a reconciliation of customer obligations and assets as at **February 28, 1999**. This information was to be submitted no later than **March 31, 1999**.
 26. TICO sent a second request for the information requested in its **March 8, 1999** letter on **April 13, 1999**.
 27. On **May 3, 1999**, TICO received a deposit slip from the Registrant showing an injection of \$30,000.00 from Ms Comella.

28. By letter dated **June 7, 1999**, TICO requested the Registrant to file its financial statements for its fiscal year ended **June 30, 1999** on or before **September 30, 1999**.
29. On **September 2, 1999**, TICO conducted an inspection of the Registrant. The inspection revealed that the Registrant did not operate a trust account for customer deposits and supplier payments, contrary to the terms and conditions of registration that the Registrant signed on **March 26, 1998**. The Registrant agreed to submit a customer deposit reconciliation for the month of August 1999 by **September 30, 1999**.
30. On **October 5, 1999**, TICO sent a second request for the Registrant's **June 30, 1999** financial statements.
31. By letter dated **October 8, 1999**, the Registrar, *Travel Industry Act* informed the Registrant that it had failed to submit the required customer deposit reconciliation and file its financial statements by **September 30, 1999**. Failure to provide this information by **October 22, 1999** would lead to administrative action including a proposal to revoke registration.
32. By letter dated **October 27, 1999**, the Registrar informed the Registrant that if it failed to file its financial statements by **November 10, 1999**, he would initiate administrative action, including revocation of registration under the Act.
33. On **November 19, 1999**, the Registrant filed its financial statements for its fiscal year ended **June 30, 1999**, which were due by **September 30, 1999**. TICO's review of the financial statements revealed a customer deposit deficit of \$4,523.00.
34. By letter dated **November 26, 1999**, TICO advised the Registrant of the customer deposit deficit of \$4,523.00 as at **June 30, 1999**. TICO required the Registrant to provide a reconciliation of customer funds and customer obligations, accompanied by a copy of its "Travel Industry Act Trust Account" bank statement for a period to **October 31, 1999**, by **December 15, 1999**, failing which a proposal to revoke registration would be issued.
35. The Registrant did not submit the trust reconciliation by **December 15, 1999**. So, by letter dated **December 17, 1999**, TICO informed the Registrant that it required a letter of credit in the amount of \$25,000.00, with TICO as the beneficiary, which TICO would utilize as a guarantee against customer deposit liabilities. This letter of credit was in lieu of the Registrant providing customer deposit reconciliations, as was required under the terms and conditions of its registration. The letter of credit was to be submitted no later than **January 17, 2000**.

2000

36. On **January 18, 2000**, TICO sent the Registrant a copy of its **December 17, 1999** letter, as the Registrant had failed to provide the letter of credit.
37. By letter dated **February 7, 2000**, the Registrar informed the Registrant that if TICO did not receive the \$25,000.00 letter of credit by **February 21, 2000**, he would issue a proposal to revoke registration.
38. On or about **February 18, 2000**, the Registrant provided a bank draft paid to the order of TICO in the amount of \$25,000.00 to be held in lieu of trust accounting.
39. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

40. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **November 23, 2000**;
41. the Registrant's registration is to be subject to the following terms and conditions:
 - (ff) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending **June 30, 2001**, no later than **September 30, 2001**;
 - (gg) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **June 30, 2002**, no later than **September 30, 2002**;
 - (hh) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **June 30, 2003**, no later than **September 30, 2003**;
 - (ii) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending **June 30, 2004**, no later than **September 30, 2004**;
 - (jj) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant.
 - (kk) Where TICO requires the Registrant provide information to satisfy the Registrant's obligations under the Act and the Regulation, the Registrant shall provide TICO with such required information by the date upon which TICO indicates the information is due.
 - (ll) The Registrant shall provide TICO with written acknowledgement of any and all future correspondence from TICO within two (2) days after the Registrant has received said correspondence.
42. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (f) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
43. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2001

Ms Angela M. Comella
Angie's All Seasons Travel Inc. o/a
Worldwide Resorts Travel/Beaches and Dreams
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

WEGG

DAN WEGG

MOTION TO HEAR SUBMISSIONS REGARDING THE ALLEGED
FAILURE TO COMPLY WITH THE CONDITIONS RESPECTING AN
ORDER TO EXTEND THE TIME TO APPEAL UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL : MARJORIE L. HILEY, Vice-Chair, Presiding

APPEARANCES:

No one appearing for the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
MOTION:

March 6, 2001

Toronto

ORDER

WHEREAS, the parties were notified on February 14, 2001 to make submissions to the Tribunal on March 6, 2001, respecting the alleged failure to comply with the conditions respecting an order to extend the time to appeal under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS, the agent for the Applicant, Dan Wegg, failed to attend before the Tribunal, although duly notified;

AND WHEREAS, evidence was heard by the Tribunal as to the failure of the Applicant to comply with the conditions contained in the Order of the of the Tribunal dated January 17, 2001, respecting the extension of time to file an appeal;

PURSUANT to the authority vested in it by the *Licence Appeal Tribunal Act*, 1999, the Tribunal orders that:

1. The application to extend the time for filing of the appeal by the Applicant is refused;
2. The Ontario New Home Warranty Program is ordered to carry out its Notice of Proposal dated June 15, 2000;
3. The hearing dates of March 29 and 30, 2001 before this Tribunal are cancelled;

4. The reasons respecting this Order are to follow its release.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair,
Presiding

RELEASED: March 7, 2001

CARMELO DE CICCIO CONSTRUCTION CO. LIMITED

CARMELO DE CICCIO CONSTRUCTION CO. LIMITED

MOTION TO HEAR SUBMISSIONS REGARDING THE ALLEGED
FAILURE TO COMPLY WITH THE CONDITIONS RESPECTING AN
ORDER TO EXTEND THE TIME TO APPEAL UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL : MARJORIE L. HILEY, Vice-Chair, Presiding

APPEARANCES:

No one appearing for the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
MOTION:

March 6, 2001

Toronto

ORDER

WHEREAS, the parties were notified on February 23, 2001 to make submissions to the Tribunal on March 6, 2001, respecting the alleged failure to comply with the conditions respecting an order to extend the time to appeal under the *Ontario New Home Warranties Plan Act*;

AND WHEREAS, the agent for the Applicant, Carmelo De Cicco Construction Co. Limited, failed to attend before the Tribunal, although duly notified;

AND WHEREAS, evidence was heard by the Tribunal as to the failure of the Applicant to comply with the conditions contained in the Order of the of the Tribunal dated January 19, 2001, respecting the extension of time to file an appeal;

PURSUANT to the authority vested in it by the *Licence Appeal Tribunal Act*, 1999, the Tribunal orders that:

1. The application to extend the time for filing of the appeal by the Applicant is refused;
2. The Ontario New Home Warranty Program is ordered to carry out its Notice of Proposal dated June 15, 2000;
3. The hearing dates of April 2 and 3, 2001 before this Tribunal are cancelled;

4. The reasons respecting this Order are to follow its release.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair,
Presiding

RELEASED: March 7, 2001

DAY

KENNETH HAROLD DAY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: Beverley J. Reade, Vice-Chair,
Presiding member

APPEARANCES: Kyle Biel,
Representative for the Registrar of Motor Vehicles

Kenneth Harold Day, Applicant

DATE OF HEARING: March 2, 2001

DECISION RELEASED: March 5, 2001 Kitchener

REASONS FOR DECISION

A hearing was held on March 2, 2001, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kenneth Harold Day (the "Applicant")
Motor Vehicle:	1991 Dodge Pickup AD2, plate # JD2070 (the "vehicle")
Date of Appeal:	January 31, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(b) and (d) of the Act.

This matter came before this Tribunal on March 2, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit # 2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My Drivers licence was not under suspension when I was driving. The Man with me John Groshaw (D.OB 66/07/03) was also charged with driving but he was not driving. I have had a meeting with crown attorney William D. William ((519) 741-3222) who advised me that with Mr. Groshaw's Bail hearing on Jan 20/01 he is ordered to have Not contact with me or buy vehicles : I am the son of Ken & Karen Day and this vehicle is used primarily by them. I was allowed to use it this evening as my vehicle had broken down. There was no reasoning to impound this vehicle as Mr. Groshaw was not driving. I would not permit him too! Also the Waterloo Regional & Crown has given me authorization to have Vehicle released.

The Tribunal also received a further letter from Kenneth Day, by fax:

Attention Kyle

Feb 8/01

I would like to amend notice to include exceptional hardship.

I am writing to explain the situation I have found myself in due to the lack of judgment of my son. My wife lost her job due to downsizing in Oct 1999. Her severance has just run out & she had started to draw unemployment ins. They told her she may have to take some courses to update her education as there are no jobs where we live. She has a 15 year old car which she uses for transportation.

I have been out of work since July 2000. I have applications in & received an interview on Feb 6/01. They are supposed to let me know if I do happen to get the job I will need transportation back & forth to job. It is a truck driving job where I will be gone 1 to 5 days at a time. My wife cannot be without transportation that long.

I have nothing on my driving record or no criminal record. I wish to get my truck back so I can take advantage of any jobs that come up. If you wish to check this information...(Mr. Day then provided his driver's licence number and the social insurance numbers for him and Mrs. Day).

"Ken Day"

Mr. Day was accompanied to the hearing by his wife. She did not wish to testify as she attended only to provide moral support to him. She was obviously very upset about the entire situation and she was almost in tears on several occasions. Jeffrey Day did not attend. He was at work and his parents have not spoken to him recently. He has obviously chosen to leave his parents to deal with the problems for which he appears to be responsible.

Jeffrey Day is 37 years old. On January 27, 2001, he was living with his parents in Drayton, a small town of about 1,500 people 30 minutes outside of Kitchener. He had permission to use his father's truck to get to work while his parents were out of town. He did not have his father's permission to allow others to drive the truck. On this appeal, Mr. Day does not contend that the vehicle was stolen. He does not know who was driving the truck before it was impounded.

When Mr. and Mrs. Day returned from their holiday, they learned that the vehicle had been the subject of the Impoundment Order under appeal. They have no personal knowledge concerning the circumstances under which the Order was made. Their son has moved out of their house and there is no communication with him at this time.

Mr. Day is 58 years old was out of work for about eight months. Since the filing of his appeal, he has been successful in obtaining a part-time position as a truck driver for Home Hardware, located in St. Jacobs. He requires transportation to get to work from his home. His driving record is spotless. His new employer searched his record back to 1977 and found not a single infraction.

Mrs. Day is 54 years old and is in receipt of unemployment insurance. She expects that she will need to have retraining at some time in order to continue to qualify, but has not been directed to do so as of the date of the hearing. Her family doctor is in Drayton and Drayton has a 911 emergency service. Her major concern is for her elderly mother who resides in another town in her own home.

Mr. Day owns another vehicle in addition to the impounded truck. It is a 1987 Chrysler 5th Avenue, which Mrs. Day has always had available to her. It is not in great mechanical condition, but it runs. Mr. Day is presently using the vehicle to get to work and said that if he needed to be on the road, Mrs. Day could drive him to work and then drive home. St. Jacobs is 22 kilometers from Drayton, and it would not be good for the vehicle to continue to put extra miles on it.

Jeffrey Day's driver's licence is now under suspension. He has a vehicle, but his parents do not think that he will lend it to them or sell it to assist with the towing or impoundment charges.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John D. Groshaw;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 21, 2002

5. Copy of Ministry of Transportation records showing ownership by Mr. Day of a 1987 Chrysler motor vehicle.

The Tribunal heard evidence from Officer Etheridge of the Waterloo Regional Police Department. Around bar closing time on January 27, 2001, his radar showed Mr. Day's 1991 Dodge truck travelling 45 kilometers per hour in a 80 kilometer per hour zone. He turned his cruiser around to investigate whether there were mechanical difficulties with the vehicle. By the time he caught up to it, it was stopping. Jeffrey Day then got out of the passenger side of the vehicle, walked around the truck, and entered the driver's door. The vehicle rocked, indicating to the officer that the original driver had slid over to the passenger seat. The only other person in the vehicle was John Groshaw, whose licence was suspended until September 21, 2002 as a result of an impaired driving conviction on September 21, 1999.

Both Mr. Groshaw and Jeffrey Day were arrested and charged with having care and control of the vehicle while their abilities to drive were impaired. Jeffrey Day admitted to Officer Etheridge that he had been stupid to listen to Mr. Groshaw's pleas to let him drive that night.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(b) & (d).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
 - (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The evidence establishes on a balance of probabilities that John Groshaw was driving Mr. Day's vehicle at a time when his licence was suspended for impaired driving. The first ground of the appeal fails.

The second ground of the appeal is also unsuccessful. It is clear that Mr. and Mrs. Day have experienced hardship as a result of the Impoundment Order. While Mr. Day has been fortunate in obtaining employment, it is not close to his home and he requires transportation to get to work. This deprives Mrs. Day of her own transportation and has caused concern and stress about her mother. The mounting costs of the storage fees for the vehicle are of obvious concern to this family which has experienced recent employment difficulties. However, because Mr. Day has his second vehicle available to him, the Tribunal cannot find that no alternative to the impounded vehicle is available. In these circumstances, the hardship is not exceptional, as defined by the regulations.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade, Vice-Chair,
Presiding Member

RELEASED: March 5, 2001

BLUE RIBBON CHILD CARE SOCIETY CARRYING ON BUSINESS AS
BLUE RIBBON DAY CARE CENTRE

PREHEARING

BLUE RIBBON CHILD CARE SOCIETY CARRYING ON BUSINESS AS
BLUE RIBBON DAY CARE CENTRE

APPEAL FROM A NOTICE OF DIRECTION DATED JANUARY 18,
2001 OF THE DIRECTOR UNDER THE *DAY NURSERIES ACT*
RESPECTING BLUE RIBBON CHILD CARE CENTRE LOCATED AT
544 LANSDOWNE AVENUE, TORONTO, ONTARIO, UNDER
SECTION 15 OF THE *DAY NURSERIES ACT*

TRIBUNAL:

Robert Adams,
Presiding Member

APPEARANCES:

Katharine E. Renison, Counsel for the Director under the
Day Nurseries Act, with Judy McCleod and Sharlene Ziniuk

Siva Kandiah, Agent for the Applicant, Blue Ribbon Child Care Society
carrying on business as Blue Ribbon Day Care Centre, with
S. Chandratitagam

DATE OF

PRE-HEARING: March 12, 2001

Toronto

ORDER

WHEREAS, Blue Ribbon Child Care Society carrying on business as Blue Ribbon Day Care Centre, (the "Applicant") has requested a hearing before the Licence Appeal Tribunal to appeal the Notice of Direction of the Director dated January 18, 2001, (the "Director") under the *Day Nurseries Act*, respecting Blue Ribbon Child Care Society carrying on business as Blue Ribbon Day Care Centre, located at 544 Lansdowne Avenue, in the City of Toronto, Ontario, under Section 15 of the *Day Nurseries Act*.

AND WHEREAS, a pre-hearing was conducted by the Tribunal on March 12, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, as set forth in the Tribunal's Notice of Pre-Hearing Conference dated March 12, 2001.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing of this matter will be conducted commencing at 9:30 a.m. on March 29, 2001, and continuing on April 2, 3, 4, 5, 6, 9, 10, 11 and 12, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario.
2. The Applicant and the Director will file with the Tribunal their submissions before 4:30 p.m. on March 19, 2001 at the Tribunal's offices.
3. The Applicant will provide the Tribunal with three additional copies of documents 2, 3, 4, 5, 6, 7, 8 and 9 as marked at the pre-hearing.
4. The Applicant and the Director will comply with the disclosure requirement set out in the Tribunal's Rules of Practice. The Applicant and the Director by March 19, 2001 will provide one copy to the other party and four copies to the Tribunal of any document that the parties wish to rely on at the hearing.
5. The following documents were numbered pre-hearing for consideration as exhibits at the by the Tribunal's panel for the hearing of this matter:

Tendered by the Director:

#1 -Document Book dated March 12, 2001, 72 indexed tabs.

Tendered by the Applicant:

#2 -hand written document dated February 1, 2001, 1 page.
#3 -binder, 25 pages, dated January 17, 2001.
#4 -binder, 41 pages, dated January 8, 2001.
#5 -binder, 4 tabs, dated December 20, 2001.
#6 -document, 13 pages, dated November 3, 2000.
#7 -document, 89 pages, dated My 12, 2000.
#9 -copy of hiring policy, 1 page.

6. It was agreed that before 4:30 p.m., on March 19, 2001, both parties will provide the other party and the Tribunal with a list of witnesses who will be called to provide evidence at the hearing.

LICENCE APPEAL TRIBUNAL

Robert Adams,
Presiding Member

Released: March 16, 2001

KHAN

MOHAMMED SAEED KHAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO, Presiding member
WILLIAM WARBURTON, Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

MOHAMMED SAEED KHAN, Applicant
unrepresented

DATE OF HEARING: March 2, 2001 Toronto

DECISION RELEASED: March 7, 2001

REASONS FOR DECISION

A hearing was held on March 2, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mohammed Saeed Khan (the “Applicant”)
Motor Vehicle:	1989 Nissan Maxima, plate # AHBN 277 (the “vehicle”)
Date of Appeal:	February 6, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 2, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I need the car to drive to work because of this My wife is recently been in a car accident and she needs to be taken to the doctors almost every week for check ups. I need a oral hearing because I can explain it better.

I have notice of impound. Please I really need it because my wife is unable to take the TTC because of her knee injury.

* I wish to wave disclosure time.

The Applicant with the assistance of his son, the impounded driver, for translating purposes, gave his oral testimony under oath.

The Applicant is a father of 4 children, 3 of which still reside at home. Their ages are 25, 15 and 14. The Applicant is currently the sole provider for the household. For the past 3 years, he has been employed at Masco Metal Finishing Co. Ltd. as a labourer/racker.

The Applicant's wife, Mrs. Khan, was in a car accident in April 1999 wherein she sustained knee and shoulder injuries. Since this accident, Mrs. Khan has been unable to work due to her injuries. She was also employed at Masco Metal Finishing Co. Ltd.

Due to a pending court case regarding the aforementioned accident, Mrs. Khan must see a specialist a minimum of once a week to once every 2 weeks so the specialist can monitor and report to her lawyer on her progress regarding the injuries she sustained in the accident. Mrs. Khan also suffers from asthma which is not life threatening, but which condition and medication must be monitored under a doctor's care.

On the morning the vehicle was impounded, the Applicant's 23 year-old son obtained a ride from a co-worker to the Applicant's place of employment. The Applicant's shift on February 1, 2001 commenced at 11:00 p.m. to 7:00 a.m. Unknown to the Applicant, the Applicant's son took the vehicle to attend a party in Niagara. The Applicant's son confessed that he had taken the spare key from home before he left for work that evening, and he also confirmed that he was aware that he was a suspended driver.

The Applicant resides approximately 25 minutes by car from his place of employment. He currently rides his bicycle to work, which takes approximately 45 minutes depending on the weather.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits #3 and #4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ahmad L. Khan;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 6, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d).

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for his appeal to be considered under section 22(2), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

These criteria are cumulative. That is all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d). On the evidence the first and second criteria are not met.

- (a) **"no alternative to the impounded motor vehicle is available"** The Applicant has testified that he is currently riding his bicycle to work each day. He has not taken taxis because he cannot afford them and testified that he has not looked into the possibility of renting a vehicle. The Applicant testified that public transit would also not be feasible since he would have to walk a fair distance to his place of employment from where the bus dropped him off.
- (b) **"the loss will be immediate, significant and lasting"** The Applicant testified that (i); he has not missed any days of work or lost any wages due to his vehicle's impoundment; (ii) there is no threat of loss of employment; (iii) he has been able to get to work by riding his bicycle; (iv) he has not incurred a financial loss from his employment but only a monthly contribution towards rent from his son, the impounded driver, when the Applicant's son was employed.

After considering the above requirement, the Tribunal finds that the Applicant albeit inconvenient to get to his place of employment, has alternatives to the impounded vehicle and the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

William Warburton, Member

RELEASED: March 7, 2001

RELIABLE CAR SALES LTD. AND DANIEL G. RIVARD

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RELIABLE CAR SALES LTD. AND DANIEL G. RIVARD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: February 1, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RELIABLE CAR SALES LTD. AND DANIEL G. RIVARD

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on June 20, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Tuesday, July 3, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 13, 2001

BABES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GEORGE BABES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 31, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GEORGE BABES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by George Babes, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 14, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Georges Babes
210 Tresane Street
Oshawa, ON L1J 1T8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, George Babes, (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees to advise the Registrar as to the status of any pending charges and upon disposition, to forthwith advise the Registrar in writing as to the disposition of the charges.
3. The Applicant agrees if he is convicted of a criminal code offence or if he is convicted of an industry specific offence under any law, his registration is automatically revoked.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar. Said consent shall not be unreasonably withheld. In addition, the applicant agrees to provide the Registrar with written confirmation, signed by the new employer, that the applicant has made full disclosure to the dealer, of any charges and/or convictions
5. The applicant shall not be an officer, director, manager, owner or partner in a dealership until the earlier of February 14, 2005 or any charges before the court have been disposed of.
6. The Applicant shall not apply for registration as a dealer until the earlier of February 14, 2005 or any charges before the court have disposed of.

7. The Applicant agrees to comply with his financial obligations when said obligations are due.
8. The Applicant shall, upon request by the Registrar, provide any and all documentation to the Registrar relating to the financial affairs of the Applicant.
9. The Applicant will not be the final signatory on any bills of sale, unless purchasing vehicles at a wholesale auction.
10. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
11. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
12. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
13. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked
14. The Applicant will provide a copy of this order to his employer forthwith and to provide proof of same to the Registrar.
15. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
16. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2001.

(Signature) George Babes

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

YIP

BETTY JOAN ROSE YIP

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JOE HEWITT,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

BETTY JOAN ROSE YIP, Applicant
unrepresented

DATE OF HEARING: March 6, 2001

DECISION RELEASED: March 8, 2001 *By teleconference*

REASONS FOR DECISION

A hearing was held *by teleconference* on March 6, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Betty Joan Rose Yip (the “Applicant”)
Motor Vehicle: 1996 Ford COF, plate # 6308EZ (the “vehicle”)
Date of Appeal: February 16, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 6, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

- (iv) The loss of the truck will result in exceptional hardship because of the following:
 - 1) The poor weather conditions and terrain in the district of Algoma area necessitate a safe 4 wheel drive vehicle. The owner just moved and is still in the process of moving from Newmarket Ont. To Searchmont Road Hwy 556. The truck is required to transport furniture this month and to haul firewood to heat the house in Searchmont.

- 2) The owner has a terminally ill brother in Newmarket Southlake hospital and will need the truck to attend to his health matters as she is the only relative responsible for his care (all other family resides in Alberta and B.C).
- 3) The owner is under medical care for anxiety depression and must attend to medical matters and job related matters concerning her own health and work at York District School Board.
- 4) The owner has a house for sale and/or rent in Newmarket and will need a safe truck to travel to and from the Searchmont area and Newmarket to close business matters within this month.
- 5) The truck is required for attending a funeral this Friday, Feb. 16, 2001 for a family friend and must.
- 6) The owner's other vehicle (Ford Taurus) is not in safe condition and has required service for the past 3 days making the release of the truck an urgent matter so that all these medical issues and safe living conditions can be resolved immediately.
- 7) Please notify me immediately at (705) 781 3506 with the decision of the Appeal Board as I do not have vehicle access to pick up my mail in Searchmont. There is no mail delivery.

The evidence of the of the Applicant, Miss Yip testified that she is presently living in Searchmount, Ontario but is still in the process of moving from her home in Newmarket, Ontario.

She testified that she has a terminally ill brother in a Newmarket nursing home and as the only family member in Ontario must attend a scheduled medical meeting on March 9, 2001. That the meeting is to discuss the placement of her brother with the doctor family, friends and her brother's estranged wife and daughter.

She stated that she needs the truck to move boxes and furniture out of her home in Newmarket that is for sale. The possible closing date is April 13, 2001 if the offer is signed back.

The Applicant testified that the terrain in the Searchmount area is very hilly, and she does not feel safe driving any other vehicle except her four-wheel drive pick-up. She advised that a motor mount on her Ford Taurus is broken, and she does not feel safe driving the car to Newmarket.

The Applicant is presently on sick leave from her work in the York Region.

On cross-examination, Miss Yip told the Tribunal that she has investigated taking the bus to Newmarket. She has not looked into renting a vehicle. Her vehicles release date is March 24, 2001, about three weeks prior to her possible house closing date in Newmarket. She said that it would be easier if she could attend the medical placement meeting and pick up her furniture and boxes at that time.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Larry Joe Lapossie;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to provide breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 29, 2002.

Miss Yip was asked if she had all the copies of the above documents and was given an opportunity to ask any questions or have any information clarified.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with the section 50.2.3 of the Act Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. This includes the unfortunate fact that the impoundment of the Applicant's vehicle makes it more difficult for the Applicant to visit her brother who is terminally ill. In order to be considered under section 22(2)(a)(b) or (c), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The applicant under cross-examination has testified that alternatives to the impounded motor vehicle are available including, transport by train, bus, and another car.

Though inconvenienced, the Applicant has not suffered any loss of employment as a result of the impoundment. The Applicant has not presented any evidence that would indicate that the loss of the vehicle would be immediate significant and lasting as required by section 22(3)(b) of Regulation 574 as amended by O. Reg. 632/98.

The Tribunal finds that the Applicant has failed to meet the onus required by the Act to establish exceptional hardship under section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

RELEASED: March 8, 2001

ALDER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BILL JAMES ALDER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BILL JAMES ALDER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Bill James Alder, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 26, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Bill J. Alder
9 Lunar Crescent
Markham, ON, L3R 2T1

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Bill J. Alder (hereinafter referred to as "the Applicant"), and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged in the future, he will immediately notify his employer in writing of the charges against him and provide a copy of the notification signed by his employer to the Registrar.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full disclosure on all future applications.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 6) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 7) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 8) The Applicant agrees that as soon as a disposition is made regarding his pending charge of Threatening Bodily Harm, he will inform the Registrar of the result forthwith.
- 9) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).

Bill J. Alder (initials)

- 10) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 11) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 12) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 13) The Applicant will provide a copy of this order to his employer forthwith.
- 14) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 15) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 16) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2001.

(Signature) BILL J. ALDER

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

VANDEVENNE

RONALD VANDEVENNE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

RONALD VANDEVENNE, Applicant
unrepresented

DATE OF HEARING: March 16, 2001

DECISION RELEASED: March 20, 2001 Windsor

REASONS FOR DECISION

A hearing was held on March 16, 2001, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Ronald Vandevenne (the "Applicant")
Motor Vehicle: 1988 Ford Tempo, plate # AFLY 917 (the "vehicle")
Date of Appeal: February 14, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 16, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The man that was pulled over with the car did not have permission to drive the car. I was unaware the car was being used by this person. Although I did have the car stored in his garage to be repaired. But there were no stickers on the car because it needed some work done on the exhaust to pass the emissions test. Would like to appeal in Windsor.

At the hearing the Applicant gave evidence as to the events that led up to and surrounding the impoundment.

The Applicant explained that he took the vehicle to Gary Hazel, to have the exhaust fixed. At no time did the Applicant give Gary permission to drive the car, however, the Applicant was advised by the police that he could not lay a charge of theft against Gary Hazel.

In direct and cross-examination, the Applicant testified that he was not able to drive the vehicle prior to same being impounded because the sticker had expired.

The Applicant has been getting around, the same way he did prior to the impoundment, by bus and by taking cabs, if necessary.

The Applicant feels that he misunderstood the meaning of “hardship”. The actual hardship incurred by the Applicant will be the cost of the towing and storing the vehicle, which the Applicant claims he cannot afford.

The Respondent offered no evidence other than the documentation offered prior to the hearing.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gary D. Hazel;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 15, 2001.

At the hearing, the Respondent provided the Tribunal with certified copies of Ministry of Transportation documents on file.

In closing, the Respondent argued that the grounds for hardship were also not met and asked the Tribunal to uphold the suspension.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal may not consider economic hardship as a ground of exceptional hardship unless the Applicant's appeal meets all of the criteria set out in subsection 20(3) of Regulation 574, R.R.O. 1990 as amended by O. Reg. 632/98. These include the criteria that no alternative to the impounded vehicle is available and that the loss is immediate, significant and lasting.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Board may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that he is able to get about, and in fact was getting about, by bus.

As the Applicant has alternate methods of transportation available to him, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Board may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant's loss is not immediate, significant and lasting.

The Applicant has not satisfied the Tribunal that he has in fact incurred any loss of income or extra expenses which could be considered hardship.

The criteria under subsection 20(3) of Regulation 574 as amended are cumulative. That is, all must be met. In this matter the two above-noted criteria have not been met by the Applicant.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established "exceptional hardship" as required by an appeal under section 50.2 of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: March 20, 2001

RITCHIE

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1500699 OWNED BY: Bruce A. Ritchie of: 14 Ashley Street, Foxboro, P.O. Box 22071, Bellville, Ontario K8N 5V7 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: February 7, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

BRUCE A. RITCHIE

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Bruce A. Ritchie, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: March 1, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Bruce Ritchie

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #V1500699** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on February 7, 2001.
2. The applicant, **Bruce Ritchie**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating **that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received and reviewed the police information, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Board set aside the order to impound.

Bruce Ritchie

(signature of Applicant)

(date)

(signature of Registrar)

(date)

BLYTH & COMPANY TRAVEL LIMITED

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
BLYTH & COMPANY TRAVEL LIMITED
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 9, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BLYTH & COMPANY TRAVEL LIMITED

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Blyth & Company Travel Limited, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: March 13, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

BLYTH & COMPANY TRAVEL LTD.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Joint Submission.

JOINT SUBMISSION

WHEREAS Blyth & Company Travel Ltd. is registered as a travel agent (registration # 2740365/R) and as a travel wholesaler (registration # 4385381/W) under the *Travel Industry Act*, R.S.O. 1990, c. T.19, as amended (hereinafter referred to as "the Act");

AND WHEREAS a registration is, pursuant to subsection 4(4) of the Act, subject to such terms and conditions to give effect to the purposes of the Act as are consented to by the registrant, imposed by the Licence Appeal Tribunal, or prescribed by the regulation made under the Act (Ontario Regulation 806/93, as amended; hereinafter referred to as the "Regulation");

AND WHEREAS the purposes of the Act include the protection of customer monies paid for the purchase of travel services;

AND WHEREAS the Registrar, *Travel Industry Act* issued a Proposal to Revoke Blyth & Company's Registration on **February 9, 2001**;

AND WHEREAS Blyth & Company Ltd. (hereinafter referred to as "the Registrant") acknowledges that it has read, understands, and will ensure compliance with the provisions of the Act and the Regulation, as well as with the further terms and conditions of registration set out below;

NOW THEREFORE TAKE NOTICE THAT the parties hereto consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* to resolve this matter, such order directing that:

1. The Registrar refrain from carrying out the Proposal to Revoke Registration dated **February 9, 2001**;
2. The Registrant's registration is to be subject to the following terms and conditions:
 - (mm) The Registrant shall provide the Registrar, *Travel Industry Act* with a statutory declaration listing the shareholders associated with the Registrant, as defined by section 11 of the *Travel Industry Act* (the "Act"), by **April 1, 2001** and notify the Registrar of any changes thereafter within five (5) days of such change;
 - (nn) The Registrant shall file complete financial statements, including a statement of sales made during the period, a balance sheet, an income statement and a reconciliation of customer funds and customer obligations, for its fiscal year ended **January 31, 2001** with a review engagement report from a licensed public accountant no later than **April 30, 2001**. The said financial statements shall be filed with an audit opinion from a licensed accountant no later than **June 15, 2001**;

- (oo) If the above-noted financial statements as filed reveal an insufficient working capital amount, under section 25 of Regulation 806/93 ("the Regulation"), or are otherwise deficient, the Registrant shall, subject to paragraph 2(m) below, have 30 days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail. Thereafter, the Registrant shall at all times maintain minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
- (pp) The Registrant shall file complete audited financial statements including a statement of sales made during the period, a balance sheet, an income statement and a reconciliation of customer funds and customer obligations for its fiscal year ending **January 31, 2002**, no later than **April 30, 2002**;
- (qq) The Registrant shall file complete audited financial statements including a statement of sales made during the period, a balance sheet, an income statement and a reconciliation of customer funds and customer obligations for its fiscal year ending **January 31, 2003**, no later than **April 30, 2003**;
- (rr) The Registrant shall file complete financial statements including a statement of sales made during the period, a balance sheet, an income statement and a reconciliation of customer funds and customer obligations for its fiscal year ending **January 31, 2004**, no later than **April 30, 2004**;
- (ss) The Registrant shall ensure that any shareholder or related party loans shall be repaid only at such time and in such amounts as will allow the Registrant to remain in compliance with the Act and the Regulation. In the event that the Registrant may decide to discontinue operations, any claims against the Ontario Travel Industry Compensation Fund are to be fully satisfied before shareholder or related party loans then in existence are to be repaid;
- (tt) The Registrant shall maintain a properly designated "Travel Industry Act Trust Account" and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
- (uu) The Registrant shall not disburse or withdraw any money held in a trust account designated as a "Travel Industry Act Trust Account" pursuant to section 36 of the Regulation until payment is made to the supplier of the travel services for which the money was received, except to provide a refund to the customer from whom the money was received;
- (ww) The Registrant shall ensure that it will not disburse consumer funds from its designated "Travel Industry Act Trust Account(s)" to pay suppliers for risk contracts or otherwise unless such payments relate directly to travel services for which the consumer funds were entrusted to the Registrant. Any payments for which consumer deposits have not been received are NOT to be disbursed from the said trust account(s);
- (ww) The Registrant shall submit a monthly trust account reconciliation to the Registrar beginning with the month of **March, 2001**, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require;
- (xx) If the above-noted trust account reconciliations as filed according to paragraph (2)(l) are incomplete or reveal a customer deposit deficiency, the Registrant will have **ten (10) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail;

(yy) The Registrant shall not knowingly carry on business with a travel agent or travel wholesaler in Ontario who is not registered;

(zz) The Registrant shall, by **April 1, 2001**, hire a contract Chief Financial Officer to manage and supervise the Registrant's operations who has, in the Registrar's opinion, sufficient experience and knowledge of the business of selling travel services to ensure that the office is managed in compliance with the Act and the Regulation; and

(aaa) The Registrant shall provide the Registrar with a list of all outstanding legal proceedings against the Registrant and/or Mr. Graham David Blyth by **April 1, 2001** and should the Registrant and/or Mr. Graham David Blyth be subject to any further legal proceedings, the Registrant shall, within five (5) days from the day in which the further proceedings come to the attention of the Registrant, notify the Registrar of said proceedings.

3. Should the Registrant fail to comply with conditions listed in paragraphs 2 (a) to (o) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of March, 2001

Mr. Graham David Blyth
Blyth & Company Travel Limited
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

SOLOMAN

WILLIAM SOLOMAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JOE HEWITT,
Presiding member

APPEARANCES: CLAIRE ROWETT,
Representative for the Registrar of Motor Vehicles

WILLIAM SOLOMAN, Applicant
unrepresented

DATE OF HEARING: March 20, 2001

DECISION RELEASED: March 23, 2001 *By teleconference*

REASONS FOR DECISION

A hearing was held *by teleconference* on March 20, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	William Soloman (the "Applicant")
Motor Vehicle:	1993 Pontiac Bonneville, plate # AFTC171 (the "vehicle")
Date of Appeal:	March 2, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 20, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To whom it may concern:

This impoundment of my car, is causing me, a lot of hardship. I've been diagnosed with congestive heart disease in 1997. I can't walk too far without rest. I live out in the country so I don't have access to bus or Taxi services. I am very sorry for what happened. I have to pick up my medication every so often & I do my grocery shopping. My doctors are Dr. Berney (1-519-786-6363) Dr. Zando ()

Mr. Soloman stated that the loss of his vehicle is a hardship. He is partly disabled because of a heart condition. He is overweight and has a hard time walking because of a broken leg some two years ago. He testified that the loss of his vehicle is a tremendous inconvenience because he has to rely on a friend to take him shopping or pick up items for him. Mr Solomon lives in a rural area outside the Town of Forest. Mr. Solomans' disability income allowance is \$ 563.00 per month, and he has a border who pays him \$300.00 per month. The border also has no vehicle and relies on Mr. Solomans' car.

Mr. Soloman is not employed at the present time. The loss of the use of his vehicle is not a threat to his health or safety. He has not investigated any car lease or rental alternative. The impoundment has not resulted in a financial loss of income. He testified that the impoundment fees will be a financial burden on him.

The Registrar's representative asked Mr. Soloman about three other cars registered to him. Mr. Soloman testified that he no longer has these vehicles in his position and that they have not been licensed since 1996.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ms. Sheila George;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 31, 2003.

The Registrars' representative also filed certified copies of ownership records of three vehicles that were registered to Mr. Soloman, which was entered as Exhibit #3.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2. of the *Highway Traffic Act*. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with criteria that the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Tribunal is precluded from considering other factors not related to the impoundment itself. Though inconvenienced, the Applicant has not suffered any loss of employment; the impoundment has no effect on Mr. Soloman's health or safety. The Applicant has not presented any evidence that would indicate that the loss of the vehicle would be immediate significant and lasting as required by section 22(3)(b) of the Regulation. In order to be considered under section 20(2), Mr. Soloman must demonstrate that all of section 22(3) has been met, but Mr. Soloman has failed to establish that no alternative to the impounded vehicle is available or that the loss will be immediate, significant and lasting, as required under subsection 20(3)(a) and (b).

Furthermore, section 22(4) of the regulation provides that the applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant under cross-examination has testified that he has not investigated any other alternatives to the impounded motor vehicle.

The Tribunal finds that the Applicant has failed to meet criteria required by subsection 20(3) and (4) of the Regulation, and has therefore failed to establish exceptional hardship under section 50.2 of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

RELEASED: March 23, 2001

TCB EXPRESS INC.

TCB EXPRESS INC.

Appeal under Section 50.3 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from an Order of the Registrar of Motor Vehicles pursuant to Section 82.1 of that Act.

TO APPEAL AN ORDER TO SUSPEND AND IMPOUND A COMMERCIAL MOTOR VEHICLE OR TRAILER

TRIBUNAL: Beverley J. Reade, Vice-Chair

APPEARANCES:

DAVID MOORE, Agent representing the Applicant

PATRICK MOORE, Counsel for Registrar of Motor Vehicles

DATE OF

HEARING: March 7, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by TCB Express Inc. (the "Applicant") respecting an Order of the Registrar of Motor Vehicles (the "Registrar") to impound a commercial motor vehicle, and to suspend the vehicle portion of the permit, pursuant to sections 50.3 and 82.1 respectively of the *Highway Traffic Act* (Ontario), R.S.O. 1990, Chap. H.8 as amended.

FACTS:

The Tribunal heard evidence on behalf of the Registrar from Officer Anderson and Officer McConnell. Mr. Moore, the Operations Manager for the Applicant, gave evidence, but did not call any other witnesses.

The Registrar relied upon various documents, including the Order to Impound and Suspend dated February 21, 2001, the Notice to Registrar of Critical Defect Inspection, the Commercial Vehicle Inspection Report, Officer Anderson's notes, licence documentation for the driver and the vehicle, the back of the driver's pre-trip inspection report, a Certificate of Inspection of Defective Vehicle, and Impounded Vehicle Transfer report. Mr. Moore provided a copy of a Safety Standards Certificate dated February 9, 2001, a bill of sale for the vehicle and a copy of an out-dated brochure setting out the appeal process to the Licence Suspension Appeal Board which was provided at the time of the impoundment.

Based on the evidence before it, the Tribunal makes the following findings of fact:

1. TCB Express Inc. owns a fleet of trucks, many of which have been purchased from Mainline Transportation Systems Inc., another company which operates out of the same terminal. On February 14, 2001, TCB purchased a 1990 Ford Aeromax tractor (the "vehicle") from Mainline. A Safety Standards Certificate dated February 9, 2001, valid for a period of 36 days, was provided to the Applicant, and the vehicle was transferred to TCB on February 17, 2001.
2. On February 21, 2001 the vehicle was required to enter the Oakville truck inspection station for a routine inspection. Officer Anderson decided to perform a visual check on the vehicle because it is an older model. He also checked the trailer it pulled. Because the visual inspection of the tractor indicated that there might be a problem with its brakes, Officer Anderson decided to perform a full Level I inspection on both the tractor and the trailer. Officer Anderson has three years experience performing such inspections and holds a Critical Inspection Certificate. He is not a registered auto mechanic.
3. Officer Anderson used an established method to measure the push rod travel of the brakes on both the tractor and the trailer. The driver co-operated. Officer Anderson noted that the tractor had an air brake system on three axles. Of the six wheel brakes, the four driving clamps were type 30 and the steering clamps in the front were type 20. He measured with a calliper and is familiar with this common type of brake. They were not long stroke.
4. Officer Anderson measured the push rod travel out of the service brake chambers and found that on the four back wheel brakes on the tractor, push rod travel was greater than 1/4 inch or more beyond the measurement of 2". All four measured 2 and one-half inches. He was satisfied that the tractor had a critical defect. He was satisfied that there was no critical defect on the trailer.
5. Officer Anderson asked Officer McConnell to review his findings. Officer McConnell also holds a Critical Inspection Certificate. He checked only the brakes over which Officer Anderson was concerned. He confirmed the push rod travel of 2 and one-half inches for each of four of the six wheel brakes of the vehicle.

6. The Driver was notified that the vehicle was to be impounded, and he arranged for a company mechanic to attend at the inspection station to adjust the brakes. There is no evidence that the mechanic measured the push rod travel and came to a different conclusion than the officers. The Tribunal heard evidence that he adjusted the brakes and the vehicle was then impounded pursuant to the Order of the Registrar under appeal.
7. There is no evidence before the Tribunal as to the number of kilometres the vehicle travelled between the time of the Safety Standards Certificate and the date of the Impoundment. Officer Anderson did not complete this information on the form, as required. No evidence was presented by the Applicant as to the actual mileage at the time of impoundment.
8. The pre-trip inspection report prepared by the driver on the day of the impoundment is not properly completed. The driver should either have checked off that the vehicle was in satisfactory condition or that any defects were corrected or did not need to be corrected.

ISSUES:

The only issue in this matter is whether the order of the Registrar to impound and suspend the Applicant's commercial motor vehicle should be confirmed or set aside?

LAW:

Section 50.3 of the *Highway Traffic Act* states as follows:

- (1) The owner of a commercial motor vehicle or trailer that is subject to an order to impound and suspend under section 82.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

Grounds for appeal:

- (3) The only ground on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound and suspend are:
 - (a) that the commercial motor vehicle or trailer that is subject to the order was stolen at the time the order was made;or
 - (b) that the commercial motor vehicle or trailer had no critical defects at the time of the inspection under section 82.1

Powers of Tribunal:

- (5) The Tribunal may confirm or set aside the order to impound and suspend.

Section 82.1(37) provides that:

- (37) The Lieutenant Governor in Counsel may make regulations,
(a) prescribing what constitutes a critical defect;

Regulation 512/97 of the *Highway Traffic Act* states:

PART II CRITICAL DEFECTS

INTERPRETATION

- 5.(1) In this Part,

“broken”, when used to refer to a vehicle component, means that the component or any of its sub-components is split into more than one part;

“cracked”, when used to refer to a vehicle component, means that the component is not broken but has a split that penetrates completely through the component or any of its sub-components;

“steering axle” means any axle of a commercial motor vehicle that is controlled by the driver to provide direction to the motor vehicle.

- (2) For the purposes of an inspection for critical defects under section 82.1 of the Act,

- (a) a liftable axle, being an axle that is designed to be adjusted vertically and to lift its tires from contact with the surface of the highway when in a raised position, shall be considered part of a vehicle;
- (b) a conversion unit shall be considered part of the vehicle that it converts; and
- (c) a trailer converter dolly, if carrying a trailer, shall be considered part of that trailer.

BRAKES

6. In sections 7 and 8, “rotor” includes a disc.

AIR BRAKES

- 7.(1) In this section, the measurement of travel of a push rod out of a service brake chamber shall be taken with the vehicle engine turned off, the air system pressure between 90 and 100 psi (620 and 690 kPa), the park brakes released and the service brake actuator fully applied.

- (2) A commercial motor vehicle or trailer, if the trailer is required by subsection 64 (5) of the Act to have brakes, equipped with an air brake system other than an air-over-hydraulic brake system has a critical defect for the purposes of section 82.1 of the Act if one or more of the following defects is present on more than 50 percent of the wheel brakes of the vehicle:

1. A drum or rotor is cracked, broken or missing.
2. A chamber housing, chamber support, chamber push rod, slack adjuster, cam shaft, or cam shaft support bracket is broken or missing.
3. A shoe, shoe lining, shoe block, pad, pad lining or pad block is missing.
4. The push rod travel out of the service brake chamber is 1/4 inch (6.3 mm) or more beyond the measurement listed in Column 2 of Schedule 1 for the type of chamber listed in Column 1 of Schedule 1 if the brake is cam or disc type.

12.(1) In this section,

“helper leaf spring” means a leaf spring designed for auxiliary load resistance;

“leaf spring assembly” means an assembly of four or more leaf springs, not including helper leaf springs;

“leaf spring” means a long narrow plate of spring steel designed for load resistance.

- (2) A commercial motor vehicle or trailer has a critical defect for the purposes of section 82.1 of the Act if on one or more of its leaf spring assemblies 50 per cent or more of the leaf springs, including the helper leaf springs if in use, are broken.
- (3) A commercial motor vehicle or trailer has a critical defect for the purposes of section 82.1 of the Act if any of its frame members or other structural support members is broken, bent or perforated by corrosion resulting in the shifting of the vehicle’s body onto any component of the vehicle’s steering, clutch, fifth wheel, engine, transmission or suspension systems.

Schedule 1

COLUMN 1		COLUMN 2
Service Brake Chambers		Push Rod Travel
Clamp Type Brake Chamber Data		
Type	Outside Diameter	
6	4 1/2" (114.3mm)	1 1/4" (31.75mm)
9	5 1/4" (133.35mm)	1 3/8" (34.93mm)
12	5 11/16" (144.46mm)	1 3/8"

.		(34.93mm)
12 Long Stroke	5 11/16" (144.46mm)	1 3/4" (44.45mm)
16	6 3/8" (161.93mm)	1 3/4" (44.45mm)
16 Long Stroke	6 3/8" (161.93mm)	2" (50.8mm)
20	6 25/32" (172.24mm)	1 3/4" (44.45mm)
20 Long Stroke	6 25/32" (172.24mm)	2" (50.8mm)
24	7 7/32" (183.36mm)	1 3/4" (44.45mm)
24 Long Stroke	7 7/32" (183.36mm)	2" (50.8mm)
24 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid . . .	7 7/32" (183.36mm)	2 1/2" (63.5mm)
30	8 3/32" (205.58mm)	2" (50.8mm)
30 Long Stroke with Square Inlet Port or With Square Raised Embossment on Lid . . .	8 3/32" (205.58mm)	2 1/2" (63.5mm)
36	9" (228.6mm)	2 1/4" (57.15mm)

Bolt Type Chamber Data		
Type	Outside Diameter	
A	6 15/16" (176.21mm)	1 3/8" (34.93mm)
		1 3/4"

B	9 3/16" (233.36mm)	(44.45mm)
C	8 1/16" (204.79mm)	1 3/4" (44.45mm)
D	5 ¼" (133.35mm)	1 1/4" (31.75mm)
E	6 3/16" (157.16mm)	1 3/8" (34.93mm)
F	11" (279.4mm)	2 1/4" (57.15mm)
G	9 7/8" (250.83mm)	2" (50.8mm)
Rotochamber Type Chamber Data		
Type	Outside Diameter	
9	4 9/32" (108.74mm)	1 1/2" (38.1mm)
12	4 13/16" (122.23mm)	1 1/2" (38.1mm)
16	5 13/32" (137.32mm)	2" (50.8mm)
20	5 15/16" (150.81mm)	2" (50.8mm)
24	6 13/32" (162.72mm)	2" (50.8mm)
30	7 1/16" (179.39mm)	2 1/4" (57.15mm)
36	7 5/8" (193.68mm)	2 3/4" (69.85mm)
50	8 7/8" (225.43mm)	3" (76.2mm)
Tie Rod Piston Type Chamber Data		
Type	Outside Diameter	
30 Long Stroke with Square Inlet Port	6 ½" (165.1mm)	2 1/2" (63.5mm)

DD-3 Type Chamber Data		
Type	Outside Diameter	
30	8 1/8" (206.37mm)	2 1/4" (57.15mm)

Schedule 2

COLUMN 1	COLUMN 2
Steering Wheel Diameter	Free movement
Less than 16 inches (40.6cm)	8 inches (20.3cm)
16 inches (40.6cm) and larger but less than 18 inches (45.7cm)	9 inches (22.8cm)
18 inches (45.7cm) and larger but less than 19 inches (48.2cm)	10 inches (25.4cm)
19 inches (48.2cm) and larger but less than 20 inches (50.8cm)	11 inches (29.7cm)
20 inches (50.8 cm) and larger but less than 21 inches (53.3cm)	12 inches (30.4cm)
21 inches (53.3cm) and larger but less than 22 inches (55.8cm)	13 inches (33cm)
22 inches and larger (55.8cm)	14 inches (35.5cm)

APPLICATION OF THE LAW TO FACTS:

The evidence before the Tribunal is that more than 50% of the wheel brakes of the three axle trailer had push rod travel out of the service brake chamber 1/4 inch or more beyond the measurements listed in Column 2 of Schedule 1 for the type of chamber listed, creating a critical defect. The only evidence to contradict this is the existence of a safety standards certificate created almost two weeks prior to the inspection.

The Tribunal is satisfied that at the time of inspection, the vehicle had critical defects within the meaning of the regulations. There are therefore no grounds for appeal under section 50.3 of the Act.

DECISION:

Upon the application by TCB Express Inc. to appeal the order to impound and suspend dated February 21 of the Registrar of Motor Vehicles to impound and suspend a commercial motor vehicle pursuant to Section 50.3 of the Highway Traffic Act, and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL that the Order of the Registrar to impound and suspend the commercial motor vehicle of the Applicant be confirmed.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade
Vice-Chair

RELEASED: March 8, 2001

ROBILLIARD

ROBERT ROBILLIARD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK,
 Presiding member

APPEARANCES: KIM GROSSKURTH,
 Representative for the Registrar of Motor Vehicles

 ROBERT ROBILLIARD, Applicant
 unrepresented

DATE OF HEARING: March 27, 2001

DECISION RELEASED: March 29, 2001 Toronto

REASONS FOR DECISION

A hearing was held by teleconference on March 27, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Robert Robilliard (the “Applicant”)
Motor Vehicle:	1986 Dodge 600, plate # AARV 018 (the “vehicle”)
Date of Appeal:	March 7, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on March 27, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals which were entered into evidence as exhibit #3.

All documents were submitted into evidence with the consent of both parties. The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I, Robert Robilliard of 4006 Melfort Cres. Mississauga being said owner would like to appeal for the following reason.

I loaned my car 1986 Dodge to my daughter Robin Robilliard living at 1229 Huron St. Apt#307 London Ont. N5Y 4L2. Drivers Lic. # R6020-65967-75825 to seek employment.

However Robin has found no steady employment but is currently involved with Pathways Career Planning doing volunteer work for the Parkinson Foundation of Canada. Southwestern Ontario Region. This requires a lot of travelling.

Unknown to myself Robin loaned the car to a Mike Monette whom was stopped by Constable Butterworth on Feb23/01.

I had no knowledge of this infraction & that he had no valid drivers license until I received the order of impoundment on Feb 27/01.

If at all possible I would like the car to be released so that I may do the necessary changes of ownership into Robin's name & address so she can continue with her career.

I would also appreciate the Telephone conference as my Hearing due to being self employed & having to serve the public daily. My # 905-820-8166.

Thank You
R Robilliard

The Applicant testified that his daughter had been using the vehicle for several years while she resided in Mississauga with him. In October of last year, she moved to London, Ontario with the vehicle, with the Applicant intending to transfer the vehicle ownership into her name.

The Applicant's daughter loaned the vehicle to Mike Monette, whose drivers licence was then under suspension. Mr. Monette was subsequently stopped by the police, and the vehicle was impounded.

The Applicant further testified that the vehicle is used by his daughter for the purposes of fulfilling her duties as a volunteer, in anticipation of some possible full time employment in the future. Since the impoundment, the Applicant's daughter has had to rely upon public transit and has had to reduce her volunteer activities. The Applicant has not made any inquiries into the availabilities of alternatives to the impounded vehicle, nor is he aware of any other attempts made by his daughter to secure alternative transportation to the impounded vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Michael J. Monette;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 26, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). In this case, the Applicant's daughter has not been shown to be suffering any significant financial or employment loss, as she was using the vehicle to carry out her duties as a volunteer in anticipation of a possible future paid position.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. In fact, the testimony of the Applicant was that he had not pursued any alternatives to the impounded vehicle, and that to his knowledge, his daughter had been using local public transit to maintain her activities, and had made no other inquiries into alternatives herself.

Therefore, the Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: March 29, 2001

BATTEN

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1601602 OWNED BY: Catherine Batten of: 4396 Carrying Place Road, Seeleys Bay, Ontario, K0H 2N0 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: March 11, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

CATHERINE BATTEN

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Catherine Batten, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: *March 21, 2001*

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

CATHERINE BATTEN

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #1601602** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended, on March 11, 2001.
2. The applicant, **Catherine Batten**, whose name is shown on the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the Highway Traffic Act, stating **that the order will result in exceptional hardship**.
5. Materials provided to the Registrar indicate that the said motor vehicle is required in order for the applicant to attend CDI college. The applicant is contracted through Human Resources Development Canada and receives a training allowance. If the applicant does not attend CDI college as contracted, she does not receive her training allowance, which is her only source of income. The impoundment of the said vehicle will result in a financial loss to the applicant, a loss of employment and employment opportunity, as well as a loss of education or training. Investigations indicate that there are no alternatives to the impounded motor vehicle.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

CATHERINE BATTEN

(signature of Applicant)

(date)

REGISTRAR OF MOTOR VEHICLES

(signature of Registrar)

(date)

454-NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF HEARING: February 28, 2001 Toronto

DECISION

A hearing was held on February 28, 2001 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: March 1, 2001

454- NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: Jeffrey M. Lee, D.C.
Presiding Member

APPEARANCES: Kyle Biel,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: February 28, 2001

DECISION
RELEASED: March 1, 2001 Toronto

REASONS FOR DECISION

A hearing was held on February 28, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 1, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 2, 2001, and was received by the Tribunal on February 6, 2001 together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The hearing was scheduled to commence at 9.30am however the Solicitor for the Applicant was late and the hearing was adjourned for 30 minutes. The hearing resumed at 9.55am and proceeded without further delay.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal.
- b) Exhibit # 2 Medical note from Physician # 1, DDS, Note from Physician # 2.

By the Respondent:

- a) Exhibit # 3 MTO submissions and original certified copies of Notice to Registrar sealed February 7, 2001, certified copy of the diving record of the Applicant, sealed February 7, 2001 and the certified copy of vehicle record as of Occurrence date, sealed, February 9, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant was called to the stand and was sworn before giving testimony. He testified that he was driving his taxi at approximately 3:30 a.m., on January 20, 2001, with a fare in the rear of the taxi. According to testimony of the Applicant, the passenger said that he was in a hurry and asked if he could get to the airport as fast as he could. The Applicant testified that he was in fact speeding. He was pulled over by an OPP Officer from the Port Credit detachment. The Applicant testified that when asked by police if he had been drinking, he stated “I usually don’t drink too much”. He testified that he had bleeding from the rectum and that when he has this bleeding, it makes him short of breath and he coughs.”

The Applicant testified that he had no problem putting his lips around the device’s mouth piece. He also testified that there was no bleeding from his mouth and his lips were not swollen. When asked where he went when he was released from police custody, he stated he went home. He testified that he did not seek medical attention and in fact was not seen by Physician # 1 until January 23, 2001. When asked by the representative for the Respondent if Physician # 1 was aware that the report that he asked to prepare, was going to be used in an appeal?, the Applicant replied “ no, I told him it was for work.”

OPP Constable Police Officer # 1, was sworn and took the stand. He testified that he was working traffic detail . He and his partner, Police Officer # 2, observed a City Peel taxi driving erratically. The time was 4:50 a.m. on January 20, 2001. The taxi was stopped and Police Officer # 1 approached the driver’s side and Police Officer # 2 approached the passenger side. Police Officer # 1 testified that he detected a very strong odour of an alcoholic beverage. He asked the Applicant if he had been drinking, and the reply from the driver was, “I am Muslim, I don’t drink.”

At 4:55 a.m. the driver was read the demand for breath and explained the procedures and then asked if he understood. The driver responded “yes”. The Applicant stated that “I bleed, when I go to the bathroom which makes my breathing difficult and cough”. It was at this time that Police Officer # 1 also noted that the driver’s eyes were blood shot.

In all, Police Officer # 1 attempt 12 or 13 times to retrieve a suitable sample for testing. The driver was cautioned and finally charged with failure to provide a suitable sample. According to the testimony of Police Officer # 1, he did not observe the driver to be in a medical distress or present with any other problems that would have affected the driver's ability to provide a breath sample. Police Officer # 1, although not in his notes, vaguely recalls that the driver mentioned that he had a rotten tooth. However, the driver was able to make a seal around the mouth piece of the machine and in the opinion of Police Officer # 1, the driver was able to provide a breath sample.

Police Officer # 2 testified that when he was present for some of the testing, the breaths provided by the driver were not of sufficient effort to give enough air into the machine. The driver was given the mouth piece and asked to blow into the mouthpiece while it was not attached to the machine. In the opinions of both Police Officer # 1 and Police Officer # 2, there was sufficient air movement on that blow to indicate that the driver was not compliant about providing the requested sample.

The reports from Physician # 2, family physician and Physician # 1 fails to meet the specific requirements of section 15(1)(2) of Regulation 574 of the *Highway Traffic Act* in the following respects:

Neither Physician # 2, nor Physician # 1 provided any subjective tests results to substantiate the Applicant's assertion that due to his medical condition he was unable to provide a proper breath sample. There is nothing in the reports to indicate the history of the condition, which would in anyway interfere with the ability to provide a breath or blood sample. Neither Physician # 2 nor Physician # 1 indicate that they have knowledge of what is actually required to perform the Breathalyser tests nor does either doctor indicate how the Applicant's present medical condition(s) would affect his ability to provide that sample of breath.

The Tribunal after very careful review of the medical information presented by Physician # 2 and Physician # 1 is of the opinion that they are insufficient in content and do not provide sufficient medical evidence to support the position off the applicant. The Tribunal attaches very little weight to these reports.

The evidence present by both Police Officer # 1 and Police Officer # 2 was presented in a clear and forthright manner. The Tribunal accepts the evidence of both officers.

APPLICATION OF THE LAW TO FACTS:

The Applicant's appealed under Section 50.1(2) of the HTA and is required to establish a medical ground for failing to give a breath sample when required. The Applicant has the onus of establishing the merit of the appeal as set out in section 13 of Regulation 574.

The evidence submitted by the Applicant does not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The Applicant has attempted to related the abscessed tooth which was extracted on January 23, 2001 as well as attempting to relate anal fissures and rectal bleeding for his inability to provide a suitable sample for testing.

The evidence submitted does not establish a causal link between the claimed medical condition and the inability of the Applicant to provide that sample due to these conditions.

The evidence is clear that the Applicant did attempt to provide a sample however that sample was not an adequate sample. The Applicant has not established that failure to provide a breath sample was because the Applicant was unable to do so for a medical reason.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated January 10, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.
Presiding Member

RELEASED: March 7, 2001

499-NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: F. CLAIRE ROWETT,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 21, 2001

Toronto

DECISION

A hearing was held on March 21, 2001 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: March 22, 2001

499- NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: Jeffrey M. Lee, D.C.,
Presiding Member

APPEARANCES: F. Claire Rowett,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 21, 2001

DECISION
RELEASED: March 22, 2001 Toronto

REASONS FOR DECISION

A hearing was held on March, 21, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 22, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 28, 2001 and was received by the Tribunal on February 28, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Tribunal convened at 9:30 a.m. without the Applicant present. The hearing was adjourned until 10:00 a.m. at which time the Tribunal would reconvene. The Applicant arrived and the hearing proceeded without further delay. There were no preliminary matters. The Applicant did however provide a Vietnamese interpreter who was sworn at the commencement of the hearing.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal dated February 28, 2001 and received by the Tribunal February 28, 2001.
- b) Exhibit # 2 Medical documentation.
- c) Exhibit # 4 Hand written note from the Applicant to the Tribunal, written March 8, 2001 and received by the Tribunal on March 13, 2001.

By the Respondent:

- a) Exhibit # 3 MTO Submissions, 15 pages received March 14, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and took the stand. She testified that on February 22, 2001, she was pulled over by police. She testified that she provided a breath sample when asked but when asked again to provide a proper sample, she was not able to because of the cold. The Applicant testified that the cold made her feel like she was going to vomit, (but did not). She testified that the police Officer arrested her because she would not sign the papers for a promise to appear notice. She stated that she was handcuffed and put into the rear of the police cruiser. At that point in time, her friend who was also an occupant in the car, acted as an interpreter and it was agreed by the Applicant that she would be released on a promise to appear instead of going to jail. She had nothing further to add.

When questioned by the Panel Chair about the medical information she had provided to the Tribunal, she said "forget it" as they really were not relevant to the issue of providing a sample of her breath for testing. Other than two emergency room reports dated November 6 and 7, 2000 along with a discharge note from Physician # 1, the Applicant provided no other medical information. The section of the Notice of Appeal was filled out only with the Applicants biographical data, no physicians' reports.

The Panel Chair asked if the Applicant suffered from any respiratory problems. The Applicant stated that for the past 4 years or so she suffers when the cold wind enters her mouth, she finds it hard to breath and feels like she is going to vomit. The Applicant stated that she had seen a physician "a few months ago" or "maybe a few years ago" but she did not receive any special testing nor any medication. She was also not referred to any specialist for follow-up.

On cross-examination, the agent for the Respondent asked the Applicant, if at any time was she placed inside of the police cruiser? She responded yes, but only in the back of the seat with the windows open. No further questions were asked by the Agent for the Respondent and the Applicant was excused from the stand.

The Respondent called Police Officer # 1 to the stand. The Officer was sworn and gave the following testimony.

Police Officer # 1 testified that he was working the 14 Traffic response. At approximately 2:56 a.m. he had set up his marked unit on the south side lot at Queen and Gladstone . He observed a Toyota Rav-4 over shoot the markings of the intersection and bring the vehicle to a stop in the intersection. This vehicle began to creep through the intersection as the light turned green, however it was an advanced green for the opposing traffic. Police Officer # 1 pulled out from the lot and followed the vehicle stopping the vehicle on Queen St just by Dufferin Street.

The Officer testified that he approached the vehicle and noticed that there was more than one occupant in the vehicle. When the Applicant rolled down the window he testified that there was a strong odour of an alcoholic beverage. He asked if the driver had been drinking? The male occupant in the front seat spoke up and said he had been drinking. The Officer asked the driver if she had anything to drink that evening and she responded by stating, yes, one drink. At that point, Police Officer # 1 had formed an opinion that the driver may have alcohol in her system and proceeded to demand a sample of her breath. He read the breath demand which is on the back of his note pad. He asked her if she understood? She responded, "I am not sure". He explained again and she was asked again if she understood, and this time she responded , "ok". According to testimony of Police Officer # 1, he demonstrated the Dragger 7410GLC roadside screening device to the Applicant. He proceeded to test the device and got a reading of 0.00 which indicated that he had no alcohol in his system and that the device at this time was functioning properly. He asked her again if she understood what to do and he said, "I think so". According to Police Officer # 1, the Applicant was given a total of 10 attempts to provide an adequate sample. He demonstrated the device on 4 separate occasions. Police Officer #1 testified that only after the 6th attempt, the Applicant stated that "the wind is bother me and I am cold".

At this point in time, according to Police Officer # 1, he placed a city wide call for an Officer who was fluent in the Vietnamese language to attend at the scene, however, there was no one available. Police Officer # 1 further testified that he removed that Applicant from the rear of the cruiser and placed her in the front passenger seat where he put the heat on. At this time he cautioned her about the consequences of not providing him with a proper sample of breath. She responded by saying "I am doing that". Finally, Officer Howard charged her with failing to provide and requested a highway patrol to attend the scene with the ADLS forms. Police Officer # 1 told her that she would have to appear at court if he released her on a promise to appear notice, however she did not want to sign and told him to take her to jail.

Police Officer # 1 placed the Applicant in handcuffs and placed her in the rear of his cruiser. Another female occupant of the vehicle asked if she could talk to her and explain to her what was happening. After conversation between the two females, the Applicant agreed to be released on a promise to appear. The cuffs were removed and she was released from his custody.

The Respondent asked the Officer is he was a trained observer and he responded "yes" but was not trained to give a medical opinion or diagnosis. He did testified that at no time did he observe the Applicant to be in a distress which required medical attention.

The Applicant did not have any questions of the Officer and the Officer was excused from the stand.

The Tribunal accepts the evidence as presented by Police Officer # 1, that he did not observe any shortness of breath or gasping of air. The Applicant was indeed communicative and has a reasonable command of the English language.

In an appeal of this nature, the onus is on the Applicant to substantiate her position. The documents submitted by the Applicant do not substantiate her claim to the effect that she had a present medical condition which precluded her from providing a breath or blood sample.

The two emergency reports and discharge summary which were entered into evidence (Exhibit # 2) have no bearing on any medical condition which may have precluded the Applicant from providing a suitable sample of her breath. After careful examination, the Tribunal can give these "reports" absolutely no weight.

The report (page 2 of 2) of the Notice of Appeal has not been filled in. There has been no medical information provided and therefore fails to meet the specific requirements of section 15(1)(2) and (3) of Regulation 574.

APPLICATION OF THE LAW TO FACTS:

Reviewing the foregoing facts, it is obvious that the Applicant did not relate her medical condition to Regulation 574 and Section 50.1(2)(b) of the Act.

The evidence is clear that the Applicant refused to provide a suitable sample of breath and has provided no evidence that this was due to a medical reason.

The Tribunal finds that the Applicant's actions were actions taken by someone who was unwilling to provide an adequate sample. The evidence provided by Police Officer # 1 is that the Applicant would on some occasions, blow at the mouth piece, without the mouthpiece actually being in her mouth or when she did form a seal, released the seal upon expiration and blew out around the mouthpiece. These are not the actions of someone who is having difficulty providing a sample because of a medical reason.

The Applicant has not discharged the onus under Section 50.1 of the HTA to establish a medical reason for her failure to provide and her refusal to comply with a demand made under Section 254 of the Criminal Code (Canada) to provide a sample of breath or blood.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 22, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: March 29, 2001

504 -ASTHMA

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 22, 2001

Toronto

DECISION

A hearing was held on March 22, 2001 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: March 23, 2001

504 - ASTHMA

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: Jeffrey M. Lee, D.C.,
Presiding Member

APPEARANCES: Kyle Biel,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 22, 2001

DECISION
RELEASED: March 23, 2001 Toronto

REASONS FOR DECISION

A hearing was held on March 22, 2001 at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on March 23, 2001, with Reasons to follow.

THE Tribunal RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated February 23, 2001, and was received by the Tribunal on March 1, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters:

There were no preliminary matters and the hearing proceeded. With the consent of both parties the documents presented were entered into evidence.

Submissions of Written Material:

By the Applicant:

- a) Exhibit #1 Notice of Appeal dated February 23, 2001.
- b) Exhibit #2 Applicant's submissions: Medical Report Physician # 1.
- c) Exhibit #3 Note from Physician # 1 on Prescription Pad.

By the Respondent:

- a) Exhibit #4 Ministry of Transportation submissions, 27 pages received March 16, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Board thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

After hearing the evidence of both the Applicant and the Respondent, the Tribunal must come to a conclusion as to the facts. The Tribunal finds the following facts as proven:

1. The Applicant was the driver of a vehicle, which was registered to A One Rent a Car.
2. Applicant had been drinking during the evening hours on February 12, 2001.
3. The Applicant was asked to provide a sample of his breath.
4. Another Police Officer # 1 attended the scene and attempted to obtain a breath sample for a roadside screening device.
5. The Applicant admits to having two beers to drink.
6. The Applicant is a holder of a G2 class of licence.
7. The Applicant refused or was unwilling to supply a proper sample of his breath.
8. The Applicant was charged under the Criminal code with failing to provide a sample of his breath.
9. The Applicant was served with a 90-day administrative drivers licence suspension.

In an appeal of this nature, the onus is upon the Applicant to substantiate his position. The testimony provided by the Applicant, in the opinion of the Tribunal is lacking a degree of credibility. The Tribunal believes that the Applicant indicated to the officer that he had asthma after the sixth attempted to obtain a sample. When asked by Police Officer #1 if he had a puffer, the Applicant indicated that he did not and that he was not that bad that he needed one. However, when giving testimony, the Applicant stated that he had a puffer, but not on him and could not recall the name of the medication. In fact, he reported to the officer that his asthma was such that he did not have to take medication. The Applicant contradicted himself and stated that he took medication 3 times a day for his asthma but again could not recall what the medication was. The Applicant further testified that he did see a specialist at Toronto East General Hospital about 3 months ago. He could not recall the physician's name or what tests were performed. He did state that "the doctor said I had asthma but it is OK and does not require treatment."

The documents submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The report of Physician # 1, dated March 1, 2001, fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act*. Physician # 1, does not indicate that he has knowledge of the fact that the report would be used in support of the Applicant's appeal. His report does not contain details required by the medical information form provided or any indication of any type of measurements taken or recent tests undergone by the Applicant or whether any tests were performed by him to corroborate his medical opinion. Physician # 1 writes "he has history of asthma, he was not able to exhale properly on February 13, 2001". This statement is speculative and provides no factual basis. Physician # 1 did not examine his patient when the demand for breath was made, and he did not perform any pulmonary functions tests subsequent to the Applicant's visit.

The Tribunal accepts the oral testimony of Police Officer # 1. The Tribunal accepts that Police Officer # 1 is not a medical practitioner but is a trained observer given the nature of his employment. The Tribunal accepts that at no time did Police Officer # 1 observe the Applicant to be in any distress which require medical attention while attempting to obtain a suitable breath sample.

APPLICATION OF THE LAW TO FACTS

Reviewing the foregoing facts, the Tribunal finds that the Applicant did not relate his medical condition to Regulation 574 and Section 50.1(2)(b) of the Act.

The evidence establishes that the Applicant refused to provide a breath sample for no stated medical reason. The evidence suggests that the Applicant had no intention of giving a proper breath sample. In the testimony provided by Police Officer # 1, the Applicant repeatedly blew with insufficient force to cause the alcotest to register an EO (error code).

The Officer gave the Applicant 7 opportunities to provide a proper sample of his breath, however each time the EO code was registered.

The Tribunal concludes from the evidence that these are actions to prevent a suitable sample from being retrieved and not the action of someone having difficulty providing a sample because of a medical condition.

The Applicant has not discharged the onus under Section 50.1 of the HTA requiring him to establish a medical reason for his failure to provide and his refusal to comply with a demand made under Section 254 of the Criminal Code (Canada) to provide a sample of breath or blood.

DECISION

Upon the application by the Applicant to appeal the suspension order dated 16 February 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: March 29, 2001

LUNNY

JAMES AND CAROL LUNNY

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

JAMES LUNNY, Agent, representing himself and on behalf of
Carol Lunny, Applicants
NETANUS RUTHERFORD, Counsel, representing the Ontario
New Home Warranty Program

DATE OF
MOTION:

November 24, 2000

Via Teleconference

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under section 7 of the *Licence Appeal Tribunal Act, 1999*, to extend the time for the Applicant to file an appeal from a decision letter dated August 3, 2000 of the Ontario New Home Warranty Program ("The Program") pursuant to section 16 of the *Ontario New Home Warranties Plan Act*.

The hearing of this matter proceeded on the consent of the parties as an electronic hearing. The Tribunal was provided with a Notice of Application for Extension of Time for Appeal from the Applicant plus a number of letters, photographs, claim inspection report dated July 31, 2000, memorandum of argument and faxes. The Program provided the Tribunal with the affidavit of Dennis Faubert dated November 16, 2000 and attached exhibits and caselaw.

The Applicant, Carol Lunny, stated via the telephone that she was authorizing her husband, James Lunny, to be her agent in this proceeding. She did not participate in any direct fashion after making that statement. The Applicant, James Lunny, by affirmation, provided the Tribunal with testimony on his reasons for bringing the application for an extension of time.

ISSUES:

Have the requirements for service of a notice under sections 16 and 20 of the *Ontario New Home Warranties Plan Act* been met in this case?

If the requirements are met and the Notice of Appeal was not filed with the Tribunal within the time prescribed by statute, is this an appropriate case for leave to be extended pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

Testimony of James Lunny:

Mr. Lunny testified that he did not receive the decision letter of the Program until the week of August 14, 2000. He did not open the letter from the Program until the end of that week or the beginning of the next week. He feels he was probably aware of the decision letter by August 18, 2000. Mr. Lunny stated that he gets a fair amount of Priority Post mail. He does not think Canada Post tried to deliver it earlier due to his location and the practice of Canada Post not to deliver to his address.

Mr. Lunny testified that he knew he had fifteen working days to respond to the decision letter. His Notice of Appeal is dated August 28, 2000. He mailed it to the Tribunal.

Mr. Lunny testified that he took possession of his home in December, 1992. He did have an inspection then. Mr. Lunny stated that on December 3, 1999 the Program said repairs would be made. Because of that he did not think it was necessary to have the representative back again to inspect the home.

Under cross-examination Mr. Lunny stated that the new building inspector for the municipality has not inspected his home. He agreed that he signed the Canada Post acknowledgement card. He probably picked up the letter and then went back to finish his vacation.

Verbal Arguments:

By the Applicant:

Mr. Lunny argued that one has to look at this matter from the beginning. In December, 1992 the Program knew that the problem existed and was covered under the warranty program. Mr. Lunny stated that the photographs of the problem were done after receiving the conciliation report so that is why the warranty representative has not seen them. There was some delay with communicating with the Program due to health reasons. The teleposts were ordered by the building inspector, but the beam sockets were not installed. The drywall cracks have not been repaired.

By the Program:

The Program relies upon the principles as stated in the Jacob Manz and Lillian Ruel Manz decision of LAT released on November 9, 2000.

Regarding the first principle, Counsel for the Program stated that the appeal period expired on August 29, 2000 so the Applicant did initiate the appeal within the time period though it reached the Tribunal after the appeal period had expired.

Counsel for the Program stated that the reason given by the Applicants of going on holidays is not a sufficient reason to justify non compliance under the second principle.

Regarding the third principle, Counsel stated that there was prejudice to the Program. The Program felt it had closure on this file. Its key witness has had a stroke and cannot testify.

Counsel stated as regards the fourth principle that there is no substantial point in issue and the Applicant has no reasonable chance of success. There is no evidence of defects in workmanship. The Tribunal was urged to view the history of this matter as that set out in the affidavit of Dennis Faubert. In 1994 the Program was prepared to give a cash settlement of \$150.00 for the stucco repair and the front step repair. The lapse of time in this matter is significant.

Counsel stated that the Program received no complaints from 1994 until 2000 regarding the foundation. Mr. Faubert inspected the home in June, 2000.

The repairs on the roof shingles and front steps were done before October, 1994. It took six years for there to be a complaint, which is a significant delay.

There was no complaint regarding the roof shingles under the first or second year warranty, and there is no evidence that they constitute a major structural defect.

LEGISLATION:

Section 14 of the *Ontario New Home Warranties Plan Act* states:

(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

Section 16 of the Act states:

(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

(4) The Corporation, the person or owner who has required the hearing and such other persons as the Tribunal may specify are parties to proceedings before the Tribunal under this section.

Section 20 of the Act states:

Any notice or document required by this Act to be served or given may be served or given personally or by registered mail addressed to the person to whom notice is to be given at the person's last known address and, where notice is served or given by mail, the service shall be deemed to have been made on the fifth day after the day of mailing unless the person to whom the notice is given establishes that the person, acting in good faith, through absence, accident, illness or other cause beyond the person's control, did not receive the notice, or did not receive the notice until a later date.

Licence Appeal Tribunal Act, 1999 states:

Section 7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 2 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Under the *Licence Appeal Tribunal Act, 1999* the Tribunal has the authority to extend the time period required for an Applicant to submit their appeal on the decision letter filed by the Program. Previously, the Tribunal had this authority under the *Ministry of Consumer and Commercial Relations Act*.

The Tribunal must be satisfied that there are reasonable grounds provided by the Applicant in applying for an extension of time and for granting that extension of time.

A pivotal case which expounds upon the principles used in applying this discretion is that of Angela Bilodeau CRAT July 11, 1994. In particular at page 4 the Tribunal states, "While no specific authorities were cited to me, both counsel agreed that the principles to be taken into account when considering such an application are those considered on a similar application in the Court of Record and are that the Applicant must show:

1. That she had an intention to appeal within the time limited.
2. That the reason the notice of appeal was not served on time is such that the Applicant should be excused for not doing so and allowed to do it later if she did as soon as the true situation was apprehended.
3. That there is not some overriding prejudice to the Respondent in the allowing of the application.
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success."

In the Mantz case (supra) it was held that, "This Tribunal notes that the fundamental principle in deciding whether to allow an extension is to see that justice is done."

Here the Tribunal finds that the decision letter was sent to the Applicant in accordance with the requirements under the Act. The Tribunal must now consider whether this is a case for granting an extension of time to appeal and, if so, on what terms and conditions.

In order for justice to be done, the Tribunal does find that the Applicant should be permitted to have an extension of time to appeal.

Mr. Lunny states that he did sign the Canada Post delivery card. He felt he received the decision letter on August 18, and the Program felt he received it on August 14, 2000. The Notice of Appeal is dated August 28. The envelope which contained the Notice of Appeal has a strip on its back with August 31 as the date. That would mean that it was processed by Canada Post on August 31 which is two days after the limitation period of fifteen days. It is evident that the Applicant wished to appeal the Notice.

Further, the Tribunal accepts the evidence of the Applicant that when he opened the envelope and saw the Notice of Appeal he realized that he had fifteen days to appeal. Now the Applicant mistakenly thought he had fifteen days from when he knew the envelope contained a decision letter, not from when he picked up the envelope which would likely have been on August 14. So the Applicant was wrong in his calculation of the dates. He states that he often gets priority mail, and he had gone back to his holiday and did not open the envelope immediately. Though that was a mistake, nevertheless the Applicant acted in accordance with what he interpreted to be the fifteen days. The Notice of Appeal is dated within the appeal period. The Tribunal is prepared to accept his explanation for the delay.

The Program states that it is prejudiced by the delay. We are talking here of a delay of a few days. The warranty representative for the Program did have a stroke in early 1999. That will cause some problems for the Program in preparing its case. But that would have been the case if the Applicant had mailed his notice within the time frame. The delay of several days do not by itself put the Program into any greater problems than if the Applicant had acted within the time frame. On that basis the Tribunal does not find that the Program is prejudiced.

The Tribunal does have some concerns regarding some of the issues raised by the Applicants, in particular the stucco repairs, the front steps, and the shingles. The shingles were never mentioned within the first year warranty period. The Tribunal cannot find that the shingles, even if they require roof vents, would fall within the definition of major structural defect. This is not a matter which would have a reasonable chance of success.

The stucco and front step complaints were raised within the first year warranty. It would appear that there was no resolution of these complaints. There is a dispute between the parties as to whether or not the Program was estopped from doing the repairs. The Applicants will have a difficult time showing that after such a significant delay they have a reasonable chance of success.

But the Tribunal is of the opinion that there is a substantial issue regarding the foundation stabilization. The Applicants will have to provide expert evidence, to show that this is a major structural repair. With the proper and relevant evidence the Applicants have a reasonable chance of success on this issue. It is fair to allow the Applicants to proceed with the appeal.

The Nicola Baldassarre CRAT released May 5, 1998 and the Gordon Smith Wilkinson CRAT released May 1, 1998 deal with the refusal of homeowners to allow the Program to make the necessary repairs to the property. The William and Jean Lowry CRAT released November 5, 1999 and the Leon Khamo and Medlin Khamo CRAT released August 19, 1997 cases deal with the issue of major structural repair. While these cases are of some assistance to the Tribunal, they are based on their own fact situations and deal with matters that had the opportunity of full hearings into these issues. Here, we are being asked to allow an Applicant to have his day at the Tribunal. This Tribunal is not prepared to deny the Applicant the opportunity to present his case at a hearing.

The Tribunal does, however, wish to ensure that the matter is dealt with on an expedient basis. Due to the length of time since the date of possession and the concerns this Tribunal has as to the success of some of the issues raised by the Applicants, this Tribunal is ordering that prior to the hearing there be a prehearing to clearly delineate the issues and the evidence to be presented at the hearing.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders that the application to extend the time for filing of the Appeal by the Applicants is granted upon the following condition:

1. That there be a prehearing conference prior to the hearing of this appeal.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

458-ALCL

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: F. Claire Rowett,
Representative for the Registrar of Motor Vehicles

Applicant,

Counsel for Applicant

DATE OF HEARING: February 20, 2001 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

- EXHIBIT # 1 Notice of Appeal submitted by the Applicant, dated January 30, 2001.
EXHIBIT # 2 Notice of Suspension of Driver's Licence received from the Ministry dated July 24, 2000.

EXHIBIT# 3 Ministry Submissions – (1-18) tabulated documents.

EXHIBIT # 4 Letter from Physician # 1, dated February 8, 2001 and Laboratory Report, dated February 7, 2001.

EXHIBIT # 5 Medical Advisory Committee Case Study, February 8, 2001.

EXHIBIT # 6 C.M.A.- Determining Fitness to Drive with Guide for Physicians.

FACTS:

The Applicant, a 69-year-old male, had his driver's licence suspended July 24, 2000 after the Ministry received an unsolicited letter from Physician # 1, the Applicant's family physician. Physician # 1 advised the Ministry that the Applicant had been on a 40-day binge and would be a public danger, if he drove. The Applicant's son had taken his car away, but they thought his licence should be suspended until he remained sober. They apparently never thought the suspension would be for at least a year.

The Applicant realized his health was in jeopardy, because his diabetes was out of control and his common law wife was threatening to leave him. With the help of his family, his doctor, Physician # 2 at the Credit Valley Hospital Drug and Alcohol Treatment Program and a psychotherapist, Physician # 3, he turned his life around and is committed to a lifestyle of abstinence. His last drink of alcohol was June 22, 2000 and he claims he has no desire to drink again.

He attended a three-week Treatment Program at the Credit Valley Hospital and is attending the Aftercare Program on a weekly basis, two AA meeting weekly, regular sessions with Physician # 3, at the Oakville Family Therapy Centre and seeing his family doctor every three weeks. Periodic blood and urine tests have been done to monitor his progress and they have all been reported normal.

Physician # 1, Physician # 2, and Physician # 3 all feel the Applicant is no longer a risk and have written letters asking that his driver's licence be re-instated.

The Applicant had not had any problems with alcohol for the previous fifteen years. Prior to that he had marital problems and was divorced. This led to a short period of drinking, but nothing like the last one. The Applicant said any time in the past when he quite drinking, it was always for someone else, but this time it was for himself. This was his way of saying he was committed.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar of Motor Vehicles to “suspend or cancel” a driver’s licence for “...any... sufficient reason...”. The original suspension was made after the Registrar received an unsolicited letter from the Applicant’s family physician, Physician # 1. The letter reported the Applicant had been on a binge for 40 days and would be a public danger, if he drove. The doctor and the Applicant’s son felt his licence should be suspended until he received some help and sobered up.

Evidence indicated the two “reporters” thought the suspension was a short-term measure until the Applicant was back on track. In September, 2000, Physician # 1 wrote the Ministry and requested the suspension be lifted because the Applicant had remained abstinent since June 22, 2000.

The two other professionals involved in the Applicant’s treatment also believe he is committed to sobriety and fully realizes the dangers of future drinking which he has never accepted previously. They are going to continue to monitor him and have periodic blood and urine tests done, but they have full confidence in him.

The Applicant appeared to be very sincere and was a credible witness. The Tribunal agrees with the Applicant’s counsel that there is no magic number, such as a twelve month suspension, to ensure the person is not going to return to drinking. The Tribunal, however, notes that the Applicant should remain compliant with follow up assessments with his physician for a full 12 months.

The CMA report on “ Determining Medical Fitness to Drive”, a guide for physicians, states “After a three month participation in a monitored program, an addiction medical specialist may provide written support of reinstatement of driving privileges, providing the physician believes that the risk for drinking and driving has been removed. Reinstatement would also be conditional on the patient remaining compliant with follow up assessments with that physician for a full twelve months.”

On the evidence, the Tribunal finds that the Applicant is not now a person addicted to alcohol to an extent likely to significantly interfere with his ability to drive a motor vehicle as set out in section 14(b) of Regulation 340194. The evidence does not establish sufficient reason for the Applicant’s driver’s licence to continue to be under suspension.

DECISION:

Upon the application by the Applicant to appeal the decision dated July 17, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision to suspend the Applicant's driver's licence be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: March 2, 2001

467-SIGHT

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: March 8, 2001 Ottawa

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit # 1 - Notice of Appeal Form received at the Tribunal January 12, 2001.
- Exhibit # 2 - Notice of Suspension of Driver's Licence dated October 28, 1993.
- Exhibit # 3 - Tabulated Documents (1-25), from the Ministry of Transportation, received at the Tribunal February 28, 2001.
- Exhibit # 4 - Applicant's Driving Record from Ministry of Transportation, dated February 6, 2001.

FACTS:

The Applicant, a 77 year old retired man, had his driver's licence suspended November 20, 1993, following receipt of an unsolicited letter from Physician # 1, a Physical Medicine and Rehabilitation Specialist. The doctor recommended the Applicant have a driving assessment before being allowed to drive, because he felt it may be dangerous for him to operate a motor vehicle. Physician # 1 had advised his patient not to drive until an assessment and the results were discussed.

The Applicant had suffered a Right Cerebral Vascular Accident with a Left Hemiparesis following removal of a Giant Aneurysm of the Middle Cerebral Artery. There was also decreased sensation to the left side of his body.

A driving assessment was carried out at the Kingston General Hospital by Lynda Rankin O.T. on December 21, 1993 and was evaluated as "Unsatisfactory". The Summary and Recommendations were: "the Applicant has residual high level cognitive deficits that interfered with his ability to drive safely. It is recommended that he not be permitted to drive."

On March 30, 1994, a second driving assessment at the Kingston General Hospital by a different driving instructor was evaluated as "Unsatisfactory". Details include; poor mechanical control of the car, unsafe driving behaviours evident, causing the instructor to brake several times, failure to shoulder check, entering wrong lanes and going through a stop sign. Summary and Recommendations: "Pre-driving evaluation revealed lack of insight and residual cognitive deficits evident in Applicant's attention and ability to function with multiple stimulation. These deficits were reflected in very unsafe driving during the on road evaluation". It was again recommended that the Applicant not be permitted to drive.

A third driving assessment at the Hugh MacMillan Rehabilitation Centre in Toronto on July 13, 1994 and the Driver Rehabilitation Specialist stated she could not support the reinstatement of the Applicant's driver's licence. She had many conversations with him following the evaluation and stated, "he does not understand how his stroke has interfered with his insight and ability to safely operate a motor vehicle."

A fourth driving assessment at the Smith Falls Community Hospital Department of Occupational Therapy was carried out March 28, 1995. The Summary was, "the Applicant was unable to demonstrate that he had the skills to be a safe driver. He demonstrated poor judgement, with regards to his skills and abilities, poor impulse control and inadequate speed of reaction." Recommendations: the Applicant should not be driving. Further driver skills evaluations would be inappropriate and serve to reinforce the Applicant's unrealistic view of his abilities.

In April 1995, the Applicant had a hearing before the Licence Suspension Appeal Board, which confirmed the decision of the Registrar of Motor Vehicles.

On March 30, 2000, a 5th Occupational Therapy Driving Evaluation was carried out at the Royal Ottawa Health Care Group Occupational Centre. The results were: " Client is unsafe to drive due to cognitive problems related to his stroke. These problems include decreased attention to visual details, decreased concentration, inability to multi-task and slow information processing. The Applicant lacks insight into his disability and his inability to drive safely".

The Ministry received a letter on September 28, 2000, from Physician # 2, the Applicant's family physician, written at the request of the Applicant to ask for reinstatement of his driver's licence. He stated," his family, myself and citizens of Cornwall, do not want him to drive".

The Applicant did not really present any evidence per se. His questions to the Respondent following his evidence were a series of excuses for many of the comments made in the various reports. He felt there was a conspiracy against him by all of the Driving Evaluators, led by Lynda Rankin from the Kingston General Hospital.

In an Administrative Review at the Ministry in August 2000, he said that every doctor he had seen is a bastard and they all should be put in jail. He also expressed discontent of the way he was treated, including the appeal of his suspension. He stated that his present condition should not be a reason to suspend because he had years of driving experience and was a very good driver.

The Applicant carried a cane and was very unsteady when he stood up. He blamed this on a fractured hip that was improperly stabilized, resulting in a hip replacement. His left hand was always held across his chest and did not appear to be functional.

The Applicant mentioned on at least three occasions that he had two Cadillacs in mint condition and they were much better than the cars provided for his tests. He attempted to illustrate what a good driver he was by antidotes. "You have to be a good driver to drive through Mexico City pulling a 31 foot trailer." Another one was about driving across the Ivy Lee Bridge and helping a truck driver whose cab was hanging over the edge of the bridge. I asked when this occurred and he said it was a year or two ago. This was strange because his licence has been suspended for eight years.

He repeatedly asked the Respondent how long was he going to be penalized for having a stroke and who could direct him to a fair driving instructor? The answer was that the referral would have to be made through a doctor. He then replied that Physician # 2 would do that and also write him a letter saying he is fit to drive. This was shortly after the Respondent introduced Physician # 2's last letter stating " His family, myself and the citizens of Cornwall do not want him to drive".

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) of the *Highway Traffic Act* empowers the Registrar to "...suspend or cancel" a driver's licence for "any...sufficient reason...". The Registrar suspended the Applicant's licence after receiving an unsolicited letter, dated September 2, 1993 from Physician # 1 advising that in his opinion it may be dangerous for the Applicant to operate a motor vehicle until he has a driving assessment. Following removal of a Giant Aneurysm of the Middle Cerebral Artery the Applicant had suffered a C.V.A. with a left hemiparesis and decreased sensation to the left side of the body.

The Tribunal finds that the Registrar acted in accordance with the Regulation in suspending the Applicant's driver's licence.

The Applicant, however, has argued for eight years that there is insufficient medical evidence to justify the suspension. The original letter from Physician # 1 recommended a driving assessment before the Applicant's licence is re-instated. The Applicant has had six driving assessments by six different instructors and failed all of them. The failures were all unequivocal with justification. Several mentioned the Applicant has no insight into his disabilities, which was clearly demonstrated to the Tribunal. No one will ever convince him that he would be a danger to himself and the public if he drove.

The Applicant has a permanent hemiparesis of his left side with no hope of improvement, cognitive deficits that interfere with his ability to drive safely, poor judgement which was obvious during his tests, inadequate speed of reaction and an unrealistic view of his abilities.

The Tribunal finds that on the evidence, the Applicant suffers from a disability likely to significantly interfere with his ability to drive a motor vehicle within the meaning of section 14(a), Regulation 340/94.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 20, 1993 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.,
Presiding Member

RELEASED: March 13, 2001

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by the
Applicant to appeal the decision of the Registrar of
Motor Vehicles pursuant to section 47(1) of the
Highway Traffic Act;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Monday, March 19, 2001, at the Tribunal;

AND WHEREAS the Applicant requested an adjournment of the hearing in order to retain counsel and to obtain additional medical information;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Monday, April 30, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: March 15, 2000

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1223

METROPOLITAN TORONTO CONDOMINIUM CORPORATION NO. 1223

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

STEPHEN BROWN, Counsel, representing the Applicant
TERRI HILBORN, Counsel, representing the Ontario New Home
Warranty Program
ENZO BERTUCCI, Agent, representing Falstaff Heights Development
Corp., Added Party

DATE OF
HEARING: December 18, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000, is known as the Licence Appeal Tribunal) by the Metropolitan Toronto Condominium Corporation No. 1223 (the "Applicant") from a decision letter dated February 11, 2000, issued by the Ontario New Home Warranty Program (the "Program") under the *Ontario New Home Warranties Plan Act* (the "Act").

The Applicant claims warranty protection under Section 13(1) of the *Ontario New Home Warranties Plan Act*. The Program refused the Applicant's claim, as stated in the decision letter, on the basis that the Applicant's claim was received beyond the limitation period established by Section 13(4) of the Act for the filing of such claims.

FACTS:

The facts not in dispute are as follows:

On December 2, 1998 the subject condominium was registered, by the filing of a Declaration as required by the *Condominium Act*. As required by the Act, a Warranty Certificate was issued indicating this registration date.

On December 2, 1999 a Technical Audit was delivered to the Program outlining deficiencies for which warranty protection under Section (1) of the Act was being sought.

The relevant facts in dispute center on whether or not the Applicant sought advice from the Program prior to the delivery of the Technical Report as to the requirements under the Act for an owner to qualify for warranty protection. In the event that the Applicant sought such advice, the parties differ as to the result in law, given the one year limitation period in subsection 13(4) of the Act.

The Applicant contends that he spoke to an employee of the Program named "Mayleen" in the Construction Department and was told that to qualify, he had to submit his record of deficiencies or Technical Audit within one year of the date of the registration of the Condominium, December 2, 1998; that is "by December 2, 1999". The Applicant stated that he took this to mean up to and including December 2, 1999. A hand written note purporting to be a record of the telephone call was entered into evidence by the Applicant. The note includes the telephone number of the Program, the date of December 2, 1998 circled, the names of the participants in the Condominium scheme and "Mayleen-construction dept."

This exhibit was disclosed to the Respondent prior to the hearing.

There is no dispute that the Program invites inquiries from homeowners and that such inquiries are invited as part of the role of the Program under the *Ontario New Home Warranties Plan Act*. However, the Program disputes that one of its employees made the representation alleged by the Applicant.

The Tribunal accepts the evidence of the Applicant that it was informed by the Program to have its warranty claim delivered to the Program "by December 2, 1999". The Tribunal also finds that the Applicant understood that delivery to the offices of the Program on the day of December 2, 1999 would satisfy the requirements.

The Respondent takes the position that Section 13(4) of the Act requires warranty claims under Section 13(1) to be made by an owner within one year of the warranty taking effect; in this case, that is within one year of the Condominium's registration, December 2, 1998. Any information given to the Applicant to the contrary, or which could be reasonably construed as contrary, can be of no effect. As the *Interpretation Act* defines "year" as meaning "calendar year", or 365 days, the time for the filing of the deficiency report was midnight December 1, 1999.

The Applicant takes the position that reasonable reliance upon the advice given to it by the entity charged with administering the Act, namely, the Program, is entirely appropriate to determine when the Applicant should file a claim with the Program. The Applicant submitted that where the Applicant has relied upon the Program's representation that a particular date is available to the Applicant to file a claim, that date applies even if it is past the expiry of a limitation period in the Act.

THE ISSUE:

On the facts before the Tribunal, does the limitation period under the Act require the Applicant to file its claim by December 1, 2000?

Can the Applicant rely upon the Program's representation to make a warranty claim on December 2, 2000 when the Act provides that the claim should be made on or before December 1, 2000?

THE LAW:

The statute establishing the Tribunal, *The Licence Tribunal Act, 1999* outlines the duties and powers of the Tribunal in section 3:

3(1) The Tribunal shall hold the hearing and perform the other duties that are assigned to it by or under any Act or regulation.

3(2) Except as limited by this Act, the tribunal has all the powers that are necessary or expedient for carrying out its duties.

Section 15 of the *Ontario New Home Warranties Plan Act* states:

15. For the purposes of sections 13 and 14, a condominium corporation shall be deemed to be the owner of the common elements of the condominium and the warranties take effect on the date of the registration of the declaration and description.

The hearing in this matter is held pursuant to Section 16(3) of the *Ontario New Home Warranties Plan Act*:

16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

The limitation period in question is contained in Section 13(4) of the *Ontario New Home Warranties Plan Act*:

13(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Section 29 of the *Interpretation Act*, R.S.O. 1990, Chap. I.11 provides that:

"year" means a calendar year.

Under section 4 of Regulation 892, written notice of a claim is required:

4(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

Regulation 892 under that Act provides that certain claims may be made more than one year after the warranty takes effect. Section 14 of the Regulation states:

14. Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the home is completed for possession.

Also, section 16 of Regulation 892 states:

Where a home was enrolled after the 31st day of December, 1990, the claim for damages became a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

APPLICATION OF LAW TO FACTS:

Section 13(4) of the *Ontario New Home Warranties Plan Act* states that:

.....

13(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Such "longer time" is prescribed for water penetration (sec., 14 O. Reg 892) and for major structural defect (sec. 16, O. Reg 892), otherwise "within one year after the warranty period takes effect" applies. Subsection 4(1) of Regulation 892 under the Act requires that "Each person with a claim under the Plan shall give written notice of the claim to the Corporation". Here, the Declaration under the Condominium Act was registered December 2, 1998.

Accordingly, the Applicant's warranty period took effect December 2, 1998 and the calendar year to make the Applicant's claim would expire on the last day of the calendar year, which is December 1, 1999. Water penetration claims would expire December 1, 2000 and major structural claims expire December 1, 2005. In the case before the Tribunal, the Applicant seeks to file claims which should be made within the one year after the warranty period takes effect. For convenience, the Tribunal will refer to these as "one year claims".

The decision of the Tribunal depends upon whether its jurisdiction is bound by the strict wording of subsection 13(4) of the *Ontario New Home Warranties Plan Act*. If so, then the Applicant can not claim warranty protection under section 13 of the Act. Only if the Tribunal has discretion to override the limitation period in subsection 13(4) of the Act, may it consider the Applicant's submissions that the Program can not raise a limitation period against the Applicant's claims.

The case at hand does not involve the Program agreeing to the Applicant making its claim on December 2, 1999 or expressly waiving any rights under subsection 13(4). Here, the Applicant relied upon the Program's representation as to when the Applicant could make a claim under the Act. That representation placed the Applicant's right to make a claim one day beyond the expiry of the governing limitation period. The Applicant contends that it acted reasonably in both its interpretation and its reliance upon the Program's representation, and it contends that the Program is thereby foreclosed from relying upon that limitation period.

The Tribunal must ascribe an ordinary meaning to the words "by December 2". Only then can the Tribunal consider whether or not the Applicant could have been misled at all. If these words, in ordinary parlance, mean "by midnight December 1", then the Applicant would have no argument about having been misled by the advice of the Program, which is the basis for its submissions now before the Tribunal. After considering the words "by December 2", the Tribunal finds that the Applicant was justified in believing that it could make its claim under the Act on December 2, 2000, which is one day beyond the governing limitation period provided by section 13(4) of the Act.

Counsel for the Program relied upon the case of *Chewerda*, CRAT 1997. In *Chewerda* the claim was filed on the same calendar date, one year after the registration date of the property.

By the definition of "year" in the *Interpretation Act*, the expiry of the limitation period was midnight of the prior day. The Tribunal ruled that the Applicant was out of time. The Tribunal concluded that as the Act and Regulations do not provide authority either within the Program or within the Tribunal to waive limitation periods, the failure of the Applicant to file a claim within the limitation period, although unfortunate, could not be remedied.

If the *Chewerda* decision applies to the case now before the Tribunal, then the right of the Applicant to make a warranty claim under the Act expired at midnight December 1, 2000. In the *Chewerda* case, the Program made no any representation to the Applicant as to when the Applicant could make a claim under the Act. In the matter now before the Tribunal, the Program stated that December 2, 2000 was the last date to make a claim. Does the Applicant's reliance on that statement override the express limitation period under subsection 13(4) of the Act?

By the ruling in *Chewerda*, the Program, and by extension its employees, are fixed with knowledge that filings by owners seeking warranty protection on the same calendar date one year from the date of registration of their property will be out of time. Given this, it is not difficult, to conclude that the Program should accurately pass on this information to owners making inquiries. Despite this, the Program's failure to do so may have no effect as to the Tribunal having or not having jurisdiction to adjudicate a matter.

This Tribunal is a statutory body. It has the jurisdiction given it by the statute. The *Licence Appeal Tribunal Act* states in section 3:

3(1) The Tribunal shall hold the hearings and perform the other duties that are assigned to it by or under any Act or regulation.

3(2) Except as limited by this Act, the Tribunal has all the powers that are necessary or expedient for carrying out its duties.

In the case at hand, "all powers that are necessary or expedient for carrying out its duties" would be those necessary to carrying out its duties under the *Ontario New Home Warranties Plan Act*.

Under section 16 of the Ontario New Home Warranties Plan Act, subsection 16(3), the Tribunal shall hold a hearing where a person gives notice under subsection 16(2) and "may by order direct the Corporation to take such actions as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation (emphasis added). Under subsection 16(2), a person is entitled to a hearing who receives a notice under subsection 16(1), which is a notice of the Corporation's decision under section 14 of the Act.

Section 14 lists what a person or owner is entitled to under the Act. The entitlement relevant to this case, set out in subsection 14(1)(b), is payment for damages resulting from breach of warranty. A "warranty" is defined under section 1 of the Act as a warranty set out in section 13 of the Act.

Under section 16 of the Act, the Tribunal shall hold a hearing, and under subsection 16(3) make an order "in accordance with the Act and the regulations...."

Under subsection 13(4) of the Act, "A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed". Except in certain claims, such as for water penetration or major structural damage mentioned above, the warranties under the Act only apply to claims made within one year after the warranty takes effect. The Applicant's claim before this Tribunal should be made within the one-year period.

There is no agreement or waiver from the Program to provide jurisdiction to this Tribunal respecting the Applicant's claim. The Applicant did not refer the Tribunal to any cases or legal authority that would support the Tribunal having jurisdiction respecting a claim that should have been made within one year but was not.

The Applicant's submission that it can rely upon the Program's representation may assist the Applicant before the courts. However, this Tribunal is a creature of statute, and that statute does not give this Tribunal jurisdiction over a claim made after the expiry of an express limitation period under subsection 13(4) of the Act.

DECISION:

It is the ruling of the Tribunal that it lacks jurisdiction to hear the Applicant's appeal of the decision dated February 11, 2000 of the Ontario New Home Warranty Program to deny the Applicant's claims.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice- Chair

HASSAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
HASSAN KASSEM HASSAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 7th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

HASSAN KASSEM HASSAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 18 and 19, 2000;

AND WHEREAS the matter was adjourned upon consent of the parties to May 23 and 24, 2001;

AND WHEREAS the matter was further adjourned *peremptory* against the Applicant to July 11 and 12, 2001;

AND WHEREAS the Applicant's counsel requested a further adjournment due to his client's urgent family illness out of the country;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, October 25, 2001 and to continue October 26, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

1032506 ONTARIO LTD., OPERATING AS FORTE CONSTRUCTION CORP.

1032506 ONTARIO LTD., OPERATING AS FORTE CONSTRUCTION CORP.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL:

TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

No one appearing for 1032506 Ontario Ltd., operating as Forte Construction Corp., Applicant
CAROL STREET, Counsel for Registrar under the *Ontario New Home Warranties Plan Act*, Respondent

DATE OF

HEARING:

June 27, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated August 9, 2000, (the "Original Proposal"), issued by the Registrar of the *Ontario New Home Warranties Plan Act* (the "Registrar"), to refuse to renew the registration of 1032506 Ontario Ltd., operating as Forte Construction Corp. (the "Applicant"), as a vendor or a builder under the provisions of Section 8(2) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990. Ch. 0.31 (the "Act").

The Registrar is appointed by Ontario New Home Warranty Program, the corporation designated to administer the Act pursuant to Section 2 thereof (the "Program") and is charged with the duties and required to exercise the powers given to the Registrar by the Act. The Registrar issued a Supplemental Notice of Proposal dated April 18, 2001, (the "First Supplemental Proposal") which, by adding information and statements supplemental to the Original Proposal, had the effect of making the Original Proposal current as at the date of the First Supplemental Proposal. The Registrar issued a further Supplemental Notice of Proposal dated May 17, 2001, (the "Second Supplemental Proposal") which, by adding or amending information and statements supplemental to the Original Proposal and/or the First Supplemental Proposal, had the effect of making the Original Proposal and the First

Supplemental Proposal current as at the date of the Second Supplemental Proposal. This hearing dealt with the Original Proposal, the First Supplemental Proposal and the Second Supplemental Proposal together, as a single proposal (collectively the "Proposal").

The Applicant by a notice requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 9(2) and 9(4) of the Act.

ISSUES:

The Registrar issued the Proposal under Section 8(2) of the Act based upon the Registrar's opinion that the Applicant is disentitled to registration as a vendor or a builder pursuant to Section 7(1)(c)(i) and Section 7(1)(d) of the Act. It is the opinion of the Registrar, as stated in the Proposal, that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings and, further, that the Applicant does not have sufficient technical competence to consistently perform the warranty service required of it.

The Applicant in its Notice of Appeal dated August 25, 2000, (the "Appeal") gave no indication of either the specific items of the Proposal that it wished to appeal nor any reasons therefor and thus, this Tribunal has some difficulty in being able to understand with which item or items in the Proposal the Applicant takes issue, or why. The Applicant's Appeal gives no direction to the Tribunal except a bland, or blanket statement that "all of the issues set out in the" Proposal are to be heard and addressed by this Tribunal.

The issues in this hearing are further complicated due to the fact that the solicitor who undertook the Appeal, and signed the Appeal on behalf of the Applicant as "Solicitor for the Applicant", breached not only his duty to his client but also to the Tribunal by abandoning this matter without either appearing before this Tribunal or the courtesy of a valid explanation for his non-appearance. This Tribunal has not experienced such conduct heretofore and such is beyond the purview of this decision (by the choice of this Tribunal), but may nevertheless be within the interests of the governing body of the legal profession in this Province should it, by choice, wish to review this type of conduct. In any event, the solicitor's non-appearance gives rise to a great waste of time and expense for the Respondent, its Counsel and its witnesses, not to mention the Tribunal and its staff. In this connection, efforts were made by the staff of the Tribunal to ascertain whether any other person, other than the said solicitor, would be attending on behalf of the Applicant at the hearing of the issues raised by the Appeal but to no avail.

EVIDENCE:

The Respondent gave its evidence by way of the testimony of Jamal DaSilva (an employee in the warranty and underwriting department of the Program) and Bob Thoburn (being the Operations Manager of the Brampton Office of the Program). As stated above, the Applicant neither appeared nor gave any evidence at the hearing to support the issues raised in its

Appeal. The evidence given by both witnesses at the hearing was straight forward, clear and precise, thus giving this Tribunal little trouble in understanding the facts which give rise to the Proposal. It is unnecessary to relate in any detail the evidence given at the hearing, except to refer to the 181 items contained within Exhibits #1 and #2 and the other Exhibits filed.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Applicant executed an agreement with the Program dated September 2, 1994, (the "Vendor/Builder Agreement");
2. The Applicant was validly registered pursuant to the Act as a Vendor/Builder as of September 28, 1994, and operated its business under the name and style of "Forte Construction Management";
3. The registration of the Applicant was renewed from time to time to September 28, 1999, by the Registrar upon the application of the Applicant therefor;
4. On March 26, 1998, the Applicant filed with the Respondent its financial statements dated as at December 31, 1996, in support of its application for a renewal of its registration effective September 28, 1997, and has failed since that date to file further financial statements in spite of numerous requests by the Respondent to bring the financial records of the Applicant and/or its principals to a more current state;
5. The Applicant, at some date between October 31, 1996 and March 24, 1997, changed the name and style under which it carried on business from "Forte Construction Management" to "Forte Construction Corp.", although it continued thereafter to utilize from time to time the name and style "Forte Construction Management" in addition to "Forte Construction Corp.";
6. The Applicant applied to the Program for a renewal of its registration as a Vendor/Builder dated September 25, 1999, which application was filed and received by the Program on November 10, 1999;
7. The Program, by letters dated January 28, 2000 and March 24, 2000, informed the Applicant that a renewal of its registration would proceed only subject to a review by the Registrar of certain documentation requested by the Registrar and payment of an outstanding fee in the amount of \$144.25;
8. The Registrar issued a Notice of Proposal dated August 9, 2000, with respect to the Original Proposal;

9. A solicitor, purporting to act on behalf of the Applicant, filed a Notice of Appeal with the Tribunal pursuant to Section 9(4) of the Act dated August 25, 2000, with respect to the Appeal;
10. The Program, by a letter dated October 10, 2000, informed the Applicant that a cheque dated September 8, 2000 in the amount of \$1,840.00 had been returned marked "Insufficient Funds" and the said amount is still owed by the Applicant to the Program;
11. The Respondent, by a letter dated December 11, 2000, informed the Applicant that a further renewal of its registration would proceed only subject to a review by the Registrar of certain documentation requested by the Registrar and payment of the appropriate renewal fee;
12. The Registrar, by a letter dated January 12, 2001, notified the Applicant that its registration had expired;
13. On or before March 21, 2001, the Applicant changed the name and style under which it carried on business from "Forte Construction Corp." to "Forte 2000 Custom Builders Inc.", and notified its customers "that Forte Construction Corp. is now under new management [and we] look forward to servicing you";
14. The Respondent, by a letter dated April 6, 2001, notified the Applicant that its registration had been reinstated;
15. The Registrar issued a Supplemental Notice of Proposal dated April 18, 2001, with respect to the First Supplemental Proposal;
16. The Registrar issued a Supplemental Notice of Proposal dated May 17, 2001, with respect to the Second Supplemental Proposal;
17. The Respondent provided documentary evidence of a number of breaches of warranty with respect to new homes built by the Applicant with specific reference to the following listed new homes, namely;-
 - (a) Hemphill Residence at 14556 Morris Road, Welland, which resulted in valid claims by the Program against the Applicant in the respective amounts of \$4,147.41, \$676.78 and \$10,345.46;
 - (b) Maddalena Residence at 163 Crysler Crescent, Thorold;
 - (c) Penner Residence at 61 Crysler Crescent, Thorold;
 - (d) Feltrin Residence at 32 Decew Woods Court, Thorold, which resulted in a valid claim by the Program against the Applicant in the amount of \$246.10;
 - (e) Pogacnik Residence at 13 Macturnbull Drive, St. Catherines; and
 - (f) Wilkinson/Moore Residence at 115 Crysler Crescent, Thorold;

18. The Applicant is indebted to the Program in the amount of \$15,415.75 due to the Applicant's failure to rectify breaches of warranty specified in paragraph 17 hereof;
19. The Applicant has consistently failed to perform the contractual obligations specified in paragraph 17 hereof as evidenced by its failure to respond to the complaints of home owners, the conciliation efforts of the Program and the inspection reports issued by the Program in consequence thereof;
20. The Applicant has failed to enroll new homes which it has constructed at 14 Silvercrest Court and 56 Ward Circle in Thorold;
21. The Applicant is in breach of its agreements set forth in the Vendor/Builder Agreement.

THE LAW:

Pursuant to section 8(2) of the Act, the Registrar may refuse to renew the registration the Applicant as a vendor or a builder for any reason that would disentitle the Applicant to registration under section 7(1)(c) and/or section 7(1)(d) of the Act, or in circumstances where the Applicant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts, or is in breach of a term or condition of the registration:

"8 (1) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts, or is in breach of a term or condition of the registration."

Pursuant to section 7(1)(c) of the Act, the Applicant is entitled to registration by the Registrar except where having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on lawfully, honestly and with integrity:

"7. (1) An applicant is entitled to registration by the Registrar except where,
(a) ...;
(b) ...;
(c) the applicant is a corporation and,

- (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty;"

Pursuant to section 7(1)(d) of the Act, the Applicant is entitled to registration as a builder except where the Applicant does not have sufficient technical competence to consistently perform the warranties:

- "7. (1) An applicant is entitled to registration by the Registrar except where,**
- (a) ...;**
 - (b) ...;**
 - (c) ...; or**
 - (d) in the case of an application for registration as a builder, the applicant does not have sufficient technical competence to consistently perform the warranties."**

Based upon the above noted facts, the Registrar has reached the decision that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings. The Registrar has further concluded that the Applicant has a record of breaches of warranties and a record of failures or unwillingness to complete performance of contracts, and is in breach of a term or condition of its registration. In addition, the Registrar has decided that there are reasonable grounds for belief that the Applicant will not carry on business with integrity. Pursuant to sections 9(1) and 9(2) of the Act, the Registrar is required to serve a notice of proposal on the Applicant:

- "9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.**
- (2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal."**

The appeal comes to this Tribunal by virtue of section 9(4) of the Act, which provides:

"9. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

Based upon the evidence presented at the hearing, this Tribunal is in accord with the Registrar's conclusions set forth above.

DECISION AND ORDER:

The onus of proof that the Proposal is correct lies with the Respondent and this Tribunal finds that this onus has been discharged in light of all of the evidence given at the hearing and for the reasons hereinbefore stated. Accordingly, pursuant to the authority vested in it by section 9(4) of the Act, this Tribunal directs the Registrar to carry out the Proposal to refuse the renewal of the registration of the Applicant as a vendor/builder under the Act.

LICENCE APPEAL TRIBUNAL

Terrence A. Wardrop, Q.C.,
Vice-Chair

Released: July 31, 2001

ALI ABDUL-HUSSEIN o/a B & A AUTO SALE

ALI ABDUL-HUSSEIN o/a B & A AUTO SALE

MOTION TO CONSIDER A STAY OF AN ORDER OF THE
LICENCE APPEAL TRIBUNAL

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair Presiding
JEAN-MARC LEFEBVRE, Vice-Chair

APPEARANCES:

RICHARD J. BOSADA, Counsel for Applicant
MARY JANE SOUTH, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
MOTION:

May 14, 2001

Ottawa

REASONS FOR RULING

BACKGROUND:

The Applicant, Ali Abdul-Hussein o/a B & A Auto Sale brings this motion seeking an Order for a stay of the Decision of the Licence Appeal Tribunal released January 25, 2001 directing the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") to carry out his proposal to revoke the registration of the Applicant as a motor vehicle Dealer under the *Motor Vehicle Dealers Act* (the "Act"). The Applicant has appealed the decision of the Tribunal by notice of appeal dated February 23, 2001.

FACTS:

The Amended Notice of Motion states as grounds for the relief sought:

1. Subsection 7(9) of the *Motor Vehicle Dealers Act*, R.S.O. 1990, c. M.42;
2. There are serious issues to be dealt with on Appeal;
3. The Appellant will suffer irreparable harm if the stay is not granted;

4. The revocation of the Applicant's registration is inequitable in view of the length of time before the appeal of the Tribunal's decision can be heard;
5. Such further and other grounds as the Tribunal may permit.

In support of the application there was filed the Affidavit of Ali Abdul Hussein. The Affidavit was not cross-examined upon and contains the following assertions:

1. He has been a Registrant under the Act since August 1999 and is the sole owner and operator of the Applicant B & A Auto Sales. Until this matter his licence was at no time suspended, cancelled or revoked.
2. Prior to becoming a Registrant as a dealer, he was registered as a Motor Vehicle Salesman for six months. During this time his registration as salesman under the Act was never revoked.
3. The Applicant does not wish to return to this employment as a salesman in that he could not make an income sufficient to maintain his family and a back injury does not allow him to stand for long periods of time.
4. The Applicant fears that even if successful on appeal the loss of good will with his customers could not be overcome upon his return to the business.
5. The Applicant is 30 years old with a grade 11 education and no formal training towards any other line of employment.
6. The Applicant is married with two children ages 7 and 4. His wife is a civil servant at a salary of \$36,000.00. His monthly expenses are \$3,000.00 of which \$1,500.00 was coming from the business. The combined incomes were necessary to cover most of the monthly expenses. His business account has gone from \$20,000.00 to \$200; \$7,000.00 of which went to Lebanon to pay for life saving surgery on his mother.
7. The loss of his registration has caused considerable stress on the Applicant and his family. This has resulted in a diagnosis of depression and treatment by medication.
8. The Applicant consents to a regime of random inspections by the regulator and the posting of a forfeitable bond in the amount of \$5,000.00 should the Tribunal grant the stay.
9. The Applicant was advised that the earliest hearing date before the Divisional Court would be November 2001.

In response there was filed the Affidavit of Laura Gordon an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC) the body charged with the responsibility of monitoring the

Act. After her review of the Applicant's affidavit, she states:

1. That OMVIC's records show a registration as a salesman from 1993 through 1996 and from March to July 1999.
2. That in answer to the Applicant's claim of having a significant stake in a dealership, the Applicant had in fact filed charges of business address on three occasions in the year 2000.
3. That on the basis of an Affidavit of a fellow investigator attached as an exhibit to her own, an investigation was carried out on the Applicant the results of which the affidavit deposes indicates that the Applicant during 1998 was buying and selling vehicles without being registered as a dealer. As well, there is a report of the investigator to the Registrar indicating that the Applicant had pleaded guilty to 10 counts of selling vehicles without a licence on September 30, 1999.

THE LAW:

The appeal from the decision of the Tribunal to the Divisional Court is brought pursuant to the right granted under section 11 of the *Licence Appeal Tribunal Act*.

Section 25(1) of the *Statutory Power and Procedures Act* ("SPPA") provides:

Unless it is expressly provided to the contrary in the Act under which the proceeding arises an appeal from a decision of a Tribunal to a court or other appellate Tribunal operates as a stay in the matter except where the Tribunal or the court or other body to which the appeal is taken otherwise orders.

Section 7(9) of the *Motor Vehicle Dealers Act* provides:

Although a registrant appeals from an order of the Tribunal under section 11 of the *Licence Appeal Tribunal Act*, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

The determination of whether a stay is appropriate in a given action is dependent upon the application by the motions judge of a three part test set forth by the Supreme Court of Canada in the matter of *RJR MacDonald Inc. vs. Canada* (A-G) 111 D.L.R. (4th) 385.

The elements of the test can be summarized as follows:

1. Is there an serious issue to be heard on appeal?
2. Will there be irreparable harm to the Applicant should the stay not be granted?

3. Which of the two parties will suffer the greater damage from the decision of the motions judge?

The first of the tests is a preliminary assessment of the merits of the case to ascertain whether there is a serious issue to be heard on the appeal. In the *RJR MacDonald* case, the court considered the appropriate level of inquiry at the motion stage as to what constituted a "serious issue".

"There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case...Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is neither necessary nor desirable."

In answer to this onus, the Applicant has set forth in his notice of appeal the grounds upon which he intends to present his case to the Appeals court. They are as follows:

1. That the Tribunal erred in denying the Appellant's request for an adjournment.
2. That the Tribunal erred in its findings of fact.
3. That the Tribunal erred in its application of Section 5(1)(b) of the Act and thereby erred in holding that the past conduct of the Applicant afforded reasonable grounds for belief that the Applicant would not carry on business in accordance with law and with honesty and integrity.
4. That in the alternative the penalty of revocation of the Applicant's licence was excessive in the circumstance.

On the first point, counsel for the Applicant submitted that he will be putting forth a Charter of Rights argument on this point. His position as understood by the Tribunal will be that the Tribunal should have weighed any prejudice that would have occurred to the Registrar by an adjournment against the right of the Applicant to be represented by counsel.

The position of the Registrar was that all proper notices were given under the Act to the Applicant and that it was his duty to retain counsel if he so wished. There was no retainer or other correspondence produced that would have indicated he was in the process of instructing counsel. It was also submitted that this very assertion by the Applicant coupled with the fact that transcripts had not been ordered should be taken by the Tribunal as evidence of the Appeal being frivolous.

The Tribunal was assured by counsel for the Applicant that transcripts had been ordered, and the fact that he had retained counsel to argue the motion should answer that argument. The

Tribunal accepts the bone fides of counsel and find that his submissions on the point raise a serious issue for appeal.

With regard to the remaining grounds and being mindful of the Supreme Court's caution that there be no in depth review of the findings of the lower court, the Tribunal was given reference to two Divisional Court decisions which dealt directly with the issues raised. Both were heard by the same judge, MacFarland J, and within 10 months of each other. As neither motion has been reviewed on appeal, they must be taken as authoritative. The first, *Jacob's Sales & Service* [1198] OCRATD 215 ("*Jacob's*") was heard in December, 1998. The second, *Registrar, Motor Vehicle Dealers Act and Aghtaie-Mashmoul Hashem* ("*Hashem*") was heard October 18, 1999.

In *Jacob's* there were two types of breaches of the Act under consideration by the Tribunal. The first involved odometer misrepresentations, the second the employment of unregistered salespersons. On the return of the motion to stay, the Tribunal held that the odometer misrepresentation breaches "may raise serious or substantial issues for argument before the Appeal Court". On the unregistered salesperson allegation, the Tribunal noted that the Applicant took no issue with the fact that there had been a breach of the Act. The Tribunal considered the Applicant's submissions that despite this, the more appropriate finding at first instance would have been for the Tribunal to exercise its discretion under section 7(9) of the Act and substitute the Registrar's decision with a lesser punishment than suspension. The Tribunal disagreed, saying that the discretion as to sanction was the Registrar's not the Tribunal's and that to modify a finding by the Registrar the Tribunal would have to find, quoting Southy J in the *Brenner* decision (1983 Div.Ct.) CRAT 19, that..."the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds that he (the Applicant) would not carry on business in accordance with the law and with honesty and integrity". Accordingly, the Tribunal found that there was no serious question for appeal.

MacFarland J. held that as the Tribunal had found that there was a serious issue for appeal respecting "odometer misrepresentations", it should have held this to be sufficient to pass the Applicant on the first part of the court's test. Consideration of the second or "unregistered salespersons", branch of the Applicant's submissions was in effect unnecessary. The Court stated, "there was no other past conduct which would justify the refusal to issue a stay in these circumstances. The only relevant past conduct which was considered was the conduct which underlies the basis for this appeal".

Clearly the court is saying that if there are two sets of circumstances giving rise to a decision by the Registrar and one gives rise to a serious issue for appeal, that is sufficient to satisfy the first part of the test for relief such as a stay of proceedings pending appeal.

In the *Hashem* decision, the Court dealt with the appropriateness of the sanction imposed by the Registrar as a ground for appeal. The Court pointed out that this was not a case involving breaches of the Act involving improper record keeping, failure to honor obligations with regard

to payment of a claim in their warranty coverage, permitting the sale of vehicles by unregistered salespersons, or failure to check on status of salespersons, or failure to provide customers with detailed written information regarding their transactions in accordance with the Act and others. It would appear from the endorsement on the record that in such a case the Applicant is entitled to have the types of breaches of the statute differentiated as to their seriousness and the reasonableness of the Registrar's exercise of discretion would be an issue for appeal. By implication, the Court is saying that if such an analysis is not undertaken at the return of the motion for stay, this supports an issue for appeal. The Court states:

"I am satisfied that the Applicant has raised a serious issue for argument on the appeal. He says in effect, his conduct while technically in breach of the Act, was really 'de minimus' and in no event justified the imposition of the ultimate penalty ie: permanent revocation of his registration as a dealer. There are no allegations of odometer tampering, fraud or other dishonest conduct".

In the affidavit of Laura Gordon referred to above, there were assertions that in 1999 there had been an investigation which resulted in a plea by the Applicant to charges of selling vehicles without a licence. Even if these assertions are true, they did not form part of the conduct under consideration by the Tribunal at first instance nor do they answer the Applicant's affidavit on this appeal. The Tribunal agrees with counsel for the Applicant that they are overarching and should not form part of the Tribunal's considerations on the motion. They were not part of the case to be met at first instance and can not be raised at this juncture. The relevant past conduct on appeal should only be the past conduct upon which there has been an adjudication.

The Tribunal notes that on the information before it, the Applicant was granted his registration as a motor vehicle dealer at the end of August 1999. This appears to be the same period that the unregistered Applicant was under a Provincial Court summons for breaches of the Act outlined above.

The Tribunal holds that the Applicant meets the first part of the test.

The second test is a determination whether the Applicant would suffer irreparable harm if the application was refused. The *RJR MacDonald* case addressed the parameters of this second test as follows:

"At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application".

The court defined irreparable harm as follows:

"where one party will suffer permanent market loss or irrevocable damage to his business".

The Tribunal takes this to mean that a stay should be granted in cases where a decision in effect shuts down a business, and a stay should be granted to preserve the business as an ongoing concern until such time as the Applicant has had his appeal heard. To decide otherwise would be to render the Applicant's right to appeal moot. This point was canvassed in both *Jacob's* and *Hashem*. In *Hashem* the Court stated:

"If the stay is not granted his business in all likelihood will be lost pending the appeal. This of course will render the appeal moot for all practical purposes and is evidence of irreparable harm".

The uncontested evidence before the Tribunal is that the earliest date for an appeal is November of this year.

Submissions were put forth by the Respondent that other cases were found to have considerably more in the way of lost business potential pending appeal; employees going elsewhere, established clientele and that like. Here the business was low volume and essentially a one man operation.

As the Tribunal interprets the words of MacFarland J., however, these assertions are not determinative as it is the potential loss to the individual applicant that is the relevant measure, not some global figure. Here the evidence before the Tribunal is to the effect that this Applicant would lose a large portion of his household income if his albeit small business was shut down pending appeal. But the essential thrust of the Court's decision is that a right of appeal may be rendered moot by delay in the judicial process.

In light of the decisions of MacFarland J., the Tribunal finds that the Applicant has met the second part of the test.

The third test involves an assessment as to which of the parties to the application would suffer the greater harm from the granting or refusal of the motion.

The Tribunal's application of the third test to the Applicant's case must be undertaken while keeping in mind the fact that the legislation under which its process is governed is consumer protection legislation. To that end, the Act mandates that every person who sells motor vehicles in Ontario must be a registrant under the Act thereby becoming subject to its terms and conditions. All registrants under the Act must be deemed to understand that if they breach their obligations under the Act, they will be subject to sanctions imposed by the Registrar, including revocation of their registration and by extension, their occupation. Furthermore, the governing legislation is exempted from the general rule that an appeal from a Tribunal's ruling acts as a stay as provided by section 25(1) of the SPPA stated above. Section 7(9) of the *Motor Vehicle Dealers Act* expressly provides that the Registrar's ruling takes effect upon its release. In placing this exception in the Act, the legislature has placed some importance on

the immediate removal of a registrant's right to deal with the public.

The difficulty here as, expressed by MacFarland J., is that section 7(9) also granted to the Tribunal the discretion to grant a stay. The Act is a legislative scheme within a regulated industry where everyone has the right to make a living by becoming a registrant subject to decisions of the Registrar which in turn are subject to an appeal process. If the exercise of that appeals process to preserve the entitlement to registration and thereby make a living is rendered meaningless due to unavoidable delays in the administration of justice, then in effect the Registrar's decision is final. This cannot be the sense of the legislation.

The Tribunal is mindful that in the present case the balance by the third test is here being made, not between private litigants but between the holder of a license in an industry that the legislature has seen fit to regulate in order to protect the public interest and the Registrar designated for that purpose. The onus upon a licensee or registrant in such situations is higher than in private litigation. This balance was struck in *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)* 43 O.R. (3rd) 760. In that case, a regulation was promulgated canceling the spring bear hunt. The Applicants sought judicial review and applied for injunctive relief until a hearing on the merits. Because of the new steps taken by the Minister to amalgamate the effect of the ban and the fact that the hearing on the merits would be heard within thirty days of the motion, a stay was not granted. Here, there is little to lessen the impact on the Applicant if a stay is granted.

Taking into account the decisions of MacFarland J., unless there was some specific evidence of a strain upon the regulator's ability to monitor this Applicant's operations, the prospect of loss livelihood must outweigh the position of the Registrar.

The Applicant therefore has met the third test.

DECISION AND ORDER:

Under the authority under section 7(9) of the Act, the Tribunal grants a stay of its decision on the following conditions:

1. the Applicant will maintain as his place of business the last premises registered with the Registrar and will neither move nor apply for a move;
2. in addition to carrying on his obligation to maintain books and records pursuant to the Act, the Applicant will maintain a journal with a separate record of all transactions in which the Vehicle Identification Number (VIN), make and model will be kept for ready inspection by the Registrar;
3. the Applicant will record beside each entry in the journal record required by paragraph 2, all pertinent details of the vehicle's history, including all notation on the wholesale bill of sale recording the Applicant's purchase of the vehicle;

4. at the end of each month commencing July 30, 2001 until the disposition of the appeal, the Applicant shall forthwith forward that month's journal enteries to the Registrar;
5. before the execution of a retail bill of sale, the Applicant shall note on that retail bill of sale any representations as to the mileage and the condition of the vehicle that appear on the wholesale bill of sale to the Applicant;
6. as offered in his counsel's submissions, the Applicant will within 10 days of the release of this Order post with the Registrar \$5,000.00 in cash or negotiable security as a forfeitable bond to guarantee the Applicant's performance of these conditions;
7. any default in these conditions shall result in the immediate forfeiture of the bond and the Applicant's registration under the Act.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair,
Presiding

Jean-Marc Lefebvre, Vice-Chair

Released: July 5, 2001

ZAYAT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
HASSAN ZAYAT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: October 24, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

HASSAN ZAYAT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Hassan Zayat, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 12, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Hasan Zayat
4 Cote Des Neiges
Nepean, ON K2K 2C2

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Hasan Zayat (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees that he will pay the Automotive Finance Corporation the amount of \$1,000 per month, in certified funds, beginning on August 15, 2001. Said payments will continue to be made until all debts owing to the Automotive Finance Corporation arising out of the operations of Cyrville Star Top Inc. and K&H Motors have been paid.
2. Notwithstanding the above, the Applicant agrees that, should the Automotive Finance Corporation obtain judgement against the Applicant and the judgement is not under appeal, the Applicant will pay all monies owing to the Automotive Finance Corporation forthwith.
3. The Applicant will not be involved in the financing of vehicles, either directly or indirectly.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
5. The Applicant shall not be an officer, director, owner, partner or person in charge of a dealership for a period of five years.
6. Notwithstanding the above conditions, the Applicant agrees that he will pay all his debts and liabilities in a timely fashion.
7. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity with the exception of issues raised in the Registrar's Proposal to Revoke dated October 24, 2000 and the Notice of Further or Other Particulars dated March 5, 2001.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the

past or that may occur in the future with the exception of issues raised in the Registrar's Proposal to Revoke dated October 24, 2000 and the Notice of Further or Other Particulars dated March 5, 2001.

10. The Applicant acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if the Registrar has evidence that the circumstances of the disposal of the vehicles purchased through the Automotive Finance Corporation differ significantly from what the Applicant disclosed in Appendix "A" to this Order, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2001.

Hasan Zayat (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

JANECZEK

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
WILLIAM JANECZEK

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

WILLIAM JANECZEK

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 30-31, 2001 and to continue August 1-2, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Holiday Inn Sudbury, Suite 134, 50 Brady Street, Sudbury, Ontario at 9:30 a.m. on Monday, September 10, 2001 and to continue September 11 and 12, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: July 23, 2001

RENAUD HOMES INC.

RENAUD HOMES INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice-Chair

APPEARANCES:

PAUL RENAUD, Agent for Renaud Homes Inc., Applicant,
CAROL STREET, Counsel for the Registrar, Ontario New Home
Warranty Program, Respondent

DATES OF

HEARING:

May 7 and 8, 2001

Windsor

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated November 24, 2000, (the "Original Proposal"), issued by the Registrar of the Ontario New Home Warranty Program (the "Registrar"), to refuse to register Renaud Homes Inc. (the "Applicant"), as a vendor or a builder under the provisions of Section 8(1) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990. Ch. 0.31 (the "Act"). The Registrar issued a Supplemental Notice of Proposal dated February 9, 2001, (the "Supplemental Proposal") which, by adding information and statements supplemental to the Original Proposal, had the effect of making the Original Proposal current as at the date of the Supplemental Proposal and this hearing dealt with both the Original Proposal and the Supplemental Proposal together as a single proposal (collectively the "Proposal").

The Applicant by a notice dated December 7, 2000, requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 9(2) and 9(4) of the Act.

ISSUES:

The Registrar issued the Proposal under Section 8(1) of the Act based upon the Registrar's opinion that the Applicant is disentitled to registration as a vendor or a builder pursuant to Section 7(1)(c) of the Act. It is the opinion of the Registrar, as stated in the Proposal, that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings and, further, that the past conduct of Arthur Paul Renaud ("Paul Renaud"), one of its officers and a director, affords reasonable grounds for belief that the Applicant's undertakings will not be carried on in accordance with law and with integrity and honesty.

During the course of the hearing before this Tribunal, it is clear that the Proposal was not based upon the past conduct of the officer and director of the Applicant with respect to the law or honesty since no evidence was adduced by the Respondent that Paul Renaud had in the past not carried on in accordance with law or in any way dishonestly, and as such, there were no grounds for such a belief as stated in Section 2 of the Proposal. Rather, the Respondent emphasized and directed this Tribunal's attention to the financial position of the Applicant, including its financial commitments to the Respondent, and the past conduct of Paul Renaud as a guarantor of those commitments, as reasonable grounds for belief that the Applicant's [future] undertakings will not be carried on responsibly, as stated in Section 2 of the Proposal.

Also during the course of the hearing before this Tribunal, it became clear that the main issue was the nature and circumstances of the past financial affairs of Paul Renaud, not only as an officer, director and guarantor of the Applicant, but also as an officer, director and guarantor of a corporation known as Renaud Land Developments Inc. ("RLD").

The evidence disclosed that RLD was an equal partner with a corporation known as Southgate Properties Inc. in a scheme to build and sell new homes on 52 building lots on River Avenue in the community of LaSalle, Ontario, under the name of Riverwood Homes ("Riverwood Homes"), another registrant as a Vendor/Builder under the Act. RLD thus became a registrant under the Act in the capacity of an [equal] partner in an unincorporated registrant, [Riverwood Homes], and as such, its [RLD's] officer, director and guarantor [Paul Renaud] became subject to the provisions of the Act. The evidence also discloses that the other equal partner [Southgate Properties Inc.] later withdrew from the partnership [Riverwood Homes] and assigned all its rights to Paul Renaud and obtained an indemnity from Paul Renaud with respect to the debts and obligations of Riverwood Homes.

It is notable that the Supplemental Proposal is identical to the Original Proposal save and except for an "additional ground" added by the Respondent relating to Section 10 of the Act whereby the Respondent alleges that, since the refusal by the Respondent to renew the registration of the Applicant in 1997, the Applicant has failed to provide any new evidence or any change in material circumstances as required by the Act. This, then, is a further issue to be dealt with by this Tribunal.

EVIDENCE:

The Respondent gave its evidence by way of the testimony of Pat Varcoe, C.A. (Vice President, Licencing and Underwriting of the Respondent), Ken Holtrop and Vern Nelligan (the latter two both being Warranty Representatives from the South West Regional Office of the Respondent). The Applicant gave its evidence through the testimony of its principal, Paul Renaud (its sole officer and director), and also the guarantor of the Applicant's debts and obligations to the Respondent. The evidence given by all witnesses at the hearing was straight forward, clear and precise, thus giving this Tribunal little trouble in understanding the facts which give rise to this appeal from the Proposal. There was little, if any, dispute between the parties as to the facts, and as such, it is unnecessary to relate in any detail the evidence given at the hearing, except to refer to the 170 items contained within Exhibits #3 and #4 and the other Exhibits filed. These facts, however, give rise to a greater degree of complexity than might first be thought when dealing with the resulting legal issues, as this Tribunal will express later in this decision.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Applicant was validly registered as a Vendor/Builder from April 18, 1989, to April 18, 1996 within the meaning of section 6 of the Act;
2. The Respondent, by a letter dated November 22, 1996, informed the Applicant that the Applicant's request for a renewal of its registration would not be approved due to the default of Paul Renaud, "a principal/officer/director/guarantor" of RLD and/or Riverwood Homes to pay the outstanding claim owed by Riverwood Homes to the Respondent in the amount of \$3,076.25;
3. The Respondent's letter dated November 22, 1996, made serious errors of fact and erroneously claimed money from the Applicant without any right in law to make such a claim against the Applicant for a claim the Respondent had against Riverwood Homes and/or its principal RLD and/or the guarantors of Riverwood Homes;
4. On November 22, 1996, Paul Renaud was a principal, officer and director of both the Applicant and RLD, and a guarantor of the obligations of the Applicant and of Riverwood Homes to the Respondent;
5. The Respondent issued a Notice of Proposal to the Applicant dated July 31, 1997, ("1997 Proposal") based upon an accurate statement of facts which corrected the errors made in the said letter dated November 22, 1996, the effect of which 1997 Proposal was to refuse to renew the registration of the Applicant, and to which Notice

thereof the Applicant failed to appeal as allowed under the Act thus affording the Respondent the right to carry out the 1997 Proposal under Section 9(3) of the Act;

6. The Respondent carried out the 1997 Proposal on October 3, 1997, and by notice to the Applicant terminated its registration effective October 3, 1997;
7. The Applicant applied for [re-]registration as a Vendor/Builder under the Act on April 11, 2000, and provided supporting documentation;
8. By letter to the Applicant dated July 5, 2000, the Respondent reasonably requested that the application for registration be further supported by way of eight enumerated items required by the Respondent in order to assess properly the said application;
9. The Respondent issued the Original Proposal pursuant to Section 9(1) of the Act on November 24, 2000;
10. The Applicant issued a Notice of Appeal pursuant to Section 9(4) of the Act on December 7, 2000;
11. The Respondent issued the Supplemental Proposal pursuant to Section 9(1) of the Act on February 9, 2001;
12. The Applicant is indebted to the Respondent in the amount of \$1,230.50 due to the Applicant's failure to rectify breaches of warranty on October 13, 1999, and on December 7, 1999, respecting two new homes built and sold by the Applicant at 365 Menard Lane and 375 Menard Lane, and enrolled with the Respondent as #821185 and #821186, respectively;
13. Paul Renaud, an officer and a director of the Applicant, executed a valid guarantee respecting the debts and obligations of the Applicant to the Respondent in the amount of \$1,230.50, and has failed to honour his guarantee subsequent to a demand therefore by the Respondent;
14. Riverwood Homes, a partnership between RLD and Southgate Properties Inc. was validly registered as a Vendor/Builder from April 5, 1994, to April 5, 1996 within the meaning of section 6 of the Act;
15. The registration of Riverwood Homes as a Vendor/Builder lapsed on April 5, 1996, due to the failure of its principals to apply for a renewal of such registration;
16. Neither Riverwood Homes nor its partners, RLD and Southgate Properties Inc., are parties to this hearing, and as such, this Tribunal is unable to make any findings of fact with respect to the claims of the Respondent against Riverwood Homes in the aggregate amount of \$15,723.47;

17. Insofar as Paul Renaud is a guarantor of all obligations of Riverwood Homes to the Respondent and is also a principal, officer and director of RLD, one of the equal partners of Riverwood Homes, this Tribunal was not made aware during the testimony of Paul Renaud as a witness at these hearings of any serious dispute which the said Paul Renaud had with respect to the said claims of the Respondent against Riverwood Homes, and as such, Paul Renaud is indebted as a guarantor to the Respondent in the amount of \$15,723.47 due to the Respondent's undisputed claims against Riverwood Homes;
18. The Applicant has failed to provide sufficient information or documentation as reasonably requested and required by the Respondent in its letter of July 5, 2000 and later correspondence, in order that the Respondent might assess properly the Applicant's application for [re-]registration in accordance with the duties imposed upon the Respondent under the Act, and which said information and documentation is specifically enumerated in Section 4 of the Proposal;
19. The Applicant has failed to provide any new evidence or give evidence of a change in any material circumstance from that which existed on October 3, 1997.

THE LAW:

Pursuant to section 8(1) of the Act, the Registrar may refuse to register the Applicant as a vendor or a builder for any reason that would disentitle the Applicant to registration under section 7(1)(c) of the Act:

"8 (1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7."

Pursuant to section 7(1)(c) of the Act, the Applicant is entitled to registration by the Registrar except where having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on lawfully, honestly and with integrity:

"7. (1) An applicant is entitled to registration by the Registrar except where,
(a) ...;
(b) ...;
(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty;"

Based upon the above noted facts, the Registrar has reached the decision that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its undertakings and that there are reasonable grounds for belief that the Applicant will not carry on business in a lawful manner, honestly and with integrity. Pursuant to sections 9(1) and 9(2) of the Act, the Registrar is required to serve a notice of proposal on the Applicant:

"9. (1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal."

The appeal comes to this Tribunal by virtue of section 9(4) of the Act, which provides:

"9. (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar."

A proposal carried out by the Registrar is not the final determination of the issue, however, since a further application for registration may be made by the Applicant pursuant to section 10 of the Act upon new evidence or where circumstances have changed:

"10. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed."

This Tribunal is unable to find any evidence which supports the Registrar's opinion that the past conduct of Paul Renaud as an officer or a director of the Applicant, or of RLD, affords reasonable grounds for belief that the Applicant's undertakings will not be carried on in accordance with law and with honesty. Although Counsel for the Respondent argued all of the grounds relied upon by the Registrar for the decision reached in issuing the Proposal, it is apparent to this Tribunal that applying all of the statutory grounds in this case is inappropriate, and certainly the allegation respecting the past conduct of Paul Renaud affords no grounds that the Applicant will not carry on lawfully and honestly.

The Act, however, includes the word "integrity". The Oxford Dictionary expands the meaning of the word "integrity" beyond just honesty to include "wholeness, soundness and rightness." This Tribunal has some difficulty when applying the test of integrity to the past conduct of Paul Renaud insofar as the defaults in honouring his guarantees for both the Applicant and Riverwood Homes do not lead to financial wholeness, soundness nor rightness. Indeed, all of the issues between the parties in this hearing are about the integrity of the financial position of the Applicant and the impecuniosity of Paul Renaud due to the unfortunate business venture he undertook, through RLD, with Riverwood Homes.

The arrangement to develop and build new homes on 52 lots on River Avenue in partnership with the land owner, Southgate Properties Inc., seems on the face of it to have been an advantageous transaction for Paul Renaud. However, to transfer attention to RLD and allow the Applicant to become temporarily dormant appears to be the undoing of the financial integrity of Paul Renaud, particularly when the transaction as it unfolded was to build fewer homes than planned and loose exclusivity. This situation was exacerbated by the assumption by Paul Renaud of the debts and liabilities of Riverwood Homes and the indemnity to the other partner.

The Respondent initially leveraged the defaults of Riverwood Homes, another separate and distinct registrant under the Act, against the Applicant by way of the guarantee of Paul Renaud. This tact was inappropriate and this Tribunal has already been critical of the Respondent's letter of November 22, 1996. The obligations of another registrant cannot prejudice in any way the Applicant's reputation or its registration. The Act requires another step to be taken through the past conduct of an officer or director common to both registrants, and only then as such affects the lawfulness, honesty and integrity of the Applicant's future undertakings. There is no reference in the Act to the past conduct of a guarantor common to both registrants, and although somewhat subtle, it is clear to this Tribunal that the apparent default of a guarantor gives rise to many equities between parties to a transaction, not the least of which is a valid defense against the principal debtor and creditor and which, in turn, does not fall within the meaning of integrity.

While this Tribunal cannot share the Respondent's opinion that the past conduct of Paul Renaud affords reasonable grounds for belief that the Applicant's undertakings will not be carried on in accordance with law and with integrity and honesty, the Tribunal is in accord with the Registrar that the Applicant has failed to provide the necessary information or documentation as required under the Act to show it can reasonably be expected to be financially responsible in the conduct of its [future] undertakings. There is an onerous duty placed upon the Registrar to regulate the building and selling of new homes in Ontario and it cannot be satisfied by just building homes, but rather the management of the business of building new homes. In short, a builder must not only build a new home, but it must also manage the business of building homes in a financially sound manner with integrity.

This Tribunal does not possess the infrastructure to assess the financial responsibility of the Applicant nor to supervise any conditions which it might attach to its decision were it to substitute its opinion for that of the Registrar's. Furthermore, it would be inappropriate to do so. This Tribunal, for the reasons stated above, therefore is in agreement with the conclusions reached by the Respondent in Sections 1 and 4 of the Proposal.

DECISION AND ORDER:

The onus of proof that the Proposal is correct lies with the Respondent and this Tribunal finds that this onus has been discharged in light of all of the evidence given at the hearing and for the reasons hereinbefore stated. It is anticipated that the Applicant would be given an opportunity during a limited time before implementing the Proposal to satisfy the Registrar respecting its financial responsibility by providing the information and documentation already reasonably requested by the Registrar and making satisfactory arrangements to liquidate the indebtedness of Paul Renaud to the Respondent.

Accordingly, and in default of the Applicant taking advantage of the said opportunity, this Tribunal, pursuant to the authority vested in it by section 9(4) of the Act, directs the Registrar to carry out the Proposal to refuse the registration of the Applicant as a vendor/builder under the Act.

LICENCE APPEAL TRIBUNAL

TERENCE A. WARDROP, Q.C.,
Vice-Chair

JOHNSON

DALTON G. JOHNSON

APPEAL FROM A DECISION OF THE MOTOR VEHICLE
DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

G. PETER ABRAHAMS, Counsel representing the Applicant
LARRY BANACK, Counsel representing the Motor Vehicle Dealers
Compensation Fund

DATE OF

HEARING: July 6, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from the decision of the Motor Vehicle Dealers Compensation Fund the ("Fund") dated December 18, 2000, wherein the Applicant's claim for compensation was disallowed in part. The claim was for a total of \$6,848.38 and the Applicant was paid \$1,600.00 by the Fund. As set out herein, the Tribunal found that the claim should be denied for the reasons set out below.

FACTS:

The following facts were agreed by the parties.

The Applicant purchased a 1990 Honda Accord from EGLINTON FINE CARS, a registered motor vehicle dealer. The price on the contract was \$6,000.00 plus tax, the value of the trade in vehicle was \$3,000.00, and there was a notation that \$4,000.00 was paid in cash. Shortly after receipt of the vehicle, although there were mechanical problems, the Applicant paid the dealer a further \$3,047.00. Later, the Applicant wanted to rescind the Agreement.

The dealer agreed, and the Applicant received back the return of his 1988 Honda Prelude and \$2,000.00 from the dealer. The Applicant brought a Small Claims Court action and received a judgment for \$6,848.38 including costs. When the Applicant tried to enforce this judgment against the dealer, he was unable to do so and made an application to the Fund. He was paid \$1,600.00 by the Fund and now disputes that amount.

The Fund disputes the entitlement of the Applicant to further compensation under section 12(10)(c) of the Schedule to Regulation 810 the *Motor Vehicle Dealers Act* (the "Act").

ISSUE:

Is the Applicant entitled to more than the \$1,600.00 paid to the Applicant by the Motor Vehicle Dealers Compensation Fund?

APPLICABLE LAW:

Section 1 of the *Motor Vehicle Dealers Act* states:

"motor vehicle" means an automobile, truck or other vehicle propelled or driven otherwise than by muscular power, including a motorcycle, but not including a motorized snow vehicle or a farm tractor or other self-propelled machinery primarily intended for farming or construction purposes.

"motor vehicle dealer" means a person who carries on the business of buying or selling motor vehicles, whether for the person's own account, or the account of any other person, or who holds himself, herself or itself out as carrying on the business of buying or selling motor vehicles.

Section 24 of the *Motor Vehicle Dealers Act* states:

The Lieutenant Governor in Council may make regulations,
.....

(o) providing for the establishment, maintenance, and administration of the Motor Vehicle Dealers Compensation Fund including prescribing provisions relating to the investing and paying out of money from the Fund.
.....

(q) providing for payment out of the Fund of claims and procedures to be followed in respect thereto.

.....

Regulation 801, Schedule

Terms of Compensation Fund

1. Definitions

"claim" means a claim for a pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

- 12.(1) The Fund is established as of the 1st day of July, 1986, to stand in the place of a participant for the payment out of the Fund of claims of customers of the participant where the transactions occurred during the period when the participant was registered under the Act and where the participant has refused after demand or is unable to pay the claims.

.....

- (3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgement in respect of the claim and the judgement has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgement, and statement of claim, for payment of the unsatisfied portion of the judgement and costs as assessed.

.....

- (5) No customer or any participant shall have any vested or absolute right to payment of a claim against the Board, the Tribunal, the Trustee, or the Fund.
- (6) The Board shall determine the eligibility and the amount of any claim made by a claimant and shall direct the Trustee to pay any claim or any part of it that meets the requirements of this Schedule and subject to section 15 of this Schedule, the decision of the Board is final.

.....

- (10) Despite subsections (1), (2), (3) and (6) and subsection 15(3) of this Schedule,

there shall not be paid out of the Fund,

(a) more than \$15,000 exclusive of costs, to each claimant in respect of each transaction, in respect of a claim or claims against any one participant;

(b) any amount of interest, including interest on a judgement or on costs;

(c) where there is a judgement, any amount for costs in excess of actual disbursements and fees as assessed;

.....

Hearing by Tribunal

15(1) Where the Board determines that a claim or any part of it made under section 12 of this Schedule is not a proper claim, it shall serve notice of its decision, together with written reasons, on the claimant, and the notice shall inform the claimant that the claimant is entitled to a hearing by the Tribunal if the claimant mails or delivers to the Registrar and the Tribunal, within fifteen days after the notice is served on the claimant, notice in writing requiring a hearing.

.....

(3) Where a claimant requires a hearing before the Tribunal under subsection (1), the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of a claim and direct the Trustee to pay the amount determined by the Tribunal.

.....

APPLICANT'S EVIDENCE

Mr. Johnson testified that he is thirty two years old, lives with his parents, is employed, and is the part owner of a restaurant. A friend had referred him to Mr. Mohamed Salhia who owned EGLINTON FINE CARS, and he first saw the vehicle on the lot with a sign on the windshield showing a selling price of over \$7,000.00. He decided to purchase the car, withdrew \$4,000.00 in cash from the bank on July 6, 1998 (Exhibit 3, Tab 3), paid it to the dealer and turned over his own vehicle as a trade-in. Mr. Johnson stated that he thought the final price would be something around \$10,000.00 but the particulars of the transaction was not explained. Mr. Salhia told him that the taxes were being waived although taxes were shown as paid on the invoice so he knew that the figures were not right. Mr. Johnson drove the car home that night, but promised to bring a further cheque in the amount of \$3,047.00 and did so on

June 11, 1998. He had been told that his trade-in was valued at \$2,000.00 but when he reviewed the transaction, it was shown as \$3,000.00. When he drove his new vehicle on the highway, the battery cable kept coming off, and when he did a background check of the vehicle with the Ministry of Transportation, he found that the vehicle had been in an accident. Mr. Johnson testified that he asked the dealer to reverse the transaction and the dealer agreed. He received back his trade-in vehicle, and \$2,000.00 from the dealer but a cheque for \$1,000.00 was not honored. Mr. Johnson filed a statement of claim against the dealer (Exhibit 3, Tab 4) for the maximum \$6,000.00 plus costs. He received a judgment for \$6,848.38 (Exhibit 3, Tab 5) and then made a claim to the Motor Vehicle Dealers Compensation Fund which paid him \$1,600.00.

In cross-examination, Mr. Johnson testified that he works as a coordinator for a cleaning company, and at the time of the purchase was working in a restaurant in which he owns an interest. He testified that he holds a diploma in general arts from George Brown College.

Mr. Johnson testified that he bought his 1988 Honda Prelude privately in 1998 for \$3,000.00 even though he knew that the market price was under \$3,000.00, but he was desperate to buy the vehicle. Even though he spent approximately \$2,000.00 on repairs, he decided to replace it with a newer vehicle. After looking in the "Auto Trader," he thought that the price range for a 1990 Honda Accord was between \$7,500.00 and \$7,900.00. He was referred to Eglinton Fine Cars Limited by a friend, attended at the dealership, and decided to buy the car. He testified that he was told the price was close to \$10,000.00 but the taxes would be waived and he believed the price was between \$9,000.00 and \$10,000.00. Mr. Johnson stated that after he received the car, he decided that he had paid too much. He did not know the formula used to calculate the price by the dealer.

Mr. Johnson testified that he took the cash from his bank account on Friday July 6, 1998, and had the car for the weekend. When it was pointed out to him that July 6, 1998 was a Monday, he stated that he was at the dealer on Saturday, and took the car home. He confirmed that he did not have any document showing that the trade-in value of his vehicle was \$2,000.00 but maintained his position that the dealer had quoted \$2,000.00 rather than the \$3,000.00 shown on the bills of sale. The bill of sale dated July 3, 1998 (Exhibit 3, Tab 3 p. 6) was presented to him by the dealer, but he did not sign it. He agreed that the dealer told him that he was going to save money on taxes, and that the tax paid was less than the amount properly due for the actual sale price. Mr. Johnson acknowledged that he knew that the price of \$6,000.00 on the July 3, 1998 bill of sale was not correct. Mr. Johnson stated that the total price was more than \$7,000.00 but when he calculated the amount he paid, it seemed too high. Mr. Johnson agreed that in his Statement of Claim (Exhibit 3, Tab 4) he claimed that the asking price of the vehicle was \$7,047.00 although he was not sure if that was actually the price for it. He had simply used the total of the money he paid to the dealer in the transaction. Mr. Johnson stated that he did not include the value of the trade-in vehicle to the claim as there was a limit to the financial jurisdiction of the court.

Mr. Johnson testified that he had problems with the car prior to delivering the cheque on July 11, 1998, however the dealer fixed the battery cable problem and assured him that everything was fine. On the strength of this, he turned over the cheque for \$3,047.00. He explained that he re-evaluated the situation after approximately a week, as he saw that the dealer was having problems with other clients.

EVIDENCE FOR THE FUND

Mr. Redinger testified that he is the Secretary Treasurer of Ready Import Co. which is a Honda dealership and has eleven years experience with that company. He oversees the paperwork for the selling of used cars, and stated that in his opinion on July 3, 1998, a 1990 Honda Accord LX with 143,941 km would be sold for \$6,000.00 as a used car. Further, in his opinion a 1980 a Honda Prelude with 158,451 km would be sold for \$3,000.00 by a dealer in a retail transaction.

In cross-examination, Mr. Redinger agreed that different factors including mileage and conditions of vehicle can effect the price of car. He explained that customers have different levels of sophistication when shopping for a car. He stated that different dealerships may sell for different amounts and that people often pay less than the asking price.

In redirect examination, Mr. Redinger explained that the price quoted took into account the evidence that the vehicle had been in an accident, and that there were mechanical problems. An 8 year old vehicle with that mileage would not have been worth \$10,000.00.

FACTS FOUND PROVEN:

The Tribunal finds that the bills of sale produced in evidence (the initial purchase and the re transfer to dealer) were the bills of sale given by the dealer "Eglinton Fine Cars" to the Applicant. On the contract of July 3, 1998, the list price of the vehicle is \$6,000.00, the trade in allowance is \$3000, the taxes are \$450.00 and the deposit is \$4000.00.

The Tribunal finds that the dealer did receive \$4000.00 on July 3, 1998. The Tribunal places no importance on the bank transaction being shown on July 6 as it is possible that a transaction carried out on Friday, July 3 or Saturday, July 4 would be shown on the next business day which was July 6.

There is a notation on the original bill of sale that the dealer was paid in full on July 11. If the actual price of the vehicle had been \$6,000.00 plus tax, the balance owing on the transaction after receipt of the trade-in would have been only \$3,450.00 so it is clear that the bill of sale document does not represent the actual transaction. The Tribunal finds Mr. Johnson made a

private agreement with the dealer even though he did not know the particulars. He was prepared to enter the agreement even though it was not in writing and he was well aware that the lower price listed on the bill of sale was for the purposes of immediately evading the payment of the proper amount of Retail Sales Tax and G.S.T. and ultimately evading the payment of the proper amount of income tax on money earned by the dealership. Despite problems with the vehicle, Mr. Johnson delivered a cheque on July 11, 1998 to the dealer in the amount of \$3,047.00 as he chose to complete the transaction with knowledge of the tax evasion scheme and the mechanical problems.

The Tribunal is unable to find whether the dealer breached his unwritten illegal contract with Mr. Johnson as its terms are not known. The Tribunal finds that the judgment obtained in Small Claims Court does not reflect the transaction between Mr. Johnson and the dealer. The terms of the agreement are not known, and the asking price of the vehicle in Mr. Johnson's Statements of Claim is simply a total of the payments he made. The Judgement Mr. Johnson obtained does not reflect the actual contract of sale Mr. Johnson entered into with the dealer.

APPLICATION OF LAW TO FACTS:

In this matter, the Tribunal has been provided with a written contract that does not set out the parties' actual monetary transaction, and it was not signed by Mr. Johnson. A verbal agreement between Mr. Johnson and the dealer was the operative agreement. Even for the agreement the actual asking price of vehicle is not clear; indeed, the terms of the agreement are not clear to the Applicant. The underlying purpose of the unwritten agreement between Mr. Johnson and the dealer was to illegally evade the immediate payment of Retail Sales Tax, and G.S.T. and later allow the dealer to avoid payment of income tax.

This is not a case where a consumer has made a legal contract for the purchase of a vehicle, and has suffered a loss. The issue is whether the Applicant is entitled to receive compensation from the Fund for a loss arising from an agreement left unwritten for the purpose of evading the payment of various taxes. This Tribunal finds that if a party takes part in a tax evasion scheme, and suffers a loss, that is not the type of loss the Fund was established to reimburse. It is not an insurance plan for losses suffered in illegal transactions in which the customer is a knowing participant. The Motor Vehicle Dealers Compensation Fund has paid \$1,600.00 to the Applicants on the basis of the cost of the vehicle, taxes and the trade in value shown on the contract, plus the \$150.00 for court costs, less the \$2,000.00 received from the dealer. The Tribunal does not find the Applicant entitled to further compensation.

DECISION

Therefore, by virtue of the authority vested in it under the *Motor Vehicle Dealers Act*, Regulation 801, Section 15(3), the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair

Released: July 27, 2001

MOGHADDAM, ALIREZA and JKA Motors Ltd.

JKA MOTORS LTD. AND ALIZERA MOGHADDAM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DOUGLAS C. MACKINTOSH, Vice-Chair

APPEARANCES: G. PETER ABRAMS, Counsel representing the Applicants
AVIVA R. HARARI, Counsel representing the Registrar

DATE OF HEARING: May 18, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal from a proposal by the Registrar under the *Motor Vehicle Dealers Act* ("the Act") dated December 28, 2000 to revoke the registrations of the Applicants JKA Motors Ltd. as a dealer and Alizera Moghaddam as a salesperson.

The Applicant, Alizera Moghaddam, is 42 years old and came to Canada in 1989. He grew up in Iran and got some experience with the workings of cars by helping his father who was a mechanic. He also got experience selling cars with his brother who was in the business. He is educated with a masters degree from Kashmir University in the Science of Geology. He speaks four languages and indicated that he understood the proceedings.

After his arrival in Canada, he ran a fast food business and took a computer course at George Brown Community College. In March 1999 he applied to the Ontario Motor Vehicles Industry Council ("OMVIC") to be registered as a car salesman and for his company JKA Motor Sales Ltd. ("the Company") to be registered as a dealer. He paid the fees and obtained the necessary licences in May 1999. Alizera Moghaddam was the sole director and officer of the company.

A property was leased in Toronto, located at 395 Dundas Street East. It has enough space for 25 to 30 cars and a garage for cleaning and checking used vehicles bought for sale and is rated by the OMVIC inspector as a fair sized dealer but not a franchised one. The Company employs three people. It does not have a licensed mechanic.

Mrs. Moghaddam, his wife, looks after the books. Unfortunately, according to Alizera Moghaddam, she had an accident with some glass falling on her head, after which she kept forgetting things and is currently on medication.

THE ISSUE:

Is the Registrar's proposal wrong to revoke the licence of the Applicant corporation and the Applicant salesperson Alireza Moghaddam? Are there sufficient grounds, based on the Applicants' past conduct, to believe that the Applicants' will not carry on business with honesty, integrity or in accordance with the law?

THE FACTS:

The Registrar relies mainly on 8 transgressions by the company to support the proposal.

The context is important in which this took place. It was established by Ms. Louise Gingras, who is an experienced inspector for OMVIC. She testified that in September 1999 she visited the dealership and gave instructions to Alizera Moghaddam to correct the poor manner in which he was carrying on business. In particular, she left an inspection notice with him which he signed. The text of that notice reads:

"You must disclose material fact on your bills of sale. Any disclosure made on the bill of sale when you purchase a vehicle must be indicated on the bill of sale when the vehicle is sold.

You have been provided with a garage registry today. Please ensure this is kept up to date at all times".

Alizera Moghaddam confirmed his understanding about the significance of disclosure by telling Ms. Gingras that he was forced to take back a vehicle sold by him at the Toronto Auto Auction for the lack of disclosure.

However, a year later in September 2000 when Ms. Gingras visited the dealership her advice had not been taken. The garage registry (a requirement under the *Highway Traffic Act*) had not been kept up to date and various infractions were discovered. These were later confirmed by some of the buyers of the vehicles involved and are set out below:

1. In October 1999 a 1995 Ford Contour was purchased by the dealer at auction marked "accident repaired" on the invoice. It was sold in May 2000 to K. Spaczynski without this disclosure on the invoice.

2. In February 2000 a Chevrolet Cavalier was purchased by the dealer at auction marked on the invoice "accident and repaired" and, although hard to read, a further declaration "frame damage". It was sold almost immediately to K. Cybelius without this disclosure. Mr. Cybelius testified that he would not have purchased the vehicle if he had known of the accident.
3. In March 2000 a 1989 Ford Probe was purchased by the dealer at auction marked "accident repaired" on the invoice. In June 2000 the vehicle was sold to M. Musiychuk without this disclosure. Mr. Musiychuk only found out about the accident when he was having the oil changed. He testified he might have bought the car if he had been made aware of the accident repair notation but would have argued about the price.

Musiychuk's version of the process of financing differs from the Applicant's version. He said he had arranged a bank loan of \$5,000 before he went to buy the car and that he took the bill of sale to the bank and obtained the loan. Alizera Moghaddam, on the other hand, which this Tribunal does not accept, said that he told Musiychuk of the accident but was asked not to write it on the invoice because the buyer did not care and wanted to get a bank loan.

4. In March 2000 a Honda Civic LX was purchased by the Applicant dealer at auction marked "True KM unknown" on the invoice. The vehicle was sold to L. Roberts without this disclosure. The odometer reading when Mr. Roberts bought the vehicle was 163,527.

Alizera Moghaddam testified that he inspected the vehicle and inquired from Honda about the average kilometres on a car of its age and found the reading to be about right.

5. In April 2000 a 1996 Mazda MX3 Precidia was purchased by the Applicant dealer at auction marked "acc. repair" on the invoice. It was sold to C. Guzman in June without this disclosure shown on the invoice obtained from the dealer.
6. In June 2000 a 1992 Plymouth Sundance was purchased by the Applicant dealer at auction marked "Police car" on the invoice. It was sold in February 2001 to L. Trieu without this disclosure. However, the buyer wrote a letter to OMVIC indicating that the salesman said the car was from the government. That turned out to be the case. Nothing, therefore, turns on this transaction.

7. In June 2000 a 1997 Chevrolet Cavalier was purchased by the dealer at auction marked "accident repaired" on the invoice. This was sold to A. Sheikh without this disclosure being noted on the buyer's copy of the invoice. What is significant is that the company's copy of the invoice reads:

"The vehicle is equipped as seen final sale. Accident repair"

Mr. Sheikh testified that he bought the car for his daughter and only found out about the accident because the back seats were loose. He had various other problems with the vehicle and said he would not have bought the car if he had known of the accident.

Alizera Moghaddam testified that he disclosed the accident to Mr. Sheikh who demanded the accident not be put on the invoice because of resale. Alizera Moghaddam went on to say the value of this vehicle involved without an accident noted was \$10,000 and with an accident noted \$5,500 which is what the buyer paid. He added that "accident repaired" is put on at auction sales to avoid arbitration.

8. In August 2000 a 1998 Ford Contour was purchased by the Applicant dealer at auction marked "accident repair" on the invoice. It was sold to S. Razdan without this disclosure on his copy of the invoice of sale although the company's copy is marked "accident repair". The evidence given by Ms. Gingras was that all three copies of these bills of sale should be the same except for the signatures.

The Tribunal finds that the Applicant Alireza Moghaddam inspected these particular vehicles to satisfy himself and that when there subsequent problems, he reduced the cost of repairs.

THE POSITION OF THE PARTIES:

The position of the Applicants' counsel is that these transgressions should be related to the total volume of business which is that 120 cars were sold retail and 20 wholesale in the year 2000. 15 to 20 clients were seen on a daily basis. (These figures are accepted). The shortcomings of disclosure, he says, are statistically minute in relation to the total number of vehicles sold and therefore do not amount to that level of past conduct affording reasonable grounds for the belief the Applicants will not carry on business in accordance with the law, integrity and honesty.

The Registrar's counsel argues that the past conduct of the Applicants is dishonest and provides adequate grounds for the proposal. The dealer deliberately misrepresented the vehicles to the consumer and failed to comply with the instructions from the inspector from OMVIC, Ms. Gingras. The provision of false doctored documents was a devious attempt to mislead the inspector.

THE LAW:

Section 3 of the Act states;

(1) No person shall,

(a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

(b) act as a salesperson of or on behalf of a motor dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

.....

Section 5.(1) of the Act states:

(1) An applicant is entitled to registration or renewal of registration except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

.....

ii) the past conduct of its officers or directors affords reasonable grounds for the belief that its business will not be carried on accordance with law and with integrity and honesty;

.....

Section 7.(4) of the Act states:

7. (4).....the Tribunal ...may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take...

.....

The leading case is Brenner v Registrar of Motor Vehicles and Salesmen 1983 19 CRAT Divisional Court which confirms how the Act should apply:

"The effect of s. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question. Instead the Board seems to have been pre-occupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

In Wrzalka v Registrar LAT 29 Jan 2001 an appeal was allowed where the Applicant had a number of similar infractions. But the circumstances were different. To a large extent it appears that the Tribunal accepted the explanations given by the Applicant, although at one point it was noted his evidence was evasive and unsubstantiated. But the Tribunal stated, "...it appears that all of the vehicles involved in this matter have been found satisfactory by the purchasers. In most cases the purchasers have been advised that the vehicle has been in an accident although the particular disclosure from the original bill of sale was not disclosed".

It is significant that the inspector in this case had not previously instructed the Applicant on the disclosure required to be made.

APPLICATION OF THE LAW TO THE FACTS:

The Tribunal is called upon to determine whether or not the past conduct of Alizera Moghaddam and his company afford reasonable grounds for revoking their licences. Alizera Moghaddam obviously has the required ability and personality for the business of selling cars. He is well educated and intelligent. But when it comes to matters of credibility, this Tribunal prefers the evidence of the other witnesses to that of the Applicant Alizera Moghaddam. Too many facts do not support him.

The Applicants' conduct was clearly at odds with the instructions given by the inspector, Louise Gingras, respecting disclosure required on the sale of vehicles. Alizera Moghaddam did not follow her instructions. Moreover, he doctored his copies of two bills of sale attempting to show disclosure had been made when it had not been.

Obviously a notation of "accident repaired" is information that would influence a normal person on whether to buy a vehicle at all or whether to bargain for a better price. In the example given by the Applicant, there is a huge 45% drop in the price from \$10,000 to \$5,500 when disclosure is made about accident repaired.

By way of explanation, Alizera Moghaddam claimed that some disclosure was omitted at the request of the buyer for resale purposes. Even if believed, it has not escaped the Tribunal that to be doing so is in itself not honest and simply enables the buyer to cheat someone else on resale with the assistance from the dealer conveniently omitting the record of accident.

In totality, this conduct is unquestionably dishonest and provides ample grounds for the reasonable belief on the part of the Registrar to support the proposal to revoke the Applicants' licences. The business of selling cars requires the consumer protection of honest dealings. The maxim *caveat emptor* has been significantly restricted by the Act for the benefit of the public. Proper disclosure is a vital part of the scheme.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated December 28, 2000 to revoke the registrations of JKA Motors Ltd as a motor vehicle dealer under the Act and Alizera Moghaddam as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh
Vice-Chair

Released: July 25, 2001

K.W. USED CAR SALES LTD. and KRZYSTOF WAWRYKA

K.W. USED CAR SALES LTD. and KRZYSTOF WAWRYKA

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

Z. R. BELINA -CZECHOWSKI, Agent representing the Applicant
AVIVA R. HARARI, Counsel representing the Registrar under the
Motor Vehicle Dealers Act

DATES OF HEARING: April 27, 2001 &
June 27, 2001 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated December 28, 2000 proposed to revoke the registration of K. W. Used Car Sales Ltd. ("K.W.") as a dealer, and Krzysztof Wawryka as a salesman under the Act.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of "K.W." as a motor vehicle dealer, and Krzysztof Wawryka as a salesman. The grounds relied upon by the Registrar for the Proposal are set out below:

1. The Registrant Krzysztof Wawryka is the sole officer of K. W. Used Car Sales Ltd. and the past conduct of Krzysztof Wawryka affords reasonable grounds for belief that the Registrant's undertakings will not be carried out in accordance with law, and with integrity and honesty, TO WIT;
 - (a) The Registrant K. W. Used Car Sales Ltd. has failed to disclose material information to purchasers of vehicles from the dealership on a number of transactions.

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

.....

Section 5 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows;

- 5(1) An applicant is entitled to registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of its judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Off Lease Motor Car Sales Inc and Vasilios Tharrenos (November 5, 1999) Commercial Registration Appeal Tribunal

In this case, a Notice of Proposal had been issued against the registrant on the basis that he employed unregistered sales persons and was selling vehicles without proper disclosure. The Tribunal found that the registrant had purchased vehicles which had been involved in serious accidents and had been written off or salvaged. These vehicles were sold to customers without notifying them of the condition of the vehicle. No thorough inspection of the vehicles was done by the registrant, and in one case he decided that a vehicle had not been in an accident based on a one minute examination of it. In the case of one vehicle, the Tribunal found that the registrant knowingly sold a seriously damaged vehicle to a consumer and refused to settle the matter until the Ontario Motor Vehicle Industry Council intervened. For another vehicle with obvious dents and scratches, the Tribunal found that although there was non-disclosure, it was not material and did not amount to a misrepresentation due to the visible nature of the damage. There had been allegations of odometer tampering, but the Tribunal found that there were no misrepresentations.

The Tribunal found that a purchaser of a vehicle is entitled to know all relevant information regarding the vehicle. The statement 'accident repair' was found to be information that could influence a customer in deciding whether or not to purchase a vehicle, and was therefore relevant and material to the contract. Six instances of material non-disclosure were found, and Mr. Tharrenos was found to be the author of the acts and omissions. In the circumstances, the Tribunal found that the past conduct of the Registrant gave the Registrar proper grounds for the decision to revoke the registration.

Aria Auto Sales Ltd & Yousofzai Shah [1998] O.C.R.A.T.D. No. 237

In this case, a Notice of Proposal had been issued to revoke the registrations of the dealer and the salesman on the basis of past conduct. It was alleged that the dealer was leading customers to believe that they had warranties which were not registered and was not disclosing that vehicles were theft recovery or had sustained accident damage and were repaired. The Tribunal found that there was not sufficient disclosure. At page 9 (para. 30) the Tribunal stated:

“These disclosures should have been made when Aria sold the vehicles, more particularly in the case of the of the vehicle declared a total loss. Non disclosure of these material facts is tantamount to dishonesty and unethical business practice. In addition, non disclosure may have been unlawful in that such non disclosure contravened the Business Practices Act, more particularly, s. 2, thereof, which deals with unfair practices.”

The dealer was also found to be employing an unregistered salesperson. The dealer also failed to register the motor vehicles within six days of their purchase as required by section 11(2) of the *Highway Traffic Act*, denying the Province of Ontario timely payment of Sales Tax and up to date information about the vehicle which the Tribunal found to be dishonest behaviour. The Tribunal found that there were sufficient and justifiable grounds for the decision of the Registrar.

**1280953 Ontario Limited O/A Morato Cars and Radomir Miljkovic [May 11, 2001]
Licence Appeal Tribunal**

In this matter, the Registrar had issued a Notice of Proposal to revoke the registration of the dealer and salesperson on the basis of past conduct. There were allegations that the dealer misrepresented odometer readings to customers, failed to disclose material facts, altered the company books to mislead the investigator, sold vehicles from other than its registered premises, and carried on business when not registered.

The Tribunal found that vehicles were purchased by the dealer with true kilometers traveled unknown but sold by the dealer without disclosure of the true reading or the fact the true reading was unknown. The readings were found to be important to a consumer and the failure to make adequate disclosure was a flagrant disregard of the dealer's obligations and contrary to the written notice given to the dealer. This was found to be sufficient to afford the Registrar reasonable grounds to believe that the Registrant and the salesman would not carry on business in accordance with law, integrity and honesty.

The Tribunal found that the dealer, through its salesman, failed to disclose to customers that five vehicles had been branded as salvage. Branding as salvage indicated that there had been serious damage, and this was indicated on the bill of sale from the auction to the dealer. On page 17 the Tribunal found that:

"The failure of Miljkovic to disclose the fact that the motor vehicles were branded as salvage gives the Registrar further reasonable grounds for belief that neither Miljkovic nor the Dealer will carry on business in accordance with law and with integrity and honesty."

The Tribunal found that the alteration of records by the dealer to mislead the Ministry and the recent industry-related convictions of Miljkovic afforded grounds for the Registrar to find that the registrations of the dealer and salesman should be revoked.

ISSUES:

The legal issue in this case is whether the Registrar was wrong in his decision to revoke the registration of the dealer and the salesman under the Act on the basis of past conduct.

WITNESS FOR THE REGISTRAR

Mr. Greg Weeks testified that he purchased a 1997 Acura (V.I.N. # 19VYA2252VL800276) from K. W. Used Car Sales Ltd. for \$18,055.00 including tax. He dealt with Mr. Wawryka and

was told that the car had damage to the front and rear, but he was given no information as to the extent of the damage. He was skeptical, as the price was up to \$3000 lower than similar vehicles he had seen, and he took a friend who was a mechanic with him to look at the car. He asked to see the pictures of the vehicle prior to the repairs and was advised that the pictures were at a residence. When he attended at the residence, he did not see the pictures and found that the vehicle's engine was warm even though he had been told that the vehicle was not being used. When he test drove the vehicle, it drove well, and he saw that it had no apparent body or frame damage. In his opinion, it generally looked very good. He still wanted to see the pictures, but he completed transaction and relied on Mr. Wawryka's assurance that there had been damage to the front and rear of the vehicle. There was still a minor blemish on the rear tail light, and he still had concerns due to the fact there had been damage to the front and the back of the vehicle. Mr. Weeks testified that he was not been told that the vehicle had been a "write off" or that it had been branded "salvage", and would have not have purchased the vehicle if he had been given this information. The bill of sale had the notation "accident repair" and Mr. Weeks was not sure why this notation was there, and assumed it related to the damage mentioned by the salesman.

In cross-examination, Mr. Weeks said that he was not sure what "salvage" meant, but would guess that it means the car was a wreck, and thought that "insurance write off" meant that the cost of the repair of the damage exceeded the value of the car. In the past, he had owned a car which was in an accident, written off by the insurance company and repaired. Mr. Weeks agreed that on his ownership document, there was a notation "branded-rebuilt", but he did not receive this until the transaction was completed. He stated that his friend (the mechanic) who inspected the car with him had left the decision to him, and he was impressed with the price of the vehicle. The witness thought it was odd that the vehicle was at a private residence when he saw it and that he was told that the pictures of the car prior to the repairs were in the console of the vehicle. His present opinion is that based on all that he knows now, he does not think it is a good car. If he had known that the vehicle was a "write off", he would not have purchase it. One concern he had was that the resale value would be lower when he wished to sell it. With his present knowledge of the history of the vehicle, he feels uncomfortable when he hears any type of noise while driving the vehicle. Mr. Weeks testified that he did not complain to K.W. or to the Ontario Motor Vehicle Industry Council ("O.M.V.I.C."), but on October 6, 2000 someone from O.M.V.I.C. called him, told him his rights, and asked what information had been given. They asked about the purchase and asked if he had been specifically told that the vehicle was "salvage" or a "write off", and he told them "no".

Mr. Mike Haran testified that he purchased a 1993 Mazda 626 (V.I.N. # 1YVGE22A7P5151474) from K.W. for \$6,900.00 including tax. He stated that Mr. Wawryka gave him little information, and he did not to get a background check as he had been told previously that dealers did not need to give the information package. Mr. Haran stated that he was told nothing about the history of the vehicle and did not know that it had been insurance "write off" or that it had been branded as "salvage". This would have given him concern as he has a son and he wants his family in a safe vehicle. When he opened the trunk, he saw that there were rivets on one side but not the other. He testified that he asked Mr. Wawryka about it, and he was told that there had been some damage. He stated that he would not have bought

the car if he knew the extent of the damage.

In cross-examination, Mr. Haran agreed that he did not know what it meant for the vehicle to be an insurance "write off" and did not know if it meant that the vehicle had been a total loss, or what connection it would have to the actual condition of the vehicle. His father had looked at the vehicle and did not see a problem with it. He confirmed that he did not go to the Ministry of Transportation for an information package as he did not think he needed one. Mr. Haran complained that the trunk on the car does not line up, the hood is "like a piece of paper" and the car pulls to the right, but he said there are no other major problems.

Mr. Robert Sembay testified that he is a registered motor vehicle dealer and the president of North Queen Auto Parts which has been in business since 1959, and he has worked there since 1969. The company sells used parts and damaged vehicles to people who repair them, and also repairs and sells the repaired vehicles to the public. North Queen Auto Parts is a member of the Ontario Auto Recyclers Association and in March 2001 he finished his term on the board of the organization. This association has approximately 150 members who carry on the same type of business. He confirmed that he had sold vehicles to K.W. Used Car Sales Ltd. and identified the four vehicles referred to in the Notice of Further and Other Particulars (Exhibit 3) as having been sold by North Queen Auto Parts. Mr. Sembay identified insurance company repair estimates for the vehicles and the bills of sale for the sales to K.W. (Exhibit 4, Tab 32).

Mr. Sembay testified that North Queen Auto Parts sold the following vehicles to K.W.:

- i) a 1993 Mazda (sold to Mr. Haran by the Registrant) was sold to K.W. on May 17, 2000 for \$2,675.00. This vehicle was purchased by North Queen Auto Parts from the Dominion of Canada Insurance Company as a "total loss". Repair costs were estimated at \$10,607.00, and it was branded as salvage.
- ii) a 1996 Corolla (V.I.N. # 2T1BA05E8TC141581) was sold to the Registrant by North Queen Auto Parts Ltd. for \$3,445.00 and the estimate of the total cost of repairs was \$12,051.81 and it was branded as salvage.
- iii) a 1991 Integra (V.I.N. # JH4DA9446MS805915) was sold to the Registrant for \$13,000.00 and "total loss" was stamped on the repair estimate. Repair costs were estimated at \$5,762.99 and the vehicle was branded as salvage.
- iv) a 1990 Nissan (V.I.N. # JN1RZ26S0LX000306) was sold to the Registrant for \$6,420.00, the estimate of repairs was \$12,621.38, and the estimate was stamped "total loss".

Mr. Sembay testified that when K.W. purchased these four vehicles, K.W. would be aware of

their condition, and he considered it very important to provide full information to purchasers who eventually bought them.

Mr. Sembay stated that he was familiar with the branding process which is a voluntary program by which vehicles are designated as stolen, salvage, or irreparable. If a vehicle is irreparable, it is not permitted back on the road; however, if it is "salvage", it can be repaired and shown as "rebuilt". This process of branding is a voluntary program and if the vehicle is not branded, there is no guarantee that it has not been in an accident. In Mr. Sembay's opinion, whether a vehicle is branded or not, full information should be given to the consumer.

In cross-examination, Mr. Sembay accepted the suggestion that a vehicle would be considered salvage if the cost of repair exceeded the fair market value prior to the damage. He agreed that before the vehicle can be sold as fit, it must have a structural certificate and must be designated as "rebuilt". Mr. Sembay agreed that a vehicle can be considered a "total loss" for economic reasons but still be repairable. He testified that his company purchases damaged vehicles, repairs them and resells them to the public, however he made it clear that the consumers are advised that the vehicles have been in accidents and repaired. The vehicles must pass a structural inspection and photographs of the vehicle and the accident damage together with any invoices for parts and labor and other relevant documentation must be presented to the mechanic who inspects a vehicle. Mechanics who do structural inspections are specially licensed, and Mr. Sembay believes that it was a type of body shop license. A structural inspection form must be produced to change the branding from "salvage" to "rebuilt". His evidence was that the photographs are left with the mechanic. Recovered stolen vehicles are branded as "stolen", and insurance company decides if they will be branded as "salvage".

Ms. Louise Gingras testified that she has been employed as inspector for O.M.V.I.C. since July 1997. Prior to that, she worked for one-year as a private investigator and for four years as an investigator for the federal government. She testified that O.M.V.I.C. was created in 1997 to administer and enforce the *Ontario Motor Vehicle Dealers Act*. The purpose of the legislation is consumer protection which is achieved through registration, inspection, and investigation. Under section 5 of the Act, an applicant is entitled to registration or renewal subject to considerations of the past conduct, honesty, and integrity of the officers of the company. In this case, the owner of the company is the salesman, and is the operating mind of the company.

All the issues in the Registrar's Proposal and in the Notice of Further and Other Particulars relate to the issue of whether there has been nondisclosure of material information to consumers. The dealer registrant, K.W. Used Cars Ltd., was originally registered on June 6, 1996, and Mr. Wawryka was first registered as a salesman on September 23, 1994.

Ms. Gingras explained that the branding program began in 1998 and is a voluntary program by the insurance companies by which vehicles are designated as "salvage", "irreparable", or

"stolen". The salvage or stolen vehicles can be later branded as "rebuilt" after they have passed a structural inspection. If a vehicle is not branded, it does not mean that there has not been a serious accident as the program is voluntary. The result is that there are many vehicles on the road which have been in accidents but not branded. Even if the vehicle is not branded, it would still be necessary for a dealer to disclose all material facts so that the customer can make the decision of whether to purchase, or what is the appropriate price based on complete information. In the opinion of Ms. Gingras, if a vehicle has sustained substantial damage, it is a material fact and should be disclosed.

Ms. Gingras stated that the registrant, K.W., had purchased vehicles from Impact Auto Auctions Ltd. which was a company that deals exclusively with insurance write-offs and stolen/recovered vehicles. A buyer's registration package (Exhibit 4, Tab 17) is provided to dealers so that they may understand the nature of the product. The vehicles for sale are arranged in rows, and their motors are not started by the potential purchasers. Some of the vehicles are in pieces, and much of the area looks like a wrecking yard. Ms. Gingras reviewed the documents obtained during her inspection and examined the purchase invoices from Impact Auto Auctions Ltd. together with the corresponding bills of sale from K. W. Used Cars Sales Ltd. to the various customers.

A summary of Ms. Gingras review of these invoices follows:

1996 Honda Accord

The first document (Exhibit 4, Tab 7) was the invoice from Impact Auto Auctions Ltd. for the 1996 Honda Accord which was sold to K.W. for \$6,179.25 with a notation that the vehicle was branded as "salvage". On the Bill of Sale from the Applicant to the customer Mr. Franciszek Gubernat (Exhibit 4, Tab 8) the purchase price was \$11,212.00 and there was a notation "as is". The witness testified that she did not think the notation "as is" was sufficient as it did not inform the purchaser that the car was in an accident, was salvage, or had been a write off. She stated that the customer had now died, but during a conversation with him, she asked if the car had been in an accident. He had said "no", and when she asked if the car with damaged at the time he purchased it, he stated "no".

1997 Ford Escort

The next invoice (Exhibit 4, Tab 11) was for a 1997 Ford Escort which was sold to Stephen Thompson for \$8,625.00 with no information provided in the "remarks" area of the invoice. The invoice from Impact Auto Auctions Ltd. showed that the vehicle was sold for \$4,226.50 and was not branded. Ms. Gingras testified that it could be assumed that the vehicle was damaged due to the low price and the fact that it was sold by Impact Auto Auctions Ltd. In her opinion, there should have been an appropriate notation on the bill of sale. When she spoke to Mr. Thompson on October 6, 2000, her notes indicated that he told her that the salesman told him that the car was in an accident but assured him that it was not a write off, there was no frame damage, and that the drivers side was repainted and replaced. His understanding was that the car had been hit on the front driver's side, and he was assured that everything had

been properly repaired. Ms. Gingras concluded that there was not proper disclosure to Mr. Thompson, and she gave him a form letter he could use if he wanted to send a letter rescinding the Agreement.

1997 Acura

The next vehicle and was a 1997 Acura. On the invoice for the sale from Impact Auto Auctions Ltd. to the Applicant, the sale price was \$6,339.75 and the vehicle was branded as "salvage" (Exhibit 4, Tab 13). This vehicle was sold by K.W. to Mr. Greg Weeks for \$18,055.00 with a notation on the bill of sale of "accident repair" (Exhibit 4, Tab 14).

1991 Acura Integra

Ms. Gingras testified that the K.W. sold a 1991 Acura Integra to Mr. Sivakumar for \$4,140.00 with a notation "car sold as is" (Exhibit 4, Tab 18). Ms. Gingras stated that according to the Ministry of Transport records (Exhibit 4, Tab 19) this vehicle was purchased by K. W. Used Cars Sales Ltd. and was branded as "salvage". In her opinion, the use of the term "as is" was not adequate, and the term is not defined in the Act or Regulations. She concluded that there was inadequate disclosure made to the customer.

1996 Toyota Corolla

A 1996 Toyota Corolla was sold by the dealer to Mr. Kalic for \$9,602.50 with no notation in the remarks area of the bill of sale (Exhibit 4, Tab 20). This vehicle had been purchased by K.W. from North Queen Auto Parts Ltd. for \$3,745.00 (Exhibit 4, Tab 21). In her conversation with Mr. Kalic, Ms. Gingras was told that Mr. Wawryka had told him that the car was in good shape, was a good car, and had been in an accident which caused damage to the side of the car. The purchaser was given no information as to the extent of the damage or the repairs done. Ms. Gingras testified that the vehicle had been branded as salvage and rebuilt, and that in her opinion the information given to the purchaser was inadequate disclosure.

1990 Nissan 300ZX

The next bill of sale was for a 1990 Nissan 300 ZX which was sold by K.W. to Mr. Harduwar for \$14,030.00 with no notation in the remarks area on the bill of sale (Exhibit 4, Tab 24). This vehicle was purchased by K.W. from North Queen Auto Parts for \$6,420.00 (Exhibit 4, Tab 25), and Ms. Gingras testified that on that bill of sale it had been branded as "salvage". Ms. Gingras stated that Mr. Harduwar advised her that he was told the car was salvage because the engine had water in it due to excessive rain, but that the engine had been replaced. He thought that he paid a fair price for the car, and was happy with it. Ms. Gingras obtained a copy of the insurance company's estimate which showed an estimated repair costs of \$12,621.38 and described the car as a "total loss".

1993 Mazda 626

Ms. Gingras testified that K. W. Used Cars Sales Ltd. sold a 1993 Mazda 626 to Mr. Haran for \$6,900.00 (Exhibit 4, Tab 28), and there was no notation of any damage in the remarks area of the bill of sale. This vehicle was purchased by K.W. from North Queen Auto Parts Ltd. The Ministry of Transport printout (Exhibit 4, Tab 31) showed that the vehicle had been branded as "rebuilt" at the time that it was transferred to Mr. Haran. Ms. Gingras testified that K.W. had failed to disclose to the purchaser that the car had been salvage and had thereby breached its obligations under the *Business Practices Act* by not disclosing a material fact. In the opinion of the Registrar, the Applicant was not obliged to divulge the price paid for the vehicle, but nondisclosure relating to the history of the vehicle was an issue of honesty and integrity. Even though the dealer is not obliged to provide a copy of the vehicle information package, it is important that customers know what they are buying so that they can properly determine the appropriate price, and the physical integrity of the vehicle.

In cross-examination, Ms. Gingras explained her understanding of the terms insurance "write-off" and "total loss" and their relation to the decision by the insurance company whether the cost of repairs exceeded the value of the vehicle. A vehicle sold "as is" was sold without a safety certificate, could not be issued a licence plate, and could not be driven on the street until certified and licenced. Ms. Gingras also said that she was not sure why she had gone to the Applicant's premises as she did not know if there had been a complaint and thought that it could have been a routine inspection. She advised that she was not sure how many bills of sale she examined. In addition, Ms. Gingras testified that if a car is branded as salvage, the brand cannot be changed unless there is a structural inspection certificate from an authorized station. The station would receive photographs of the car prior to the repair showing all four sides of the vehicle. The photographs must be kept by the inspection station for six years. She stated that she had spoken to Mr. Weeks and had sent him information, but she did not hear from him. Ms. Gingras agreed that she had initiated all calls, and that none of the parties had contacted her with complaints about the vehicle. She explained that when the vehicle is branded "stolen" it has not been recovered and that the brand is used to keep a stolen vehicle from being transferred.

WITNESS FOR THE APPLICANT

Mr. Krzyszyof Wawryka testified that he came to Canada 1996, and has been carrying on business as a car dealer. His policy is to tell the truth to customers and to invite them to take vehicles for inspection by an independent mechanic. He explained that he shows them where the car has been repaired and shows them the pictures of the prior damage if he has them. Until Ms. Gingras began contacting his clients, he never had a complaint; but as a result of her

actions, he did receive a letter asking to reverse the transaction.

Mr. Wawryka stated that he replaces any necessary parts, has an alignment done, and has the vehicle then checked by a structural inspector who keeps pictures of the vehicle for five or six years. Mr. Wawryka testified that when he shows the vehicles to customers, he tells them everything about the vehicle that he knows. He complained that there were no instructions given to dealers on the what to write on the bills of sale or what to tell customers. He said that he advises the customers that the vehicles have been in an accident, and tells them what parts have been repaired. Mr. Wawryka stated that customers often asks for the car without a safety certificate and emissions test as it is cheaper, so he sells the car "as is". His understanding is that "as is" means that the vehicle is bought in its present condition, is uncertified, and is the responsibility of the purchaser. For the vehicle sold to Mr. Thompson, Mr. Wawryka stated that he agreed not to put "accident" on the bill of sale at the request of Mr. Thompson even though he knew it was not the right procedure.

In cross-examination, Mr. Wawryka testified that when he got Mr. Thompson's letter, it appeared that Mr. Thompson wished to sell the car and wanted \$1000 from him. Mr. Thompson had been concerned about frame damage, had explained to him that he was intending to sell the car and wanted the money as compensation. Mr. Wawryka stated that if people ask where he got a car, he tells them, and he advised Thompson that he got the car from the insurance company at auction. He produced a letter dated October 16, 2000 from Mr. Thompson (Exhibit 10) in which Mr. Thompson sought to rescind the Agreement under section 4 of the Act. In this letter, Mr. Thompson confirmed that he had been advised that the vehicle was in an accident and claimed that he was told there was no frame damage.

FACTS FOUND PROVEN:

The Tribunal finds that Mr. Wawryka is the sole proprietor and salesman for K. W. Used Cars Sales Ltd. and was responsible for the acquisition and sale of all vehicles.

The 1996 Honda Accord V.I.N. #1HGCD5634TA12336 was purchased by K. W. Used Car Sales Limited from Zenith Insurance through Impact Auto Auctions Limited for \$6,170.25 and was branded as "salvage" on the bill of sale. The car was sold by the dealer to Mr. Franciszek Gubernat for \$11,212.00 with the notation that the car was sold "as is". Unfortunately, the customer had died subsequent to speaking with Ms. Gingras and her notes provided the only hearsay recollection of the conversation. There were also concern as to his language skills. She asked him the car had been in accident and he stated "no". When she asked if the car was damaged at the time he purchased it, he also stated "no". It is not clear whether he understood the question about the accident to mean before or after it was purchased, so his response is not useful to determine what he meant by what he said. Mr. Wawryka, however,

had stated that when a vehicle is purchased "as is", it is bought in the "present condition" and all responsibility for it is on the purchaser.

The 1997 Ford Escort V.I.N # 3FALP15P8VR152013 was purchased by K.W. Used Car Sales Limited from the Pilot Insurance Company through Impact Auto Auctions for \$4,226.50. When it was sold to Stephen M. Thompson for \$8,625.00, there was no reference to accident, salvage or write-off on the bill of sale to Mr. Thompson. When Mr. Thompson was advised by Ms. Gingras that the vehicle was an insurance write-off and provided with a format for a letter to request to rescind the Agreement, he sent it to the Applicant. There is an undated document apparently sworn by an unknown Commissioner of Oaths indicating that Mr. Thompson had received a satisfactory explanation and wished to keep his car. The document further stated that he had been told the car was in an accident and had asked the dealer not to mention this on the invoice as it would have made his financing more difficult. This document was offered on behalf of K.W. and shows that the only information provided by the dealer to the customer was that the car was in an accident. When the customer was later told by Ms. Gingras that the vehicle had been insurance write-off, he was clearly surprised, and decided to rescind the Agreement until he was given a suitable explanation by the dealer. Mr. Wawryka was also willing to omit any reference to an accident from the bill of sale so that the bank would not have full and correct information for the loan application.

The 1997 Acura V.I.N. # 19UYA225VL800276 was purchased by K.W. from Unifund Assurance Company through Impact Auto Auctions for \$6,339.75 and was branded as "salvage". It was then sold to Greg Weeks for \$18,055.00 with the notation of "accident repair" on the bill of sale. The Tribunal accepts the testimony of Mr. Weeks that he was told that there was damage to the front and rear of the vehicle but was not given any indication about the severity of the accident. He made efforts to see the photographs of the vehicle prior to the repairs, but was unable to view them. Mr. Weeks knew that the price was considerably lower than other similar vehicles, and had concerns, but he relied upon the information provided by K.W. In his statement to Ms. Gingras, Mr. Weeks advised her that his understanding from the dealer was that the car had suffered "a minor collision basically a bump". Even though he had no specific complaints with the performance of the vehicle, he was clear that he would not have purchased the vehicle if he had known that it had been salvage or an insurance write-off. He understood that an insurance write-off meant that the cost of repairs was estimated to be greater than the value of the vehicle and stated that he had owned an insurance write-off in the past. The Tribunal finds that he was not advised of the history of the vehicle or the extent of the estimated damage.

The 1991 Acura Integra V.I.N. #JH4DA9446MS805915 was purchased by the dealer from North Queen Auto Parts Ltd. for \$1,391.00. It was in a damaged condition and was branded as "salvage". K.W. Used Cars Sales Ltd. sold the vehicle to Mr. Sivakumar Thiyagarajah for \$4,140.00 with the notation on the bill of sale of "as is". There was no further evidence about any information provided except the general statement of Mr. Wawryka concerning his

responsibilities on the sale of an "as is" vehicle. The Tribunal finds that the purchaser received the vehicle, and in the mind of the dealer assumed all responsibility for it as purchased.

The 1996 Toyota Corolla V.I.N. # 2T1BA05E8TC141581 was purchased by K.W. from North Queen Auto Parts Ltd. for \$3,745.00 in a damaged condition and branded as "salvage". K. W. Used Car Sales Limited sold the vehicle to Mr. Kalic for \$9,602.50, and there was no notation on the bill of sale that the car had been branded as salvage or had even been in an accident. The Tribunal accepts the evidence of Ms. Gingras that the purchaser knew that the vehicle had been in an accident but there is no evidence that the knew the extent of the accident or that it had been branded as salvage and rebuilt.

The 1990 Nissan V.I.N. #JN1RZ26S0LX000306 was purchased by K.W. from North Queen Auto Parts Ltd. for \$6,420.00 and had been written off by the insurance Company as a "total loss". K. W. Used Cars Sales Limited sold the vehicle to Kamdeo Harduwar for \$14,030.00 and there was no notation on the bill of sale that the vehicle was in an accident or had been insurance write-off. The Tribunal accepts the evidence of Ms. Gingras that Mr. Harduwar told her that he had been advised that the car was salvage but understood that this was because rain water had found its way into the engine and the engine had been replaced. Mr. Harduwar was satisfied with the vehicle.

The 1993 Mazda 626 VIN #1YVGE22A7P5151474 was purchased by K.W. from North Queen Auto Parts Ltd. for \$2, 675.00. It was sold to Mr. Michael Haran for \$6,900.00 with no notation on bill of sale that it had been in an accident or had been insurance write-off. The Tribunal accepts the testimony of Mr. Haran that he was not given information about the history of the vehicle. He did not know it had been insurance write-off or that it had been branded as salvage. Had he known of the history of the vehicle, and the extent of the damage, the Tribunal finds that he would not have purchased the vehicle as he had concerns about the safety of his family.

The Tribunal finds that some information was provided to K.W. customers about the vehicles by Mr. Wawryka, but his practice was to minimize the accidents. In the materials provided by him, there is no evidence that the customers knew that vehicles they purchased had been insurance write-offs. Only in the testimony of Ms. Gingras was there evidence of Mr. Haduwar being told that the vehicle had been salvage, however the explanation provided clearly minimized the situation. The Tribunal finds that Mr. Wawryka was not forthright with the information provided and rejects his evidence that his practice is to explain to his customers all of the parts that have been replaced and show them pictures of the vehicle in the damaged condition. The testimony of the two customers before this Tribunal is consistent, and is accepted as evidence that this is not the policy of Mr. Wawryka. Ms. Gingras' conversations with K.W. customers are consistent with this.

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of a registrant where the

registrant's past conduct affords reasonable grounds for belief that the registrant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal has found that Mr. Wawryka did not provide an accurate description of the prior condition of the vehicles so that customers could properly take that information into consideration in their decisions of whether or not to purchase vehicles from K.W. It was argued on behalf of the Applicant that if customers were advised that the vehicle had been "salvage" or "a total loss" they would not buy the car. This confirms the value of this information to the customers when making a decision to purchase a motor vehicle.

Failure by K.W. to disclose that a vehicle has been in an accident and was considered an economic write-off is nonetheless failure to disclose a material fact to the customer even if the customer is satisfied with the vehicle.

A motor vehicle dealer or salesperson deals with members of the public who are purchasing products of substantial value. Customers depend on the motor vehicle dealer or salesperson not to withhold material information that would affect the value or quality of the vehicles. A dealer or salesperson who withholds material information about a motor vehicle that is crucial to potential purchasers is not conducting business with honesty and integrity.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with integrity, honesty and in accordance with law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of K.W. Used Cars Sales Limited as a motor vehicle dealer and Krzysztof Wawryks as a motor vehicle salesman.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair, Presiding

RELEASED: July 6, 2001

SHAHIDI ,TAGHI VAHID o/a GTA AUTO

TAGHI VAHID SHAHIDI o/a GTA AUTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

ANTHONY E. BAK, Counsel representing the Applicant
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

April 26, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal pursuant to the entitlement granted to the Applicant in Section 7(2) of the *Motor Vehicle Dealers Act* RSO, 1990 c M.42 ("the Act") from a decision of the Registrar contained in a Notice of Proposal dated January 17, 2001 and supplemented by a Notice of Further and other Particulars dated March 13, 2001. The grounds given for the unwillingness of the Registrar to continue the Applicant's registration under the Act are that the Applicant's past conduct is inconsistent with his obligation under Section 5 of the Act to carry on business with integrity and honesty. The Applicant has been a Registrant under the Act since October 1999.

THE EVIDENCE:

The Notice of Proposal and Notice of Further and other Particulars contain a number of allegations regarding specific transactions of the Applicant's business which the Registrar believes gives sufficient grounds to warrant the action contemplated by the Notice of Proposal. Three of the allegations refer to vehicles sold with apparent discrepancies between the real number of kilometers traveled and the figures registered on the vehicle's odometer. Another refers to a transaction involving a vehicle with an undisclosed prior accident. The Registrar's position is that the evidence supports a finding that the Applicant completed the transactions with this knowledge. The Applicant's position is that the evidence is more consistent with a finding of carelessness on the part of the Applicant, not active dishonesty, and in any event that

the revocation of the Applicant's licence is disproportionate to the alleged breaches of the Act. Evidence was lead from inspectors from the Ontario Motor Vehicle Industry Council ("OMVIC") regarding inspections of the Applicant's dealership and consultations with the Applicant resulting from those inspections. The first of these contacts with the Applicant occurred February 17, 2000, the second on April 7, 2000 and the third on June 29, 2000. The usual routine for the inspector was to visit the Applicant's dealership, proceed with an investigation, take notes and reduce these to writing in the form of "Investigation Findings". These "Investigation Findings" were reviewed with the Applicant and signed by the Applicant and the inspector. This routine was followed for the first two visits. The record of the third visit includes only the inspector's notes.

The testimony of the inspectors and their notes reveal concerns over odometer readings and Bills of Sale. On the "Investigation Findings" produced from the February and April inspections, the Applicant was admonished to the effect that when a vehicle is sold with an unknown mileage, the customer must be told and the highest last known mileage must be indicated on the Bill of Sale along with the words "True Mileage Unknown".

The first transaction reviewed involved a 1994 Volkswagen Jetta. The copy of the retail Bill of Sale between the Applicant and his customer dated March 30, 2000, recovered from the Registrant's files indicates in the box designated "Distance Traveled" the figure 52,000 km. On the wholesale document entitled "Sale Agreement" dated March 22, 2000, produced as evidence of the purchase of the car by the Applicant at the dealer's auction in Montreal (ADESA), there are two references to the vehicle's odometer. One in the box labeled "odom" the figure 53,540 km appears. The other occurs in the box labeled "declarations" and includes the statement "odo broken 225,000 km and more". The base auction price was \$5,550, the base price to the Applicant's customer was \$7,200. Evidence was introduced to show certain unavoidable costs incurred by the dealer to bring the vehicles to market, for example \$150 in transportation costs. Such evidence was led to indicate the actual profit margin available to the dealer.

The customer who signed the Bill of Sale was not called, his wife was. She testified that she was present at the time of purchase and did not recall any mention of the odometer reading of 52,000 km being different from the 225,000 km plus noted on the ADESA contract. She further testified that the car would not have been purchased if this discrepancy would have been revealed. She also testified about the subsequent dealings between the parties to the contract, including testimony that the Applicant did some repair work on the vehicle pursuant to a complaint by the customer. Approximately \$1,600 was stated as the value of the repairs, however no documentary evidence was produced in support.

In answer, the Applicant testified that when he purchased the vehicle at the auction, the mileage number on the vehicle's windshield as it stood in the auction lot for inspection matched the odometer. As well, he stated that a buyer such as himself does not actually get the ADESA contract, which notes any discrepancies, until he attends at the Auctions office some two hours after bidding on the individual vehicles. He stated he did not notice the difference between the actual odometer reading and the note on his copy of the ADESA

contract.

The second vehicle alleged to have been sold by the Applicant with a misrepresented odometer reading was a 1993 Volkswagen Jetta. For this vehicle, the retail Bill of Sale dated January 20, 2000 between the Applicant and his customer had the "Distance Traveled" box left blank. On the wholesale contract, again an ADESA document, the box entitled "ODOM" contains the figure 48,838 km, but the box entitled Declarations contains the statement "True Mileage 348,838", a difference of exactly 300,000 kilometers.

The purchaser of the 1993 Volkswagen Jetta vehicle gave a statement to the Registrar and testified at this hearing. He testified that the odometer registered 48,838 at the time of purchase. He identified the Applicant as the person with whom he dealt. When he queried the Applicant as to the accuracy of the odometer reading, he was told that as far as the Applicant knew the numbers were correct. He further stated that he would not have gone through with the purchase if he had known of the 348,838 figure. As with the 1994 Volkswagen Jetta mechanical trouble ensued necessitating repairs.

The third vehicle sold by the Applicant with questionable odometer accuracy was a 1993 Honda Civic. As above, the vehicle was an ADESA auction purchase. The odometer box on the ADESA contract, dated February 16, 2000, read 154,332 but the Declaration box stated "odo change mileage 310,000 km". The retail contract between the Applicant and the customer, dated June 19, 2000 had in the "Distance Traveled" box 155,000. It was the testimony of the purchaser that the Applicant, the person with whom he dealt at the time of purchase, did not advise him of the discrepancy noted on the ADESA contract. The Applicant in his testimony confirmed that he did not tell the purchaser about the odometer discrepancies.

This purchase was specifically referred to in the June 29, 2000 notes of one of the OMVIC inspectors called. There were no "Investigation Findings" signed by the Applicant. The inspector testified that her notes were contemporaneous with her investigation. Those notes indicate that the Applicant told her that he did not disclose the true mileage because cars with over 150,000 on the odometer cannot get financing. Obviously, this would reduce the breath of the market for such vehicles. A letter from the company which did the financing on the vehicle was introduced to confirm this point. The author of the letter was not called. The Applicant testified that he did not mislead the finance company or mislead the OMVIC inspector on this issue.

In testimony related to his usual business practices, the Applicant stated that most weeks he attends at the Montreal auction from whence the subject vehicles were auctioned and buys a few vehicles. The evidence shows that on his licence approximately 160 cars have been sold. The Applicant testified that once he suspected the odometer problems at the Montreal auction, he scaled back his dealings; yet, he further stated that he keeps returning, with his latest trip being two weeks prior to the hearing.

From the testimony as it relates to the documents in his possession, namely the auction or ADESA contracts, the Applicant sold vehicles under his licence without passing on to the customer the gross discrepancies between the odometer information on those ADESA contracts and the actual numbers on the vehicle's instruments. The customer was misled on an item central to the determination of the value of the vehicle.

The Applicant's counsel suggested that as there was no direct evidence from ADESA, the information on the ADESA contracts about the odometers should not be given much weight. The counter argument was that as the ADESA contracts came from the Applicant's own files, the Applicant had to have been aware of the discrepancies. Further, whether the information on the ADESA contracts was or was not correct in no way diminishes the duty of a registrant under the Act to disclose any doubt as to the true mileage on a vehicle to the purchaser.

The fourth vehicle purchase in question was that of a 1995 Mazda Millenia. The vehicle was purchased by the Applicant wholesale from Toronto Auto Auctions by contract dated May 30, 2000. It was sold under the Applicant's Bill of Sale dated June 26, 2000. On the wholesale contract retrieved from the Applicant's records, the words "Accident Repair" occur. The copy of the retail bill of sale retrieved from the Applicant's files contains no reference to an accident. Counsel for the Applicant tendered a copy of another Bill of Sale between the purchaser and the customer which clearly indicates the car was an "Accident repair" and that the customer accepted the car in full knowledge of this fact. Clearly the documents both purport to be a contract between the Applicant and a customer but equally clearly they are not carbon copies of each other. The copy introduced through the OMVIC inspector and according to her testimony retrieved from the Applicant's files not only is absent information regarding an accident but has a price of \$13,500 while the other document has a sale price of \$12,750. The purchaser was not called to verify the contents of the documents or his signature. As well, there was no verification that the statement on the wholesale Bill of Sale is accurate, supported by the documents such as repair invoices and the like.

The Applicant offered an explanation for the fact of there being two documents both ostensibly a retail Bill of Sale for the same car. He stated that he was absent when the transaction took place and when this occurs he signs Bills of Sale "clear" in order that his salesman can complete transactions. This is what occurred with regard to the Bill of Sale with no reference to an accident. He went on to say that when he realized that the accident information had not been passed on to the customer, he made up a new Bill of Sale the next day reducing the price and including the accident information but keeping the June 26, 2000 date. This new document was not shown to inspectors.

Further testimony on this point was given by the Applicant's salesperson involved in the transaction. He stated that the document retrieved by the inspectors was in his handwriting and that the subsequent document was in the Applicant's. He repeated the explanation of the Applicant as to how the subsequent Bill of Sale came to be produced. He further stated that the signatures on the documents were those of the customer.

THE LAW:

Section 5(1)(c)(ii) of the Act under which the registrar seeks to revoke the Applicant's registration reads;

5.(1) An Applicant is entitled to registration or renewal of registration by the registrar except where,

.....

(c) the applicant is a corporation and,

.....

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

.....

Section 7(4) details the process and the mandate of the Tribunal upon the exercise of the Applicant's right of appeal:

7(4) Where the applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

There was no dispute as to the duty of a registrant under the Act to disclose to the consumer any variance between the reading on the vehicle's odometer and any information to the contrary.

The issue of how the courts should view odometer readings as they relate to the consumer protection aspect of the sale of automobiles was dealt with by Cory J, as he then was, in *Re Herman Motor Sales Inc et al and the Registrar of Motor Vehicle Dealers and Salesmen* 29 O.R.(2d)431. He addressed the subject on page 3 as follows:

"However, the Act and regulations stress the importance of odometer readings. There can be no doubt that the readings form the basis for the assessment in value of most vehicles. To tamper or interfere with the odometer readings must be considered seriously and must constitute a grave breach of the duty of the dealer."

The *Herman* case was one of active odometer tampering at the registrant or retail dealer level. The situation now before the Tribunal concerns vehicles that come into the registrant's possession for resale with a discrepancy between what is stated on the wholesale contract as the distance traveled and the numbers that appear on the actual odometer, and that discrepancy not being passed on to the purchaser. In line with the reasoning of Cory J., surely the end result is the same when it comes to the consumer protection aspect of the Act and questionable odometer readings. At the very least the consumer is deprived of the ability to assess accurately the worth of the vehicle being purchased, and at worst is duped into paying more for the vehicle than it is worth.

In the *Herman* case there was a plea to 77 of 82 counts of the fraud charge of odometer tampering. The court concluded that on this amount of evidence of past conduct, it was not unreasonable for the Registrar to have found that pursuant to 5(1)(c)(ii) of the Act the registrant would not carry on future business with honesty and integrity.

It was urged by counsel for the Applicant that the present case is qualitatively different from a case involving fraud and that therefore unless the Registrar made out a case of active misrepresentation, the penalty of revoking the Applicant's licence and therefore his ability to earn a living would be too severe. The evidence, in the Applicant's submission, amounts to a failure to disclose through careless business practices, not actively to mislead the consumer. Counsel likened the penalty of licence revocation in this case to that of the death penalty for a first offense. While obvious hyperbole, the sanction of revocation would deny the Applicant his right to pursue his chosen occupation. There is ample case law to the effect that this entitlement should not be taken away by a regulator without sufficient grounds. If the Tribunal does concur with the Registrar's proposal, the Applicant's recourse for reinstatement as a registrant lies in Section 8 of the Act which reads:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

While not canvassed in testimony, it would appear to be cold comfort to a prior registrant to submit an application for reinstatement to the scrutiny of the very regulator that revoked his licence in the first place.

The Tribunal was referred to a number of cases for which it gives thanks to both counsel. The decision most often referred to for guidance as to how section 5(1)(c)(ii) should be interpreted is *Brenner and the The Registrar of Motor Vehicle Dealers and Salesmen* March 1983 (orally); Southy J. The case came before the Tribunal on appeal from a decision of the Registrar to refuse an application for a salesman's licence. The applicant had an extensive criminal record including 14 convictions over 20 years, including fraud, theft, attempted armed robbery, and narcotics possession. As well, he had served prison time and was deported back to Canada from the USA. Evidence had been adduced at the Tribunal level to the effect that the applicant had changed his ways and was on the road to rehabilitation. The Tribunal, relying on this evidence and despite the evidence of prior bad conduct set aside the decision

of the Registrar. Southy J reviewed the powers of the Tribunal set out in Section 7(4) stated above. He concluded on page 3 of his judgment as follows:

"The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with honesty and integrity.

It transpired that no stay of the Tribunal's order was sought and the Court thought the appropriate remedy given the lapse of time was to order a rehearing . At the rehearing the Court stated the proper question to be:

"...whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with the law and with honesty and integrity. Unless the Tribunal can find that it does not, the tribunal should not order the Registrar to refrain from carrying out his proposal."

The Registrars obligation as set forth in section 5 of the Act is to balance the entitlement to registration with the protection of the consumer. Any comparisons between the scope of the transgressions in the *Herman* or *Brenner* cases to those alleged here would, of course, be grotesque. Nevertheless, the Tribunal has before it certain objective evidence of past conduct, upon which the Registrar relied as grounds for his opinion that the Applicant would not carry on business properly in the future as the Act requires. The issue for the Tribunal in light of the *Brenner* decision is whether that evidence is sufficient to form the basis of the.. "reasonable grounds for belief that the Applicant will not carry on business in accordance with the law and with honesty and integrity"... called for in section 5(1)(b).

The evidence indicates that since the commencement of the Applicant's business in October of 1999 and the issuance of the Proposal in January of this year followed by the Notice of further Particulars in March, there have been between one and two hundred cars sold from the Applicant's lot. This comes from the approximation of the number of vehicles purchased through ADESA. An exact figure is not necessary for present purposes. Of that number, there are three transactions with questionable odometer readings which, without doubt imposed a clear duty of notification to his customer upon the Applicant as a registrant under the Act. Clearly that duty was not fulfilled. There is no information in the initiating documents nor in the evidence of any other such transgressions. The Tribunal can only conclude that since the Applicant's files were searched, these are the only instances that in the view of the Registrar occurred. Of these three transactions, two occurred after representatives of the regulator gave specific warnings to the Applicant that this was unacceptable .

The Applicant was also given specific instructions by the regulator as to how to complete a Bill of Sale when there are odometer discrepancies.

The Tribunal understands the argument of the Registrar to be that unless it can be shown that the Registrar acted unreasonably in the exercise of his discretion, then the Tribunal has no alternative but to put its imprimatur upon the Registrar's decision. However, it is difficult to see how such an analysis squares with Section 7(4) which calls for the exercise of the Tribunal's discretion. In the present case, the Registrar imposed the ultimate sanction available to his office, revocation of a licence, on the evidence of three breaches of the Applicant's duty to disclose differences between the wholesale and retail odometer readings to a customer. This same sanction was imposed in the *Herman* and *Brenner* cases where there were dozens of such offenses and in the *Brenner* case an extensive criminal record. If the position of the Registrar is accepted as presented, there is no authority in the Tribunal to compare the cases before it with others. The logical extension of that position would be that once there is a single finding of a particular breach of a duty imposed upon a dealer by the Act, the "reasonableness" of the Registrar's cancellation of that dealer's licence cannot be modified by the Tribunal. After all as Cory J points out in the *Herman*, it is obvious that a regulator would look to the past conduct of a registrant in order to assess future behavior. How could a conclusion based upon the only objective criterion available ever be found "unreasonable" in the sense very ably urged by counsel for the Registrar.

The Tribunal was referred to the decision of *O'Leary J in Re Bernstein and the College of Physicians and Surgeons of Ontario* (1977), 15 O.R.(2nd) 447. The matter involved a review of a decision of the Discipline Committee of the College involving the suspension of a physician's licence. The issue on appeal before the Divisional Court was the quality of the evidence upon which the Discipline Committee sentenced the Appellant to "professional death", as the court put it. The doctor in the case had been sanctioned for improper conduct largely on the uncorroborated testimony of a patient who had an extensive history of psychiatric problems. The court found the Discipline Committee's reasoning on the point unsatisfactory. The Discipline Committee held as follows: "With respect to that issue where the evidence of Miss Johnston and Dr. Bernstein is in conflict as to whether sexual intercourse took place, we accept the evidence of Miss Johnston in preference to that of Dr. Bernstein". It was argued by the counsel for the Applicant that where the consequences of a Tribunal's decision are grave as in the case where an entitlement to a licence is revoked, a higher burden of proof is required than a mere balance of probabilities. Also, the Tribunal should give some indication of the criteria it employed in weighing the evidence before it and not rely upon bald assertions as above.

Counsel for the Applicant submitted that if the Tribunal exacts the ultimate penalty of licence revocation, it should insist upon a standard of evidence similar to that in a case of fraud. It should not accept as sufficient the "bald assertion" of the figures on the ADESA contracts as conclusive evidence of the true mileage of the vehicles, at least not as the basis upon which such a serious outcome flows. If these contracts were in fact authored by the Applicant, counsel concedes that would be a different matter. Counsel for the Registrar points out that it is not the truth of the figures on the ADESA contracts that should be determinative but rather the fact that these discrepancies were not disclosed to the customer. The Applicant took the stand in his defense and denied that he deliberately misled customers as to the mileage on

the three vehicles in question.

DECISION AND ORDER:

The Tribunal in this case was faced with a set of facts similar to those in others that have come before it. In each case vehicles are purchased from a wholesaler not covered by the legislation, in this case ADESA. On the wholesale Bills of Sale there are two numbers relating to the number of kilometers traveled by the vehicle, one as the actual reading on the installed odometer, the other under the heading "declarations" the latter being many times greater than the former and put forth as the true indication of mileage. No explanation was given as to how the wholesaler knew of this differential (though none was called for in the instant case) without the wholesaler knowing how it happened to come about. All of the lower odometer readings were below 150,000 kms, the number which, according to the evidence, is the cut off point for financing. Obviously a lower odometer reading and the ability to get financing makes a vehicle more marketable at both the wholesale and retail level. The retail level is the one covered by the Act, section 7(4) of which charges the Tribunal with directing the Registrar to take such action as the Tribunal deems appropriate in the circumstances of the case.

In the present case, the Tribunal sees its responsibility as striking a balance between the Applicant's entitlement to making a living as a dealer by becoming a registrant under the Act and the curtailment of that entitlement if it threatens the protection of the consumer.

Accordingly, the Tribunal orders as the Applicant to be permitted a registrant under the Act under the following conditions:

- 1) In addition to the obligation to maintain books and records in accordance with the Act, the Applicant will maintain a separate journal of all vehicle purchase and sale transactions which will be kept available for ready inspection by a representative of the Registrar. Each entry will be identified by the Vehicle Identification number (VIN) and the make and model;
- 2) Beside the record of each transaction there will be kept a record of all pertinent details of each vehicle's history including all entries from the Bill of Sale or other document through which the Applicant became the owner;
- 3) The Applicant will forward to the Registrar at the end of each month a copy of that month's journal entries until the Registrar informs the Applicant that the Registrar no longer requires this to be done.
- 4) Before the execution of every retail Bill of Sale with a customer the Applicant will show and include on that Bill of Sale any statements as to that vehicle's odometer status appearing on the document by which the Applicant obtained the vehicle and the Applicant shall explain such information to the customer. The Applicant will in writing on the face of the Bill of Sale in the presence of the customer attest to having done this.

- 5) Any default in any of these conditions shall result in the immediate forfeiture of the Applicant's registration under the Act.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair, Presiding

RELEASED: July 24, 2001

SINGH, GURNEK O/A SARWAN AUTO SALES

GURNEK SINGH O/A SARWAN AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DOUGLAS C. MACKINTOSH, VICE-CHAIR

APPEARANCES:

ARIF RAZA, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF

HEARING: July 6, 2001

Toronto

ORDER

Following attendances on July 6, 2001 at a hearing before the Licence Appeal Tribunal of Arif Raza, Counsel for Gurnek Singh o/a Sarwan Auto Sales (the "Applicant") and A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

WHEREAS the Applicant requested a hearing before the Tribunal to appeal the proposal of the Registrar, *Motor Vehicle Dealers Act*, to revoke the registration of Gurnek Singh o/a Sarwan Auto Sales, pursuant to section 7(4) of the Act;

AND WHEREAS the hearing was to be heard on May 14, 2001 at the Tribunal's Chambers;

AND WHEREAS upon consent of the parties, the matter was adjourned peremptory against the Respondent to July 6, 2001 at the Tribunal;

AND WHEREAS upon commencement of the hearing on July 6, 2001, counsel for the Applicant requested the hearing be further adjourned to a later date, due to having lost his client's file a week before the hearing and in addition, lacked an essential witness who was out of the country;

NOW THEREFORE this Tribunal Orders that:

- 1) this matter is adjourned upon consent and peremptory against both parties to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, September 24, 2001;
- 2) the conditions set out in "Schedule A" hereto, must be complied with by the Applicant in the interim.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh,
Vice-Chair

Released: July 6, 2001

SHINE CAR SALES INC. AND OMAR HASSAN RAHIM

SHINE CAR SALES INC. AND OMAR HASSAN RAHIM

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

PHILIP ULRICH, Counsel representing the Applicants
A. MICHAEL ROTHE, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATES OF
HEARING:

June 6 and 25, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated February 1, 2001 proposed to revoke the registrations of Shine Car Sales Inc. ("Shine") as a Dealer and Omar Hassan Rahim ("Rahim") as a salesperson under the Act.

FACTS:

The Registrar under the Act proposed to revoke the registration of Shine and Rahim. The grounds relied upon by the Registrar for the Proposal are set out below:

1. The past conduct of Rahim as a salesperson and as the directing mind of the dealer "Shine" affords reasonable grounds for belief that the Registrant's undertakings will not be carried out in accordance with law, and with integrity and honesty, TO WIT;
 - (a) The Registrant was convicted of 2 charges of odometer tampering by the Provincial Offenses Court.

- (b) The Registrant has failed to disclose material information to purchasers of vehicles.

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 of the *Motor Vehicle Dealers Act* states as follows;

- 5(1) An applicant is entitled to registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application, but he had not disclosed three further convictions which were considered by the Registrar to be minor offenses. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitating himself. The Tribunal found that "possibly the applicant will in the future, be a person of honesty and integrity", and the Tribunal expressed a willingness to "encourage that objective". The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Re Harrison [1998] O.C.R.A.T.D. No. 65

In this matter, the Applicant had applied to be a Gaming Assistant and was refused

registration on the grounds of past conduct. He was found guilty of a charge of Fraud Under \$1,000.00 and given a conditional discharge with 6 months probation and a Compensation Order for \$483.90. The Applicant claimed he did not have a criminal record, denied being on probation and denied that he was to pay restitution. He had disclosed the offense on an application for a security guard licence but gave an explanation that denied the requisite *mens rea* for the offense, and did not take responsibility for the offense. He said that he took the plea bargain as a simple and easy way to end the matter and was told by the Court that he would not have a criminal record. The Tribunal found that it could not go behind the finding of guilt to avoid the consequences of it and that *mens rea* is an essential element of the offense that is admitted by a plea of guilt. A conviction for fraud was a serious matter and relevant to the roving casino industry which demands a high standard of honesty and integrity to protect the public interest. A recent finding of guilt for fraud raised reasonable concerns as to his honesty and integrity, and the Tribunal can not look behind the guilty plea. The Registrar's Proposed Order was upheld.

**1280953 Ontario Limited O/A Morato Cars and Radomir Miljkovic [May 11, 2001]
Licence Appeal Tribunal**

In this matter, the Registrar had issued a Notice of Proposal to revoke the registration of the dealer and salesperson on the basis of past conduct. There were allegations that the dealer misrepresented odometer readings to customers, failed to disclose material facts, altered the company books to mislead the investigator, sold vehicles from other than its registered premises, and carried on business when not registered.

The Tribunal found that vehicles were purchased by the dealer with true kilometers travelled unknown but sold by the dealer without disclosure of the true reading or the fact the true reading was unknown. The readings were found to be important to a consumer and the failure to make adequate disclosure was a flagrant disregard of the dealer's obligations and contrary to the written warning given to the dealer. This warning was explained and given in writing to Miljkovic by the Inspector. The conduct was found to be sufficient to afford the Registrar reasonable grounds to believe that the Registrant and the salesman would not carry on business in accordance with law, integrity and honesty.

The Tribunal found that the dealer, through its salesman, failed to disclose to customers that five vehicles had been branded as salvage. Branding as salvage indicated that the vehicles were damaged beyond economical repair, and this was indicated on the bill of sale from the auction to the dealer. On page 17 the Tribunal found that:

"The failure of Miljkovic to disclose the fact that the motor vehicles were branded as salvage gives the Registrar further reasonable grounds for belief that neither Miljkovic nor the Dealer will carry on business in accordance with law and with integrity and honesty."

The Tribunal found that the alteration of records by the dealer to mislead the Ministry and the recent industry-related convictions of Miljkovic afforded grounds for the Registrar to find that

Miljkovic is an unsuitable person to be a motor vehicle salesperson, or the director and controlling mind of a motor vehicle dealer. The Tribunal found that the Registrar did not err, and the registrations of the dealer and salesperson should be revoked.

ISSUES:

The legal issue in this case is whether the Registrar was wrong in his decision to revoke the registrations of Shine Auto Sales Inc. as a dealer and Omar Hassan Rahim as a salesperson.

WITNESSES FOR THE REGISTRAR

Mr. Ferrante

Mr. Domenico Farrante testified that his son had wanted to by a 1989 Honda Civic he had seen at the "Shine". His son looked at the car and test drove it prior to the purchase. The price of the vehicle was \$4,500.00 plus tax, and he stated that on the bill of sale (Exhibit 4, Tab 11) \$2,000.00 was written as a way of saving tax even though the actual price was \$4,500.00. There was a notation of "repair and repaint" on the bill and sale, and Mr. Ferrante stated that when he asked if the car had been in a big accident, Mr. Rahim had told him that the car had been involved in a "fender, bender" but not in a major accident. Mr. Ferrante testified that the vehicle had been obviously poorly repainted as the colour had been changed from red to yellow. Two days after the purchase of the car, his son complained that there were no brakes. When the witness examined the vehicle, he said that there were no brake shoes, and there was also damage to the rear of the car. Mr. Ferrante explained that he had experience with motor vehicles as he had been a Toronto Transit Commission mechanic for 30 years and certainly could tell if something was wrong with the car. When the car was taken back, the Applicant did a repair to the brakes, but did not do further work on the car and simply told them that if there was a problem, to bring the car back and he would have it fixed. He explained that Mr. Rahim had promised to return his money, but kept giving him excuses so he went to the dealer's business premises on March 10 to get his money back. Mr. Rahim had told him that he would repaint the vehicle and return \$500.00. Mr. Ferrante became angry at him, and Mr. Rahim called his brother who hit Mr. Ferrante with a coffee mug. Mr. Ferrante explained that he saw a truck outside, and that Mr. Rahim had people out there intending to beat him. He was pushed out of the door and in the incident, his wife suffered a back injury. If he had known about the condition of the vehicle, he said he would not have bought it. He did not feel that he had been dealt with fairly.

In cross-examination, Mr. Ferrante testified that he still has the car, and although it was off the road for five months, it is now being driven again. When he purchased the car, it looked like there had been a major repair, but he trusted the Applicant, and did not carefully inspect the vehicle himself. He agreed that the bill of sale showed the purchase price as \$2,000.00 and that he knowingly put his signature on a false document as it would save some tax. His evidence was that he did this as the Applicant had told him to do it. When he was asked about a conversation with Ms. Gingras, an inspector with the Ontario Motor Vehicle Industry Council,

he explained that she called him but he could not hear on the phone so she spoke with his son. According to her notes (Exhibit, 5, Tab 8, p.3), he told her that he had paid \$3,500.00 for the vehicle, but he could not remember if that is what he said. Mr. Ferrante explained that he has problems sleeping and problems remembering anything, and if he had told Ms. Gingras that he had paid \$3,500.00 he could not explained why. At this time he was unsure of what he had paid but knew that his son remembered. On May 15, 2001 he signed a statement showing that he had paid \$4,500.00 and explained that at the time of the statement, that was his recollection and his son confirmed it for him. He stated that his memory was not bad while he was giving evidence to the Tribunal.

Mr. Ferrante testified that he called the police. They spoke to Mr. Rahim and then told him that they could not lay charges without witnesses.

Mr. Ferrante stated that the Ontario Motor Vehicle Industry Council ("OMVIC") had told him to try to get his money back and explained some information about the vehicle, and that prior to this information he did not know that the accident had been anything other than a "fender bender". He repeated that he had seen damage to the back shocks but accepted the Applicant's assurance that they would repair anything that was wrong. There were no "big problems" with the car and it appeared that they had fixed it. In response to questions posed by the Tribunal, he agreed that there were problems with the clutch, the brakes and damage to the suspension and yet he allowed his son to drive the vehicle.

Mr. Vahle

Mr. Harald Vahle testified that he is familiar with Mr. Rahim and has purchased vehicles from him. He traded a Ford Explorer and purchased a 1995 Ford Aerostar and Jeep Cherokee (Exhibit 4, Tab 10) as an even trade. The Ford Aerostar was received three weeks after the transaction because repairs were being done, so he took possession of the Jeep Cherokee and used it until the Aerostar was ready. He had looked at the Aerostar but did not see the odometer. Mr. Rahim told him that the mileage was 55,000 kilometers and the witness explained that because the vehicle has a digital dashboard, the mileage was not visible as there was no battery in the vehicle. Until a battery was connected and the ignition key was turned, nothing would be visible with a digital dashboard. He had been advised that the vehicle was an insurance write-off and knew this from his inspection in any event. Mr. Vahle stated that he had no problems with the vehicle subsequently and drove it for approximately two years. He sold it to a dealership because it was too large for his needs and later reacquired it and drove it again without problems for a further year. When he was contacted by O.M.V.I.C approximately a year ago, he said that he was satisfied that the vehicle had approximately 85,000 kilometers and had completed the purchase even though he was originally told 55,000 kilometers. He repeated that the odometer could not be read until a battery was hooked up and the dashboard was activated.

In cross-examination, he confirmed that the Aerostar and Cherokee were the first vehicles that he had purchased from Mr. Rahim and was advised by Mr. Rahim that the Aerostar was an insurance write-off. Mr. Rahim also told him that the "distance travelled" quoted was not

accurate, but was not at all concerned when he found that there were 25,000 kilometers extra on the vehicle. Mr. Rahim repainted his mother's car to compensate him for any depreciation in the value caused by the extra mileage and had also offered to let him out of the deal. He did not feel deceived, and did not want out of the deal. For the Jeep Cherokee, he agreed that the 137,700 kilometers shown on the bill of sale was accurate and understood that it was branded "rebuilt" and had been in an accident. When he later sold the Cherokee, he did so because he did something bigger, and purchased a 1994 Ford Explorer on a straight trade. He did not feel that any information was withheld from him by Mr. Rahim.

Ms. Gingras

Ms. Louise Gingras testified that she has been an inspector with O.M.V.I.C. for four years and prior to that was investigator with the federal government for five years and was also a private investigator in the private sector. She explained that the *Ontario Motor Vehicle Dealers Act* is a public protection statute which deals with the registration and regulation of motor vehicle dealers and salespersons. Under section 5 of the Act, a person is entitled to registration unless they fail to meet the required standards for financial responsibility and conduct. The test for conduct is whether they will carry on business with honesty, integrity, and in accordance with the law. In the Notice of Proposal (Exhibit 1), the grounds for revocation were that the dealer was convicted of two counts of odometer tampering under the *Motor Vehicle Dealers Act* for failure to disclose altered or adjusted odometers. A guilty plea was entered in December 2000 on these charges in Provincial Offenses Court. In the Notice of Further and Other Particulars dated May 17, 2001 (Exhibit 3) allegations were made of nondisclosure that vehicles were salvage. Ms. Gingras found that Mr. Rahim was registered as the only officer and director of Shine Car Sales Inc. (Exhibit 4, Tab 6).

On January 14, 2000 Ms. Gingras conducted a routine inspection at the dealership to ensure compliance with the Act and Regulations. Ms. Gingras testified that during this inspection she found various documents which related to the allegations in the Notice of Further and Other Particulars. She produced a bill of sale (Exhibit 4, Tab 9 p. 2) from Impact Auto Auctions Ltd. to Shine Car Sales Inc. for a 1992 Ford Aerostar V.I.N. #1FMDA31X7NZA23589 by which the vehicle was sold on behalf of the Zurich Insurance company for \$750.00. The odometer reading shown was T.M.U. (true mileage unknown). This vehicle was later sold by "Shine" to Mr. Carl Kisshundat for \$3,000.00 with a notation of "accident repair" and the distance travelled shown as 207,156 kilometers rather than T.M.U. (Exhibit 4, Tab 9, p. 1) Ms. Gingras stated that she was concerned that distance travelled shown on the bill of sale to the customer differed from the notation on the bill of sale to the dealer. Ms. Gingras produced a bill of sale for a 1995 Ford Aerostar V.I.N. # 1FMDA31X2SZA75014 from Impact Auto Auctions Ltd. to Shine Car Sales Inc. by which the vehicle was sold on behalf of the Citadel General Assurance Co. for \$2,600.00 with a notation of "T.M.U." for the distance travelled. The vehicle was then sold by the dealer to Mr. Harald Vahle for \$12,000.00 with a notation of 55,000 kilometers for the distance travelled rather than T.M.U. Ms. Gingras testified that she was concerned over the lack of disclosure concerning the distance travelled as well as the condition of the vehicle. According to the records of the Ministry of Transport (Exhibit 4, Tab 10) she was also concerned that the transfer to the dealer was done 30 days from the date of purchase from

Impact Auto Auctions Ltd. and not within the six days required by statute. Next, Ms. Gingras produced the bill of sale for the 1989 Honda Civic V.I.N. # 2HGED6302KH006732 from Impact Auto Auctions Ltd. to Shine Car Sales Inc. by which the vehicle was sold on behalf of Pilot Insurance Company for \$350.00 (Exhibit 4, Tab 11). Ms. Gingras was concerned about the condition of the vehicle when purchased by the dealer as the vehicle was repainted prior to sale by the dealer.

Ms. Gingras testified that odometer readings are important as they affect the value of the vehicle, and are taken into account by the consumer or another dealer assessing the value of the vehicle. If the vehicle is "T.M.U." this would, in her opinion, affect the amount of money that the customer would pay for the vehicle. A vehicle which has been an insurance write-off or salvage has less monetary value as the insurance company has determined it would cost more to fix properly than it is worth. The consumer is entitled to this information as a material fact. She was also concerned in this case, that the dealer had been convicted of odometer tampering and was therefore not acting with honesty, integrity, and in accordance with law.

In cross-examination, she stated that a vehicle was sold as a write-off after it has been recovered following a theft and the claim has been paid. If a vehicle has suffered little or no damage, it would be sold from a different part of the Impact Auto Auctions Ltd. property. She repeated that the dealer must disclose material facts. She conceded that there is no requirement under the Act or Regulations that where there has been some damage which has been disclosed, the dealer must tell a consumer that the vehicle has been an insurance write-off. Ms. Gingras testified that she was not sure if there were other instances of odometer tampering and agreed that the provincial prosecution only involved two vehicles with no charges being dismissed and no charges being withdrawn. She agreed that the odometer tampering occurred in 1999 and was not surprised that the charges were not laid until eight months later. Mr. George Riekstins who was the investigator laid the charges.

Ms. Gingras testified that she considered the incidents with the mileage shown in the Notice of Further and Other Particulars to be serious as the distance travelled should have been shown as unknown. When she was asked about digital odometers, she could not disagree that it was necessary to supply power to the dashboard to get a reading, and agreed that it would be possible that if a vehicle was not started, the bill of sale would read T.M.U. even though a reading would appear later when power was supplied. Ms. Gingras disagreed that a reading of 207,156 kilometers on the Kisshundat vehicle was necessarily a high reading and stated that she did not know if that was the correct reading in any event. In her opinion, the distance travelled notation of 207,156 kilometers was still misleading as the dealer must advise the customer of the possibility that the true mileage was not 207,156 kilometers. Even where there is an analog odometer, she agreed that there is still a chance that the kilometers shown are not the true distance travelled. She also considered the mileage notation on the Vahle vehicle dishonest as Mr. Rahim had agreed to repaint the customer's mother's car to compensate him for the difference.

Ms. Gingras did not agree that the plea of guilt to the provincial offenses was a sign of remorse, and stated that admitting wrongdoing may not be the first step to stopping behaviour

as it depends on the person and their willingness to change.

Ms. Gingras agreed that there was no mileage problem with the Ferrante vehicle, but she was troubled by the fact that the car was repainted and felt that there was a problem of material nondisclosure although she never inspected the vehicle. She was concerned that the vehicle had sold at auction for only \$350.00 and was re-sold for \$3,500.00. Ms. Gingras understood that she had been told by Mr. Ferrante that the vehicle was sold for \$3,500.00 and in his Consumer Questionnaire (Exhibit 4, Tab 12) he stated that he had paid \$4,500.00. However, she assumed that he was troubled by the fact that O.M.V.I.C. was a government agency and was worried about having avoided paying tax.

In redirect examination, Ms. Gingras testified that the vehicles for sale at Impact Auto Auctions Inc. are set out in rows, and the dealers are taken to look at the cars. The onus to disclose true odometer readings is on the vendor. In her opinion, there is a difference between accident repair and salvage, however she considers insurance write-off to mean salvage. An accident repair may refer to a minor repair, but if the vehicle is a write-off it means that the cost of repair exceeds the value of the vehicle. If an odometer is replaced, section 19 of the Regulations require that the replacement odometer show the same mileage as the odometer which was replaced.

WITNESSES FOR THE APPLICANT

Mr. Romano

Mr. Tony Romano testified that he knows Mr. Rahim as he owns a vintage Volkswagen "beetle" which was repaired at Shine Auto Body. In 1999 he attended regularly at Shine Auto Body to monitor the work being done on his car, and near the end of the year he witnessed an incident involving Mr. Ferrante. When Mr. Romano went to Mr. Rahim's office, he saw Mr. Rahim sitting at his desk while three or four of his employees put Mr. Ferrante out of the office. Mr. Ferrante was attempting to get at Mr. Rahim and Mr. Ferrante's wife was "uncontrollable". There appeared to be three or four people outside with Mr. and Mrs. Ferrante. The witness stated that Mr. Ferrante was not being beaten up, but was trying to break free and get back into the office. He saw no blood on Mr. Ferrante, but did see injuries on Mr. Rahim's head and hand. When the police arrived, Mr. Romano provided a statement. At the time he did not see Mr. Rahim strike Mr. Ferrante.

In cross-examination, Mr. Romano explained that he had no dealings with Mr. Rahim except for the repair of his Volkswagen and had no social contact with him. When he went into the shop, he would usually spend an hour examining his car, and on this occasion went into the office where he saw the altercation in progress. He noticed that a piece of glass had been broken and that there were people outside with Mr. Ferrante when he was put out.

Mr. Rahim

Mr. Omar Hassan Rahim testified that he is the sole officer of Shine Car Sales Inc. and has operated the business since 1997. During the inspection, he gave Ms. Gingras access to his records and the only records she did not have, involved prior purchases of vehicles from private individuals. In the past he had not filled out complete paperwork, but once she explained the requirements to him, he kept proper records. Mr. Rahim stated that he is 37 years old, had been in Canada approximately 18 years, has no criminal record, and has never been convicted of a provincial offense except for the two charges involving odometers. He agreed that he broke the law, and pleaded guilty because he was guilty. Faulty odometers had been replaced with odometers that he knew had lower readings so although he did not roll back the odometers he did knowingly break the law. Since then he has not had to replace an odometer. When Ms. Gingras completed her inspection, she advised him to keep a proper "garage register" and since that time he has been doing that as well. She also told him that when he buys a car from Impact Auto Auctions, he should write the name of the seller as Impact. Up to the time of the inspection Mr. Rahim estimated that he had sold approximately 125 vehicles and there were records for all transactions except for between 10 and 15 private purchases. The inspection by Ms. Gingras lasted 3 or 4 hours, and she made copies of any documents she wanted.

Mr. Rahim testified that when he purchased the 1992 Ford Aerostar from Impact Auto Auctions Ltd., he had to estimate the repair cost as he did not know the mileage. There was no battery in the vehicle, so the digital odometer did not show a reading. When he purchased the vehicle, Impact put "T.M.U." on the bill of sale as there was no odometer reading. Most of the vehicles at Impact Auto Auctions Ltd. have analog odometers which are visible without electrical power so for those vehicles the mileage is shown on bills of sale based on the odometer reading. He paid \$909.50 for the vehicle, and sold it for \$3,000.00 as it was not badly damaged and it was repaired in his auto body shop for probably under \$2000.00. When the vehicle was started, he was shocked at the amount of mileage, but had no reason to suspect it was either more or less. He knew that the vehicle was an "insurance write-off" and wrote "accident repair" and did not know that he was required to write anything else, however after the discussion with Ms. Gingras, he now writes "salvage" if the vehicle is sold unrepaired and "rebuilt" if it has been repaired. In addition, he advises the customer that the vehicle has been written off and repaired. Before the 1992 Ford Aerostar was sold to Mr. Kisshundat, he said that the customer saw the vehicle during the repairs, but could not remember if he had told him that it was a write-off. Mr. Kisshundat still owns the vehicle and brings it in for oil changes.

Mr. Rahim testified that he purchased the 1995 Ford Aerostar from Impact Auto Auctions Ltd. It was badly damaged, and because there was a digital odometer and no battery in the vehicle, there was a notation T.M.U. on the bill of sale from Impact. Mr. Vahle saw the vehicle while it was being repaired, and was told that it was a "write-off" although it was not written on the bill of sale. Mr. Rahim agreed that he wrote 55,000 kilometers on the bill of sale but does not know why as the proper reading was over 80,000 kilometers.

Mr. Rahim testified that when he was licensed as a dealer there were no courses available but he did understand that as a registered dealer he was required to know the rules. Since that time, he has voluntarily taken a course from the Used Car Dealers Association, and had become familiar with the Ontario Motor Vehicle Dealers Association rules and *Motor Vehicle Dealers Act Regulations*.

Mr. Rahim testified that the 1989 Honda sold to Mr. Ferrante was a "theft recovery" vehicle which was sold as the insurance company had already pay the claim. There was no damage the front or back of the vehicle, and he only had to repaint it and replace the ignition. Normally, he repaints any vehicle purchased from Impact Auto Auctions Ltd. On the bill of sale from Impact there was nothing showing that it was a "theft recovery" or had been damaged. He disagreed with Ms. Gingras, and testified that "theft recovered" vehicles can be in the same area as damage vehicles. Mr. Rahim said that he did tell Mr. Ferrante that the vehicle was a "theft recovery", and testified that the sale price was \$2,150.00 has shown on the bill of sale. Even at this price, he knew that he made some money on the vehicle. He agreed that the vehicle was returned for a repair of the brakes, but he was not aware of exactly what work was done. In cross-examination, he stated that the vehicle had been issued with a "safety certificate" by the licensed mechanic. Mr. Rahim was sure that there was no frame damage to the vehicle. Several months later he received a call from Mr. Ferrante who asked for his money back because a lady from O.M.V.I.C. had called and advised him that the car was not roadworthy. He was surprised as he had regularly seen the car being driven in the area. Mr. Rahim testified that he agreed to take the car back and return the money but he had sold the "trade in" to someone else and could not get it back immediately as that customer was on holiday in Jamaica. Mr. Ferrante wanted his money back immediately as he was planning a trip to Italy and came to his office. When Mr. Ferrante came in and walked towards him Mr. Rahim got up and walked away. He is not sure what was said but knows that some of his employees came and tried to put Mr. Ferrante out the door. During this confrontation, a glass partition was broken, and one of the workmen called the police. When the police arrived they interviewed witnesses, spoke to the parties and decided not to lay any charges.

Mr. Rahim produced a series of 13 bills of sale on which it was noted that the vehicles were "salvage", "repair-rebuilt", "branded rebuilt", "salvage-theft recovery", and "as is-salvage". He stated that he would be willing to abide by any terms and conditions in order to keep his registration, would submit all of his bills of sale on a monthly basis to O.M.V.I.C., would take any courses, and would provide any financial information required.

In cross-examination, he agreed that he is the sole officer of "Shine" and is the only registered salesperson who buys and sells autos. He confirmed that his date of birth is August 27, 1963 and testified that he did not recall an assault charge in 1988 although he did remember an egg-throwing incident on a picket line when he was the president of a union. When he was asked about a charge of Theft Under \$5000 in 1997, he remembered that he was with a group of people, there was a theft, he was charged, and he pleaded guilty for convenience as he did not want to go to prison, or hire a lawyer.

Mr. Rahim testified that when he looks at a car, the age of the vehicle and the price are factors. He agreed that if everything else is the same, the mileage can affect the price and the mileage information may come from the vendor. On the bill of sale from Impact Auto Auctions Ltd. for the Kisshundat vehicle, he agreed T.M.U. was shown for distance travelled and that the selling price was \$750.00. He agreed that he sold the vehicle for \$3,000.00 and the mileage noted on the bill of sale was 207,156 kilometers. There was no notation that the vehicle was a write-off.

Mr. Rahim agreed that the 1995 Ford Aerostar sold to Mr. Vahle was purchased from Impact Auto Auctions Ltd. for \$2,600.00 with a notation of T.M.U. on the bill of sale. When he sold the vehicle to Mr. Vahle, he put 55,000 kilometers on the bill of sale, and did not write down that it had been an "insurance write-off". He also explained that the transfers are not always done within the 6-day time limit under the Highway Traffic Act of Ontario, because the transfers from "Impact" are often delayed. Even though he repaints 99% of the vehicles, this is not mentioned on the bills of sale as it is not required.

The witness confirmed that "Shine" was inspected by O.M.V.I.C. shortly after the business opened and he identified an "Inspection Findings" document (Exhibit 6) which had been left with him. In paragraph 3 it stated:

"any and all information regarding a vehicle such as theft recovery, insurance write off or accident repair must be written on the contract and signed by the customer when you sell the vehicle."

Mr. Rahim stated in reply that the form was filed away in the office, and he had forgotten about it.

FACTS FOUND PROVEN:

The facts found by the Tribunal are as follows:

The Provincial Offense Charges

Mr. Rahim pleaded guilty in December, 2000 to two charges of odometer tampering which arose in 1999. There were no other charges before the court, and no charges were withdrawn. The Tribunal accepts Mr. Rahim's explanation that he had replaced faulty odometers for two vehicles, and did not adjust the replacement odometers to match the readings on the replaced odometers.

1989 Honda Civic

The Tribunal finds that Mr. Rahim purchased the 1989 Honda Civic for Shine Car Sales Inc. from Impact Auto Auctions Ltd. for \$350.00. Mr. Domenico Ferrante purchased the vehicle for his son after it was test driven, and there was a notation of "repair and repaint" on the bill of

sale. The Tribunal finds that repairs were done to the brakes but rejects the evidence that there was extensive damage to the rear suspension of the car and that there were no brake shoes. Mr. Ferrante is an experienced mechanic employed by the Toronto Transit Commission and the Tribunal does not find the witness' evidence credible that he would observe damage to the rear suspension of the car and permit his son to drive it in reliance on the promise by Mr. Rahim that if there was a problem he would fix it. Further, if the car had no brake shoes, the Tribunal does not find it credible that a mechanic of 30 years experience would not detect it immediately. The Tribunal does not find his evidence that he paid \$4,500.00 to be credible, as he also told Ms. Gingras that he had paid \$3,500.00 and in cross-examination tried to explain it by saying that he had problems remembering anything, although his memory while giving evidence was not bad. The purchase price of the vehicle is found to be \$2000.00, less trade in allowance, plus tax as shown on the bill of sale.

Mr. Ferrante's recollection of the particulars of the incident in Mr. Rahim's office is found to be unreliable. Mr. Ferrante stated that when he was pushed out of the office by the employees, Mr. Rahim had a group of people waiting outside to beat him. Mr. Romano was a customer at Shine Autobody and also observed the people outside. He saw that these people appeared to have been with Mr. Ferrante. The Tribunal finds that after receiving information from Ms. Gingras, Mr. Ferrante attended at the dealer's premises to demand his money back together with the return of his "trade in" vehicle. He did not receive his money back, and in the course of the argument he was pushed out of the office, and a pane of glass was broken.

The Tribunal prefers the evidence of Mr. Rahim on the question of what information was given to Mr. Ferrante at the time of the purchase. The Tribunal finds that Mr. Rahim told Mr. Ferrante that the vehicle was a "theft recovery", and finds that the ignition was replaced and the vehicle was repainted.

1992 Ford Aerostar

The Tribunal finds that the vehicle was purchased by Shine Car Sales Inc. from Impact Auto Auctions Ltd. for \$750.00 with a notation of T.M.U. on the invoice as the vehicle had a digital odometer and there was no electrical power to the odometer when the vehicle was sold by "Impact". "Shine" sold the vehicle for \$3,000.00 to Mr. Kisshundat with the distance travelled shown on the bill of sale as 207,156 kilometers, and a notation of "accident repair". The Tribunal accepts that Mr. Rahim wrote 207,156 kilometers on the bill of sale as that was the number that showed on the odometer when a battery was connected to the electrical system. Further, it is found that the customer saw the vehicle during the repairs, still owns the vehicle and still deals with Shine Car Sales Inc. for oil changes. Mr. Rahim knew that the vehicle was an "insurance write-off" and there is no evidence that the customer was told or notified in writing, although he did see the vehicle while the repairs were being done, and would have had some knowledge of the condition of the vehicle. There was no intention to deceive in the circumstances.

1995 Ford Aerostar

The Tribunal finds that the vehicle was purchased by Shine Car Sales Inc. from Impact Auto Auctions Ltd. for \$2,740.00. It was in very badly damaged condition and the distance travelled was shown as T.M.U. as the vehicle had a digital odometer which was without electrical power. Mr. Rahim advised Mr. Vahle that the vehicle was an "insurance write-off" but did not make a notation on this on the bill of sale. He also wrote an incorrect mileage once the odometer reading was visible. Mr. Vahle was satisfied with the vehicle and did not think that he was deceived by Mr. Rahim.

Inspection Findings document

The Tribunal finds that Mr. Rahim was personally served with a document on May 22, 1998 setting out examples of suggested disclosure that O.M.V.I.C. considers necessary on a bill of sale. This list is not exhaustive and is not set out specifically in the Act or regulations and is information which O.M.V.I.C. has determined would effect the purchasers decision. The list includes "theft recovery", "insurance write-off", and "accident repair" and does not mention "salvage" or "rebuilt". Mr. Rahim disregarded this document and it was filed away somewhere in the office.

Criminal Record

The Tribunal finds that Mr. Rahim stated under oath that he had no criminal record when he had been found guilty of one charge of assault in 1988 and one charge of theft in 1997. There is no proof that either of these charges was industry related, and both were minimized by the witness, however the Tribunal finds that the requisite *mens rea* and *actus reus* requirements were satisfied beyond a reasonable doubt.

Correction of Procedure

The Tribunal finds that when Ms. Gingras advised Mr. Rahim that he must complete the formal paperwork for a private purchase of vehicles, he did correct his procedure. Similarly the Tribunal accepts his evidence as substantiated by bills of sale subsequent to the Notice of Proposal that he has made notations of "salvage", "repair-rebuilt", "branded rebuilt", "salvage-theft recovery", and "as is-salvage" on bills of sale. He also complied with the requirement to send copies of his bills of sale to Ms. Gingras during the adjournment of this hearing between June 6 and June 25, 2001.

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty. The Tribunal finds the

following facts to be relevant past conduct.

Provincial Offenses

The Applicant pleaded guilty to the charges of odometer tampering and provided an explanation for his behaviour which was consistent with his guilt, but was mitigating. These charges relate to two incidents in 1999 and there has been no subsequent similar behaviour.

Criminal Record

Mr. Rahim was not completely forthright on this issue, and attempted to downplay his involvement in the incidents. The first charge was quite dated, and did not involve dishonesty, and although the theft charge gives some concern to the Tribunal, it is not industry related and there is no evidence that it involved a credit card, a cheque or a course of behaviour of any significant duration.

Material nondisclosure

Prior to the issue of the Notice of Proposal, Mr. Rahim did not write "salvage", or "insurance write-off" on his bills of sale. However, of the three vehicle involve in the allegations in the Notice of Further and Other Particulars, there is evidence that the purchaser of the 1992 Aerostar saw the vehicle during repairs, the purchaser of the 1995 Aerostar was told that the vehicle was an "insurance write-off", and the purchaser of the 1989 Honda was advised that the vehicle was a "theft recovery" which was repaired and repainted. Unlike the situation in the *Miljkovic* case referred to by Counsel, Mr. Rahim had not been given "explicit written instructions" received by Miljkovic although he did fail to advise one of two customers that the vehicle was an "insurance write-off" despite having received the Inspection Findings form on May 22, 1998. There is also evidence of behavior subsequent to the Notice of Proposal which shows that the registrant is making disclosure according to the guidelines set out by O.M.V.I.C. This is consistent with his apparent correction of his improper procedure when purchasing a vehicle from private individuals. After his discussion with Ms. Gingras, Mr. Rahim began to keep proper records based on suggestions given to him.

Odometer

The Tribunal finds that the Applicant has provided a reasonable explanation for his actions in not showing T.M.U. (true mileage unknown) on the bills of sale for vehicles with digital odometers that were purchased at Impact Auto Auctions Ltd. These vehicles had working odometers, but the true readings were not visible, and therefore not known until a battery was connected. At the time the vehicles were sold by Impact Auto Auctions Ltd., the readings were not known. However, at the time the vehicles were sold by the registrant, the readings were known, although in the case of the 1995 Aerostar the reading was improperly recorded on the bill of sale. The Tribunal finds that there was no intend to deceive in the failure of the registrant to record T.M.U. on the bills of sale.

A motor vehicle dealer or salesperson deals with members of the public who are purchasing or selling products of substantial value and are depended upon not to misrepresent to value or quality of the vehicles. By withholding or falsifying information, they are in a position to take advantage of a vulnerable consumer, and the public must have confidence that the dealer or salesperson will not put their own personal interests ahead of their responsibility to conduct business with honesty and integrity. The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with integrity honesty and with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was in error. The Tribunal finds that although some of his practices were careless, in this case Mr. Rahim as the salesperson and operating mind of the dealer was not acting without integrity and honesty, or not in accordance with the law in his dealings with the public. His behaviour subsequent to the inspection has shown that he will implement and follow better procedures when advised to do so.

COSTS:

Counsel for the Registrar applied for an order for costs against the Applicant on the basis that one day was set aside for the hearing of the matter but it was adjourned to a further day as the Applicant wished time to consider whether he would call a further witness. No allegations of improper conduct by the Applicant's Counsel were made and it was conceded by the Counsel for the Registrar and noted by the Tribunal that Mr. Ulrich had conducted himself in a proper and highly professional manner throughout the proceeding. Counsel for the Registrar pointed out that in the original Notice of Proposal dated February 1, 2001 the Applicant was put on notice that under section 8 of the *Licence Appeal Tribunal Act*, the Tribunal may entertain an application for costs by a party to the proceeding.

This section gives the Tribunal the power to refuse to grant a hearing or to terminate the hearing at any time, and make an order for costs where the Tribunal finds that there has been notice and that the application for the hearing is frivolous or vexatious. In this matter, the chronology of events is significant as the inspection of the Registrant's premises was carried out in January, 2000, the Notice of Proposal was dated February 1, 2001, the Applicant filed his appeal on February 14, 2001, and the Registrar filed a Notice of Further and Other Particulars dated May 17, 2001. The Registrar complied with the rules of the Tribunal, however as the hearing was scheduled for one day, and was to commence on June 6, 2001, the registrants were left with little time to prepare. The original Notice of Proposal referred only to the two charges of odometer tampering which was dealt with in the Provincial Offenses Court whereas the allegations referred to in the Notice of Further and Other Particulars dealt with the sale of three vehicles which were purchased from Impact Auto Auctions Ltd. These allegations potentially raised issues of odometer readings, the condition of the vehicles and the procedures for sale used at Impact Auto Auctions Ltd. Shortly after 4:00 p.m. on June 6, 2001 Counsel for the registrants requested an adjournment so that he could consider whether he needed to call a witness on this issue. The adjournment was granted, and the matter was

adjourned to June 25, 2001 for argument if no further evidence was to be called, and the date of July 27, 2001 was reserved if further evidence was to be called before final argument. The Tribunal would not have commenced argument on June 6, 2001 as it was too late in the day, and the matter would have been adjourned in any event. This Tribunal finds that the request for an adjournment was neither vexatious nor frivolous in view of the fact that the new and different grounds were added by the Registrar virtually at the last moment notwithstanding within the time required by the Tribunal's Rules of Practice and based on information from the inspection carried out in January, 2000. In such circumstances, the Tribunal finds that the application for costs is without merit and is refused.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar not to carry out his proposal to revoke the registration of the registrants, Shine Car Sales Inc. as a motor vehicle dealer and Mr. Omar Hassan Rahim as a salesperson provided the following conditions are complied with.

1. When Shine Car Sales Inc. purchases a vehicle for which the distance travelled or odometer reading is shown as unknown, the contract of sale from Shine Car Sales Inc. to any purchaser of that vehicle shall contain a statement that the true distance travelled is not known and the odometer reading may not be accurate.
2. When Shine Car Sales Inc. sells a motor vehicle that has an odometer which has been replaced, the registrant Shine Car Sales Inc. shall confirm that at the time of replacement the replacement odometer had the same reading as the replaced odometer and the contract of sale from Shine Car Sales Inc. to any purchaser of that vehicle shall contain a statement that the odometer has been replaced and that the true distance travelled is unknown.
3. When Shine Car Sales Inc. purchases a motor vehicle described as an insurance write off, or salvage, or a theft recovery, the contract of sale from Shine Car Sales Inc. to any purchaser of that motor vehicle shall contain a statement respecting that identical description.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice-Chair

RELEASED: July 27, 2001

FULLER and SWICK

PREHEARING

TIMOTHY FULLER AND PATRICIA SWICK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES:

TIMOTHY FULLER, representing himself and Patricia Swick
NETANUS RUTHERFORD, Counsel, and CORY BEVERDAM, warranty
representative, for the Ontario New Home Warranty
Program
JOHN JAWORSKI, Counsel, and MR. CHOO, MR. YIP and
MS. WICKI, representatives, for the Added Party,
ASHCROFT HOMES CENTRAL PARK INC.

DATE OF
PREHEARING: June 11, 2001

Ottawa
via teleconference

ORDER

A prehearing conference by teleconference was heard by this Tribunal on June 11, 2001. In attendance were representatives of the Applicants, the Program and the Added Party. There was a written consent from Patricia Swick agreeing to Timothy Fuller to represent her at this hearing.

The Tribunal explained to Mr. Fuller why Ashcroft Homes Central Park Inc. was added to the proceedings as an Added Party under the jurisdiction of the Rules of Practice of the Tribunal and the *Statutory Powers Procedure Act*.

The issues were canvassed with all the parties. Despite lengthy discussions, there was no resolution of these issues.

The Tribunal issues the following order:

1. Ashcroft Homes Central Park Inc. is an Added Party to these proceedings.
2. The hearing will commence at 1:00 p.m. on Tuesday, September 25, 2001 and continue if necessary at 9:30 a.m. on September 26 and 27, 2001. The hearing will be held at Gillespie Reporting Services at 130 Slater Street, suite 200, Ottawa, Ontario.
3. The following continue to be issues to be heard at the hearing:

Section # 1 of the Decision Letter of February 8, 2001:

1. Heating to the loft area and the 2nd bedroom – Item # 27 (items covered under warranty) in Conciliation Report # 1
2. Replacement of kitchen and bath cupboards as not being maple – Item # 32 (items covered under warranty) in Conciliation Report #1
3. Drywall repairs to the powder room – item #4, twisted post –item #3, and stair stringer – item #17 (all items covered under warranty) in Conciliation Report #1
4. Painting of repairs – item #2, item #19, item #20 (all items covered under warranty) in Conciliation Report #1; item #5 and item #6 (items covered under warranty) in Conciliation Report #2
5. Repair the patio door track – item #11 (items covered under warranty) in Conciliation Report #1
6. Replace siding with proper colour – Item #43 (items NOT covered under warranty) in Conciliation Report #1

Section #2 of the Decision Letter of February 8, 2001:

Items mentioned in the August 28, 2000 letter as follows:

- trim by front foyer door and paint it – item #5 (items NOT covered under warranty) in Conciliation Report #1
- replace tiles at fireplace/level floor – item #6 (items covered under warranty) in Conciliation Report #1
- repair livingroom floor near fireplace – item #7 (items covered under warranty) in Conciliation report #1
- baseboards by fireplace – item #8 (items covered under warranty) in Conciliation report #1
- repair crack in drywall near fireplace – item #9 (items covered under warranty) in Conciliation report #1
- nosing at junction of vinyl floor and hardwood floor – item #10 (items covered under warranty) in Conciliation report #1
- drywall joint at top of stairs – item #18 (items covered under warranty) in Conciliation report

#1

- stipple on cathedral ceiling – item #19 (see section I of decision letter)
- patch drywall in spare room – item #20 (see section I of decision letter)
- repair bathroom wall/new ceramic tiles- items # 21 & #22 (items covered under warranty) in Conciliation Report #1
- repair wall under bathroom vanity – item # 23 (items covered under warranty) in Conciliation report #1
- repair by rec room plug – item # 24 (items covered under warranty) in Conciliation report #1
- baseboard in rec room – item #25 (items covered under warranty) in Conciliation report #1
- repair concrete floor in unfinished basement – item #26 (items covered under warranty) in Conciliation report #1
- install telephone jack in kitchen – item # 33(items covered under warranty) in Conciliation report #1
- repair windowsill at basement stairwell – item # 35 (items covered under warranty) in Conciliation report #1
- straighten garage door frame – item #8(items covered under warranty) in Conciliation report #2
- repair parging at rear corner of foundation – item #10(items covered under warranty) in Conciliation report #2
- repair shingles at top section of roof – item #11(items covered under warranty) in Conciliation report #2
- repair window wells at rear of home – item #1(items covered under warranty) in Conciliation report #2
- repair toe kick below pantry - ?item # 14(items NOT covered under warranty) in Conciliation report #1
- replace finish to right of dishwasher - ?item # 10(items NOT covered under warranty) in Conciliation report #1
- replace runner to main stair – item # 16 & 17(items NOT covered under warranty) in Conciliation report #1

Section #3 of the Decision Letter of February 8, 2001:

The following items are still in dispute:

#4 – front door repair (it is item #4 of items NOT covered under warranty in the Conciliation report #1)

#29 –drain from furnace (it is item #29 of items NOT covered under warranty in the Conciliation report #1)

#44 – loft wall not as per plans (it is item #45 of items NOT covered under warranty in the Conciliation report #1)

#45 – fireplace – not correct mantel (it is item # 46 of items NOT covered under warranty in the Conciliation report #1)

#46 hydro, cable and phone boxes (it is item #47 of items NOT covered under warranty in the Conciliation report #1)

#47 obstacles obstructing property easement (it is item #48 of items NOT covered under warranty in the Conciliation report #1)

#48 delay in closing – (it is item #49 of items NOT covered under warranty in the Conciliation report #1)

#49 structural problems with basement (it is item #50 of items NOT covered under warranty in the Conciliation report #1)

#5 – shingles not overhanging front roof apex (it is item #5 of items NOT covered under warranty in the Conciliation report #2)

#9- landscaping not complete (it is item #9 of items NOT covered under warranty in the Conciliation report #2)

4. The parties were reminded of their obligations to disclose all documents to be used at the hearing at least ten days prior to the hearing date and to comply with the additional provisions respecting expert witness evidence covered under Rule 6.4 of the Rules of Practice of the Tribunal. The Applicant must disclose expert reports, curriculum vitae of the expert and conclusions of the expert who will be providing verbal testimony at least thirty days prior to the hearing. Other parties must do so at least twenty days prior to the hearing.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: July 23, 2001

373503 ONTARIO LIMITED O/A DURABLE CAR AND TRUCK SALES AND
ANGELO VELLONE

373503 ONTARIO LIMITED O/A DURABLE CAR AND TRUCK SALES AND
ANGELO VELLONE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: DAVID J. HUNT, Vice-Chair
JOHN ORT, Member

APPEARANCES: PATRICK DI MONTE, Counsel for Applicants
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: July 27, 2001 Toronto

ORDER

Following attendances on July 27, 2001 at a hearing before the Licence Appeal Tribunal of Patrick DiMonte, Counsel for 373503 Ontario Limited o/a Durable Car and Truck Sales and Angelo Vellone (the "Applicants") and A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

AND WHEREAS at the hearing on July 27, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicants and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair

John Ort, Member

Released: July 27, 2001

MID EAST MOTORS INC. AND FADI FAHMI DARWISH

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MID EAST MOTORS INC. AND FADI FAHMI DARWISH

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION AND
TO REVOKE REGISTRATION
- Proposal dated: January 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MID EAST MOTORS INC. AND FADI FAHMI DARWISH

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 6, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Tuesday, September 11, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 5, 2001

CHARLES BRAY AND DEBORAH BRAY O/A CHUCK BRAY CONSTRUCTION

ONTARIO NEW HOME WARRANTIES PLAN ACT

Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a REGISTRATION by
CHARLES BRAY AND DEBORAH BRAY O/A CHUCK BRAY CONSTRUCTION

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),

TO REFUSE TO RENEW REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

CHARLES BRAY AND DEBORAH BRAY
O/A CHUCK BRAY CONSTRUCTION

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on July 4-5, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Holiday Inn Select, Tecumseh "A" Room, 1855 Huron Church Road, Windsor, Ontario, at 9:30 a.m., on Friday, August 24, 2001.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 12, 2001

PICCININ

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
NILLO PICCININ

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

NILLO PICCININ

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

AFFINITY CUSTOM HOMES & CONTRACTING INC.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on July 16-17, 2001;

AND WHEREAS the matter was adjourned upon consent of the parties to July 30-31, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Added Party* to commence at the Holiday Inn Select, Tecumseh "A" Room, 1855 Huron Church Road, Windsor, Ontario, at 9:30 a.m., on Wednesday, October 17, 2001, and to continue October 18, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 25, 2001

THE EXIDOR CORPORATION O/A SUMMIT HOMES

THE EXIDOR CORPORATION O/A SUMMIT HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

No one appearing for the Applicant
KEN ROSENBERG, Counsel representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING:

July 23, 2001

Toronto

ORDER

WHEREAS a written Notice of Proposal dated February 23, 2001 to revoke the registration of The Exidor Corporation o/a Summit Homes (the Applicant) was issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

WHEREAS, the Applicant filed an appeal with the Tribunal, requesting a hearing;

WHEREAS, the hearing was to be heard on July 23, 2001 and to continue July 24-26, 2001 at the Tribunal's Chambers;

AND WHEREAS following attendance on July 23, 2001 at the Tribunal of Ken Rosenberg, Counsel for the Registrar and on behalf of the Applicant, Mr. Rosenberg advised the Tribunal that on consent of all parties they have concluded a settlement in terms of which the Registrar has withdrawn his Notice of Proposal;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings are terminated and this matter before this Tribunal is concluded.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair

794658 ONTARIO LTD. O/A TRAVEL MEDIA/JET-A-WAY VACATIONS

PREHEARING

794658 ONTARIO LTD. O/A TRAVEL MEDIA/JET-A-WAY VACATIONS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
TRAVEL INDUSTRY ACT

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ZEYA HAQUE, Counsel for the Applicant

TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
PRE-HEARING: June 29, 2001 Toronto

ORDER

WHEREAS, a Notice of Proposal dated March 20, 2001 was issued by the Registrar under the *Travel Industry Act* (the "Registrar"), to Revoke the registration of 794658 Ontario Ltd. o/a Travel Media/Jet-A-Way Vacations (the "Applicant");

AND WHEREAS, the Applicant has appealed the Notice of Proposal to the Tribunal;

AND WHEREAS, the prehearing conference was set down for hearing before the Tribunal, on Friday, June 29, 2001, at 9:30 a.m. at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS, when the prehearing came before the Tribunal on June 29, 2001 there was no resolution of any of the issues in this matter;

NOW THEREFORE the Tribunal makes the following Order respecting the hearing scheduled to be heard before the Tribunal:

1. The Parties to the hearing are the Applicant and the Registrar.
2. That the hearing of the matter shall commence at 9:30 a.m., on Tuesday, September 18, 2001, and thereafter, if necessary to continue September 19 and 20, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
3. That the parties shall fully comply with Rule 6.3 of the Tribunal's Rules of Practice.
4. That the Tribunal orders the parties to disclose to the other the existence of all documents and things that the party will refer to or tender as evidence at the hearing.
5. That the Tribunal further orders the parties deliver to the other at least 30 days before the hearing copies of all documents that the party will produce as evidence at the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: July 5, 2001

1270991 ONTARIO INC. O/A AREIA FINISH CONCRETE

1270991 ONTARIO INC. O/A AREIA FINISH CONCRETE

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair
JOHN ORT, Member

APPEARANCES: DOUGLAS A. FREURE, Counsel representing the Applicant
ANDREW LEWIS, Counsel representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING: July 18, 2001 Toronto

ORDER

Following attendances on July 18, 2001 at a hearing before this Tribunal of Douglas A. Freure, Counsel representing 1270991 Ontario Inc. o/a Areia Finish Concrete (the "Applicant") and Andrew Lewis, counsel representing the Registrar, Ontario New Home Warranty Program (the "Registrar");

AND WHEREAS at the hearing on July 18, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair

John Ort, Member

1004670 ONTARIO INC. O/A TURNER CONSTRUCTION

PREHEARING

1004670 ONTARIO INC. O/A TURNER CONSTRUCTION

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

DOUGLAS A. SULMAN, Q.C., Counsel for Applicant
NETANUS RUTHERFORD, Counsel for Registrar,
Ontario New Home Warranty Program

DATE OF

PRE HEARING: July 6, 2001

By teleconference

ORDER

Following attendances *by teleconference* before the Licence Appeal Tribunal (the "Tribunal") on July 6, 2001, at a prehearing of Douglas A. Sulman, Q.C., Counsel representing 1004670 Ontario Inc. o/a Turner Construction (the "Applicant"), and Netanus Rutherford, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant and the Registrar.
- 2) That there was no resolution of any of the issues between the parties.
- 3) That the parties shall fully comply with Rule 6.3 and Rule 6.4 of the Tribunal's Rules of Practice.

- 4) That the hearing of the matter shall commence as scheduled at 9:30 a.m., at the Radisson Riverfront Hotel Windsor, MacDonald Room, 333 Riverside Drive West, Windsor, Ontario, on Wednesday, August 8, 2001, and thereafter, if necessary to continue August 9, 2001.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: July 6, 2001

MACLELLAN and PAPROSKI

PREHEARING

DAMIAN MacLELLAN AND PETER PAPROSKI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR

APPEARANCES:

DAMIAN MacLELLAN AND PETER PAPROSKI, representing
themselves
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
PAUL ROTHWELL, Agent, representing the Added Party, Claridge
Homes (Somerset) Inc.

DATE OF

PREHEARING: July 5, 2001

By teleconference

ORDER

Following attendances *by teleconference* before the Licence Appeal Tribunal (the "Tribunal") on July 5, 2001, at a prehearing of Damian MacLellan and Peter Paproski, representing themselves (the "Applicants"), and Netanus Rutherford, Counsel representing Ontario New Home Warranty Program (the "Respondent"), and Paul Rothwell, Agent representing, Claridge Homes (Somerset) Inc., (the "Added Party");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicants, the Program and the Added Party.
- 2) No settlement was arrived at in regard to any or all of the issues.
- 3) That the parties shall fully comply with Rule 6.3 and Rule 6.4 of the Tribunal's Rules of Practice.

- 4) Disclosure by the Applicants and the Added Party shall be served on the Program's counsel, Mark Friedman of Burke-Robertson, Solicitors, 70 Gloucester Street, Ottawa, Ontario, K2P 0A2.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: July 5, 2001

FIACCO

LIVIO FIACCO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, VICE-CHAIR

APPEARANCES:

LIVIO FIACCO, appearing on his own behalf
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: July 20, 2001 Toronto

ORDER

Following attendances on July 20, 2001 at a hearing before the Licence Appeal Tribunal of Livio Fiacco, appearing on his own behalf (the "Applicant") and A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar"),

WHEREAS at the commencement of the hearing on July 20, 2001, counsel for the Registrar, applied for an adjournment on the basis that the Registrar needed more time to review the file, as he did not receive the Notice of Hearing indicating today's hearing date;

NOW THEREFORE this Tribunal Orders that:

1. this matter is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Thursday, November 15, 2001.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

Released: July 24, 2001

LATIPOW

PREHEARING

ALEXANDER AND BELLA LATIPOW

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED
FOR THE PURPOSES OF THE *ONTARIO NEW HOME
WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, VICE-CHAIR

APPEARANCES:

ALEXANDER AND BELLA LATIPOW, representing themselves,
(the "Applicants")
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program (the "Respondent")
FARAD MORSH, Agent, representing Symphony Square Limited
(the "Added Party")

DATE OF

PREHEARING: July 12, 2001

Toronto

ORDER

Following the attendance before the Licence Appeal Tribunal (the "Tribunal") on July 12, 2001 at a prehearing of Alexander and Bella Latipow, the Applicants, Netanus Rutherford, Counsel for the Respondent, Farad Morsh, Agent for the Symphony Square Limited, Added Party;

AND WHEREAS at the prehearing on July 12, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicants, the Program and the Added Party as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair

Released: July 16, 2001

CENTER CITY QUALITY CARS INC. AND EVELYN MAY WATLING

CENTER CITY QUALITY CARS INC. AND EVELYN MAY WATLING

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DERK ISRAEL, Vice-Chair

JOHN ORT, Member

APPEARANCES:

ROSS MacDONALD, counsel, representing the Applicants

A. MICHAEL ROTHE, counsel, representing the Registrar,
Motor Vehicle Dealers Act,

DATE OF

HEARING: July 9, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal dated April 11, 2001, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse registration of Center City Quality Cars Inc. ("Center City") as a motor vehicle dealer under the provisions of the Act and to refuse the registration of Evelyn May Watling ("Watling") as a motor vehicle salesperson under the provisions of the Act.

THE ISSUES:

The Registrar bases his proposal to refuse the registration of Center City and Watling under section 6(1) of the Act, which reads as follows:

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

The Registrar further bases his proposal to refuse registration in terms of section 5(1)(b), (c)(ii), and (d) of the Act, which read as follows:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(c) the applicant is a corporation and,

.....

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that is business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

In support of the Notice of Proposal to refuse registration of Center City and Watling the Registrar furnished particulars, which reads as follows:

PARTICULARS

The reason for this proposal are:

- 1) Center City Quality Cars Inc. applied for registration as a motor vehicle dealer on or about December 12, 2000. Evelyn May Watling is the only officer or director of Center City Quality Cars Inc.
- 2) Evelyn May Watling applied for registration as a motor vehicle salesperson on or about December 12, 2000.
- 3) On or about January 30, 2001, Evelyn May Watling signed terms and conditions of registration on behalf of the Dealer. Clauses a) and b) of these terms and conditions read as follows:
 - a. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
 - b. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer".
- 4) The application of the Dealer and the Salesperson were approved on or about January 30, 2001.
- 5) On or about February 28, 2001 a representative of the Registrar attended at the registered premises of Center City Quality Cars Inc. for the purpose of conducting an inspection. This inspection revealed that Alex Kalsatos had been left in charge of the dealership in the

absence of Evelyn May Watling and that Alex Kalsatos had acted as an unregistered salesperson on behalf of the Dealer.

- 6) On or about March 20, 2001, the registration of Center City Quality Cars Inc. and Evelyn May Watling was cancelled in accordance with Section 13(3) of Regulation 801 to the Act.
- 7) Subsequent to the February 28, 2001 inspection, further evidence was found of Alex Kalsatos acting as an unregistered salesperson on behalf of Center City Quality Cars Inc.
- 8) On or about July 22, 1999 a proposal to refuse an application by Alex Kalsatos was issued by the Registrar. Mr. Kalsatos did not appeal the proposal and the application of Alex Kalsatos was refused in accordance with Section 7 of the Act.

THE EVIDENCE:

The evidence introduced by the Registrar consisted of the testimony of Sharon Mills, John Taylor and Mary Jane South. In addition the Registrar introduced documentary evidence through the above parties.

TESTIMONY OF SHARON MILLS

Ms. Mills testified that her sister has previously dealt with Center City when she purchased a motor vehicle through Center City. Ms. Mills decided to also deal with Center City and accordingly she went to 2383 Dundas Street West, Toronto, the premises of Center City. She was shown motor vehicles that were on display at Center City's premises. The person who showed her the motor vehicles was Alex Kalsatos ("Kalsatos"). She left Center City's premises without purchasing a motor vehicle that day. The following day she telephoned Center City and spoke with Kalsatos and told him she was interested in a particular car she had viewed the previous day when she was at Center City's premises. Arrangements were then made for her to attend at Center City's premises to sign papers and to finalize the purchase transaction.

On March 8, 2001 Ms. Mills attended at Center City's premises and met with both Watling and Kalsatos. She was presented with a vehicle purchase agreement (Exhibit 4, Tab A) the top portion whereof has been completed according to the particulars she had earlier given over the telephone. The balance of the information on the vehicle purchase agreement was completed on March 8, 2001 by Kalsatos in the presence of Ms. Mills and Watling. The vehicle purchase agreement was then signed by Watling on behalf of Center City and Ms. Mills signed as purchaser. Kalsatos when completing the information on the vehicle purchase agreement wrote on that agreement "Paid & Delivered on March 8, 01 at 6:30 p.m.". Alongside these words both Ms. Mills and Kalsatos placed their initials.

No questions were put to Ms. Mills by counsel for Center City or Watling.

TESTIMONY OF JOHN TAYLOR

John Taylor ("Taylor") testified that he has been an inspector with the Ontario Motor Vehicle Industry Council ("OMVIC") since January 2001 and was a complaint's manager with OMVIC

prior thereto. His present duties as an inspector include inspections of Registrants to ensure that they are in compliance with the Act and regulations.

On February 28, 2001 Taylor in the normal course of his duties, called at the premises of Center City at 2382 Dundas Street, Toronto to ensure that Center City was in compliance with the Act and regulations. The only person then on the premises was Kalsatos with whom Taylor spoke. Taylor asked to speak with Watling and was informed by Kalsatos that she was at home. Kalsatos in the presence of Taylor telephoned Watling at her home and Taylor then spoke with her. At the request of Taylor, Watling faxed to him three bills of sale concluded by Center City (Exhibit 3, Tab 7). The purchasers in terms of those three bill of sales were Taylor, Vaz and Mare. On receipt of these three bill of sales Taylor noted that Kalsatos had signed on each of the bills as the authorized representative of Center City. Before leaving the premises of Center City, Taylor wrote out and handed to Kalsatos a notice entitled "Inspection Findings" (Exhibit 3, Tab 6) in which he pointed out that only persons registered as salespersons to Center City may "buy, sell, lease or represent vehicles" on behalf of Center City and that "Alex Kalsatos is not registered and is therefore not permitted to buy sell, lease or represent vehicles". These "findings" were handed to Kalsatos who signed acknowledging receipt thereof.

Under cross-examination by counsel for Center City and Watling, Taylor stated that Kalsatos was cooperative in that he supplied Taylor with all information that had been requested.

TESTIMONY OF MARY JANE SOUTH

Ms. South testified that she is the Deputy Registrar under the Act and that she oversees the registration under the Act of all persons who apply for registration.

Ms. South then reviewed the particulars contained in the Notice of Proposal (Exhibit 1).

She also reviewed the two applications that were completed by Watling for her registration as a salesperson and for Center City's registration as a motor vehicle dealer. Both these applications were received by OMVIC on December 12, 2000.

She also reviewed the Articles of Incorporation of Center City furnished to OMVIC by Watling in which document the latter was both the incorporator of the corporation and the first Director of Center City.

Ms. South explained that on January 30, 2001, at the request of OMVIC, Walling on behalf of Center City executed written "terms and conditions" to which its registration would be subject. The first two clauses of these executed "terms and conditions" stated as follows:

- a) The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
- b) The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is

not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.

On receipt of the executed "terms and conditions" Center City and Watling were registered as a dealer and salesperson respectively under Section 13(3) of Regulation 801 to the Act which states as follows:

13.(3) Every registration is conditional for a sixty-day period following registration pending verification of the registrant's application.

On March 20, 2001 OMVIC wrote to Center City advising that its registration had been cancelled in terms of section 13(3) of Regulation 801 to the Act as a recent inspection of Center City indicated that it has used the services of an unregistered salesperson on "all three retail sales which have been made this far" (Exhibit 3, Tab 7).

By letter dated March 27, 2001 Watling wrote to OMVIC in which she stated as follows:

Just to let you know, my husband Alex Kalsatos, has filed for bankruptcy in Jan'01. He just had a creditors meeting on Friday, March 23, 01 and representatives from Revenue Canada were at the meeting. I believe that the problems with his sales license involve Revenue Canada. From this meeting, if Revenue Canada does not dispute his bankruptcy then it is my understanding that Alex could be "discharged" by April'01. At that time, I believe he would be eligible to reapply for his "Salesperson License" from your office.

I just want to let you know that if I am fortunate enough to be allowed to continue business, I will abide by all of the rules and regulations set out by OMVIC to the best of my ability. I **do** understand that I would be the only licensed salesperson at the dealership, at this time, and therefore it is my responsibility to speak to customers regarding any vehicles they are interested in purchasing and finalizing the sale. My husband will be there in the capacity of Service Manager and will therefore deal with any problems the customers have involving service to their vehicles. He will **not** be involved in the selling of vehicles until which time as his license has been reinstated. He will also have to be there when I am out on the road or when I have to take my two-year-old daughter home for her nap. She is still nursing and therefore, at this time, I am the one who has to take her home for afternoon nap. **Please Note:** Even if I am not in the office, I can be reached by cell phone at anytime.

Ms. South stated that subsequent to execution on January 30, 2001 of the "terms and conditions", Center City entered into a bill of sale with Sharon Mills on March 8, 2001 (Exhibit 4, Tab A) and with Judith Bush (Exhibit 4, Tab B) also on March 8, 2001. Both these sales were handled by Kalsatos on behalf of Center City.

Ms. South went on to state that to her knowledge a corporation which was previously registered as a motor vehicle dealer and of which Kalsatos was the director and controlling mind had its registration revoked. That corporation had failed to comply with the *Retail Sales Tax Act* to file returns, remit tax when due and pay assessments when due. The registration of that corporation was revoked in November 1996.

Ms. South further stated that Kalsatos had applied for registration as a motor vehicle salesperson. On July 22, 1999 the Registrar had issued a proposal to refuse Kalsatos'

registration as he had failed to pay \$277,270.20 he owed under the *Retail Sales Tax Act*. This according to Ms. South constituted a failure by Kalsatos to demonstrate financial responsibility and to act with honesty and integrity in that monies collected for the Ministry of Finance had not been remitted. As Kalsatos had not exercised his right to a hearing before the Tribunal in accordance with section 7(2) of the Act, the proposal to refuse registration became final. According to the Ministry of Finance, the amount owing to that Ministry, which at June 15, 2001 stood at the sum of \$322,795.00, has not been paid by Kalsatos who filed for personal bankruptcy effective January 22, 2001.

Ms. South further testified that according to a CPIC report the dated May 7, 2001 obtained by OMVIC Kalsatos has a criminal record as follows:

<u>DATE & PLACE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
JAN 20 75 TORONTO	(1) FORGERY (3 CHGS) (2) UTTERING	(1-2) SUSP SENT & PROB FOR 1 YR
APR 22 94 TORONTO	BREACH OF INCOME TAX ACT (9 CHGS)	14 DAYS ON EACH CHG CONSEC
JUN 06 94		PAROLED
SEP 12 95 TORONTO	(1) BREACH OF INCOME TAX ACT (2) BREACH OF INCOME TAX ACT (6 CHGS)	(1) 12 DAYS INTERMITTENT (2) 12 DAYS INTERMITTENT CONSEC

Ms. South finally testified that in terms of bills of sale dated June 12, 2001, May 5, 2001 and April 20, 2001 entered into between Center City and Mabellineo Gousalves, Maria Carneiro and Peter Koufos respectively, Center City sold motor vehicles to such parties. In each instance, the sale was handled by Kalsatos who completed the bills of sale and signed same as salesperson for Center City. (Exhibit 6, 7 and 8). All three transactions were entered into after Watling in her letter of March 27, 2001 undertook not to use unregistered salespersons.

At the conclusion of the evidence of the above three persons, Watling testified on her own behalf and on behalf of Center City.

TESTIMONY OF EVELYN MAY WATLING

Ms. Watling stated that she lives with Kalsatos who is her common law spouse. They have a 2-year-old child.

She attended at Bloor Collegiate Institute and received her grade 13 diploma in the general program. She then attended the University of Toronto to pursue a three-year Bachelor of Arts degree. Due to family problems she left university and did not attain that degree. She subsequently completed two of five levels in the Certified General Accountants Program and has received the Canadian Payroll Association certification. She worked as a payroll

manager until 1998 when she left her employment to pursue a career in the second hand car business.

Ms. Watling stated that she is customarily on the premises of Center City except when doing banking or taking her daughter home for a "nap". When these events occur, she leaves Kalsatos on the premises. Kalsatos is a motor mechanic and his presence as such is needed on Center City's premises.

She remembers the Mills transaction and that she telephoned Ms. Mills to obtain her personal information to partially complete the bill of sale. When Ms. Mills returned to Center City's premises to complete the transaction, Kalsatos, in Ms. Watling's presence, completed in his handwriting the remainder of the bill of sale.

Ms. Watling confirmed that she completed both applications for registration by Center City as dealer and herself as salesperson.

She also confirmed that the letter of March 27, 2001 (Exhibit 3, Tab 9) addressed to OMVIC was written and signed by her. She further stated that she understands that Kalsatos cannot engage in the sale of motor vehicles as he is not a licenced motor vehicle salesperson and that she would not utilize his services as a salesperson if Center City's application for registration were to be granted.

Under cross-examination by counsel for the Registrar, Watling stated that the bill of sale entered into between Center City and Ms. Mills (Exhibit 4, Tab A) was partially completed by her from information she obtained over the telephone from Ms. Mills. The remainder of the bill of sale containing financial information under the headings of "Purchase Price and Payment" and "Basic vehicle and Options" was completed by Kalsatos in his hand writing and such information was entered on the bill of sale by Kalsatos on March 8, 2001 when the sale was concluded in the presence of Watling, Ms. Mills and Kalsatos.

Ms. Watling also stated under cross-examination that she completed the information on the Judith Bush bill of sale (Exhibit 4, Tab B). However, Kalsatos wrote the words "Paid by cheque # 001 delivered on March 8, 2001, at 7:30 p.m." on the face of the bill of sale and placed his initials alongside Ms. Shaw's initials next to those words. This was done by Kalsatos in the presence of Watling at the time of the conclusion of the sale transaction at which she and Ms. Bush were present.

Watling further stated under cross-examination that she faxed to OMVIC copies of the bills of sale between Center City and purchasers Takcor, Vaz and Mare dated January 15, 2001, February 10, 2001 and February 14, 2001 respectively (Exhibit 4, Tab 7, first, second and third pages). She confirmed that she was present in each instance when the bills of sale were

drawn up by Kalsatos and when the three purchasers signed and when the bills of sale were signed by Kalsatos as authorized representative of Center City.

Exhibits 6, 7 and 8 were shown to Watling by counsel for the Registrar. Watling confirmed that these three exhibits were copies of three bills of sale between Center City and Gonslaves, Carneiro and Kouros dated June 12, 2001, May 5, 2001 and April 20, 2001 respectively. Watling further confirmed that she was present when each of these bills of sale was completed by Kalsatos in Kalsatos' handwriting. She was also present when the individual purchasers signed their respective bills of sale and when Kalsatos signed each bill of sale as salesperson on behalf of Center City.

Watling further stated under cross-examination that she had completed the certification course required by OMVIC. In the certification course she studied the Act and its Regulations and therefore knows that unregistered salespersons are not permitted to be employed by motor vehicle dealers. She stated further that when executing her application for registration as a motor vehicle salesperson, she acknowledged in the application that she has completed the certification course and also acknowledged that she knew that "buying and selling" motor vehicles includes any form of negotiation concerning the purchase and sale of a vehicle and is not limited to the signing of contracts.

Finally, Watling confirmed that on January 30, 2001 she has signed "terms and conditions" (Exhibit 3, Tab 5) and that such terms and conditions contained, among others, two conditions, which state as follows:

- a. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
- b. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer".

No further persons testified for Center City and Watling.

FACTS FOUND TO BE PROVEN:

The following are the facts found by the Tribunal to have been proven, based on the oral and documentary evidence presented at the hearing.

- 1) Center City applied for registration as a motor vehicle dealer under the Act by written application dated December 12, 2000.
- 2) Watling applied for registration as a motor vehicle salesperson under the Act by written application dated December 12, 2000.
- 3) Watling is the sole Director and the controlling mind of Center City which was incorporated on November 22, 2000.
- 4) Watling on behalf of Center City signed and executed written terms and conditions dated January 30, 2001. Such terms and conditions, contained among others, the following:
 - a. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
 - b. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer".
- 5) On January 30, 2001 Center City and Watling were conditionally registered in terms of Regulation 801, Section 13(3) for a period of 60 days pending verification by the Registrar of their applications.
- 6) Center City, therein represented by Kalsatos, was at all material times an unregistered motor vehicle salesperson who represented Center City when it entered into written bills of sales with the following purchasers of motor vehicles on the dates shown hereunder:

Kackor	January 15, 2001
Vaz	February 10, 2001
Mare	February 14, 2001
Sharon Mills	March 8, 2001
Judith Bush	March 8, 2001
Koufos	April 20, 2001
Carneiro	May 5, 2001
Gonsalves	June 12, 2001
- 7) Watling was at all material times aware that Kalsatos was an unregistered salesperson and was representing Center City as a motor vehicle salesperson in connection with the above eight sales of motor vehicles.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of Center City and Watling ought to be refused based upon the activities of Center City and Watling having been carried on in contravention of the Act and Regulations and which past conduct affords reasonable grounds for belief that Watling will not carry on business in compliance with Section 5 of the Act.

The Divisional Court decision released April 7, 1983 of *Brenner*, reported in 19 CRAT 58, held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. Southey J. for the Court reviewed the authority of the Tribunal under section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar under *Brenner* at Section 5(1)(b) of the that Act. He states at page 60:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in this case Southey J. sent it back for a rehearing, however, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court reversed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry

out his proposal only if it thought the Registrar was in error in his belief.

The Tribunal's analysis of the evidence before the Tribunal and the Tribunal's conclusions pursuant to the analysis follow.

Watling in her testimony did not attempt to deny that Kalsatos was not a registered salesperson in terms of the Act. Indeed, it was clear from the evidence that she was aware that Kalsatos was not registered as a motor vehicle salesperson. This was borne out by the fact that she had successfully completed OMVIC's certification course prior to making application to OMVIC for registration and her acknowledgement that in the course of studying for the certification she had been made aware that unregistered salespersons are prohibited in terms of the Act from buying or selling motor vehicles.

In addition she had, on January 30, 2001, signed terms and conditions that specifically spelled out that unregistered salesperson were not to be retained by a motor vehicle dealership. These terms and conditions clearly stated what constituted "buying or selling" of motor vehicles. Despite Watling according to her own evidence being aware that she could not employ an unregistered salesperson in the dealership, she nevertheless employed Kalsatos, her common law husband, who she knew was not licenced to act as salesperson.

On January 30, 2001 the provisional registrations of both Watling and Center City were granted subject to the terms and conditions signed by Watling. On February 10, 2001, February 14, 2001 and March 8, 2001 four bills of sale were concluded by Center City with Naz, Mare, Mills and Bush. Each of these sales was negotiated by Kalsatos with the full knowledge of Watling. Watling, by knowingly allowing Kalsatos to act as a salesperson for Center City after signing the terms and conditions, was following a course of conduct in direct contravention of the terms and conditions she had so recently signed and in contravention of the Act which she admitted she knew and had studied in the OMVIC certification course.

To compound the course of conduct as evidenced by the above four sales, Watling continued after her letter to OMVIC of March 27, 2001 to permit her common law spouse Kalsatos to act for Center City as an unregistered salesperson in three contracts of sale with Koufos, Carneiro and Gonsalves.

Compelling and persuasive evidence exists that Watling (the controlling mind of Center City) as well as Center City have not conducted themselves in accordance with law and with integrity and honesty. This past conduct does afford the Registrar with reasonable grounds for the belief that both these parties have not conducted themselves in accordance with law and with integrity and honesty. The sales that were handled by Kalsatos were not isolated instances but rather appear to be an ongoing course of conduct and are all industry related.

Having regard to the findings of the Tribunal in regard to the above instances, the Tribunal is faced with the question of whether the past conduct of Watling is likely to result in future acts or omissions that would or could reasonably give rise to the belief that Watling and Center City will in the future not carry on business in accordance with law and with integrity and honesty. The evidence of the Registrar and the evidence of Watling herself supports the Registrar's decision that Watling and Center City will in the future not carry on business with integrity and honesty and that the Act and that its Regulations will not be adhered to.

Counsel for Watling and Center City submitted that while Watling had acted contrary to the requirements of the Act, the penalty of refusing registrations would be too harsh a sanction to impose. The Tribunal does not agree with this submission and in particular does not agree that the dissenting judgement of Holland J. in the matter of *Camp Cars Ltd. v. Registrar of Motor Vehicle Dealers and Salesman* [1993] O.J. No 578 is supportive of Counsel's contentions as the facts in that case related to odometer roll backs and not to using the services of unregistered salespersons.

Having regard to all the aforesaid reasons, this Tribunal finds no grounds to interfere with the Registrar's proposal.

ORDER:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to carry out his proposal dated April 11, 2001 to refuse the registrations of Center City as a motor vehicle dealer and Watling as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

John Ort, Member

Released: July 24, 2001

FORBECK

PREHEARING

BRAD FORBECK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS C. MACKINTOSH, VICE-CHAIR

APPEARANCES:

THOMAS W. TEAHEN, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
SHELDON L. WOOD, Counsel, representing the Added Party,
James W. Pol

DATE OF

PREHEARING: July 12, 2001

Toronto

ORDER

Following attendances before the Licence Appeal Tribunal (the "Tribunal") on July 12, 2001, at a prehearing of Thomas W. Teahen, Counsel representing Brad Forbeck (the "Applicant"), and Netanus Rutherford, Counsel representing Ontario New Home Warranty Program (the "Respondent"), and Sheldon L. Wood, Counsel representing, James W. Pol (the "Added Party");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant, the Program and the Added Party.
- 2) No other resolution was arrived at between the parties.

- 3) The parties shall fully comply with Rule 6.3 and Rule 6.4 of the Tribunal's Rules of Practice.
- 4) The hearing will commence at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, on Monday, August 20, 2001 and to continue August 21, 2001, if necessary.
- 5) Joanne Forbeck is to be added as a party pursuant to the Applicant's request on July 12, 2001 and pursuant to section 16(4) of the *Ontario New Home Warranties Plan Act*.
- 6) The Applicant is to advise the Program twenty days before the hearing whether or not he will be proceeding with items 2, 3 and 5 in the Program's decision letter dated April 9, 2001.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh,
Vice-Chair

Released: July 12, 2001

FORBECK

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
BRAD AND JO-ANN FORBECK

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

BRAD AND JO-ANN FORBECK

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

JAMES W. POL

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on August 20-21, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Added Party* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, August 29, 2001 and to continue August 30, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RICHMOND PROPERTIES INC.

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a REGISTRATION by
RICHMOND PROPERTIES INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),

TO REFUSE REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

RICHMOND PROPERTIES INC.

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on July 25, 2001 at 1:30 p.m. and a hearing on September 4 and 5, 2001, at 9:30 a.m. at the Tribunal;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Applicant* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, September 20, 2001 and adjourns the hearing to commence at the above noted address at 9:30 a.m., on Tuesday, October 16, 2001 and to continue October 17, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 12, 2001

KAAFARANI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JIHAD KAAFARANI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 20, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JIHAD KAAFARANI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 1, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Holiday Inn Select, St. Clair "A", 1855 Huron Church Road, Windsor, Ontario at 9:30 a.m., on Monday, November 26, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 31, 2001

FALBO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
JOHN FALBO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

JOHN FALBO

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing *by teleconference* in the above matter on August 2, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Respondent* to commence at 2:00 p.m., on Tuesday, August 7, 2001 *by teleconference* at the telephone numbers specified in the Notice of Prehearing.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: July 10, 2001

MARASCO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MARIA MARASCO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MARIA MARASCO

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

WILBAK HOMES INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on July 25, 2001 at 9:30 a.m. and a hearing on September 6 and 7, 2001, at 9:30 a.m. at the Tribunal;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Applicant* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Friday, September 28, 2001 and adjourns the hearing to commence at the above noted address at 9:30 a.m., on Thursday, November 29, 2001 and to continue November 30, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

SIMPLE ESCAPES INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
SIMPLE ESCAPES INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: April 19, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SIMPLE ESCAPES INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Simple Escapes Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

Released: July 16, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

SIMPLE ESCAPES INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Simple Escapes Inc. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") as a travel agent (registration number 50006738/R) since September 29, 1999 and as a travel wholesaler (registration number 50008331) since August 17, 2000. The Registrant's fiscal year end is September 30th.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of Ontario Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation") states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated August 29, 2000 the Registrant was requested by the Travel Industry Council of Ontario ("TICO") to file financial statements for the fiscal year ending September 30, 2000 by December 31, 2000.
4. On January 17, 2001, a second request was sent to the Registrant, providing the Registrant with a deadline to submit the required filing by January 31, 2001.
5. By letter dated February 5, 2001, the Registrar, *Travel Industry Act* issued a final due date of February 16, 2001 for the Registrant's September 30, 2000 financial statements, failing which the Registrant was advised that a proposal to revoke its registration would be issued.

6. By April 19, 2001, the Registrant had failed to provide its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's Registration.
7. On May 16, 2001, the Registrant filed its Notice of Appeal with the Licence Appeal Tribunal.
8. On June 15, 2001, the Registrant filed its financial statements for its fiscal year ended September 30, 2000, which were due by December 31, 2000. The statements indicated that the Registrant had adequate working capital as of September 30, 2000.

EVENTS AFTER THE ISSUANCE OF THE PROPOSAL

9. On June 11, 2001, the Registrant issued a cheque payable to TICO in the amount of \$85.98 for its contribution to the Compensation Fund, under section 47 of the Regulation. On June 18, 2001, the cheque was returned NSF.
10. On July 4, 2001, TICO conducted an inspection of the Registrant. The inspection revealed that the Registrant's general account had a negative balance of \$59,328.49, as of May 31, 2001, which suggested that the Registrant was not maintaining minimum working capital as required by section 25 of the Regulation. The inspection also revealed that as of May 31, 2001, the Registrant appeared to be maintaining proper trust accounting. In March and April, however, the trust account was overdrawn on occasion and there were disbursements drawn from the trust account that were not related to the travel services for which the funds were received.
11. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated April 19, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall replace the NSF cheque to TICO for \$85.98 by July 31, 2001;
 - (b) The Registrant shall submit interim financial statements for the nine month period ended June 30, 2001 by August 31, 2001;
 - (c) If the above-noted financial statements as submitted reveal an insufficient working capital amount, the Registrant will have 60 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending September 30, 2001, no later than December 31, 2001;
 - (e) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending September 30, 2002, no later than December 31, 2002;

(f) The Registrant shall submit a monthly trust account reconciliation to the Registrar for the months of June and July, 2001 no later than 30 days after the end of each respective month; and

(g) If the above-noted trust account reconciliations as filed according to paragraph (2)(f) are incomplete or reveal a customer deposit deficiency, the Registrant will have ten (10) days from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent to the Registrant by courier or registered mail

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (g) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.

4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of July, 2001

Ms Lisa Laudenbach
Simple Escapes Inc.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

GARCIA

MICHAEL F. GARCIA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

MICHAEL F. GARCIA, Applicant
unrepresented

DATE OF HEARING: June 29, 2001

DECISION RELEASED: July 5, 2001

Toronto

REASONS FOR DECISION

A hearing was held on June 29, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Michael G. Garcia (the "Applicant")
Motor Vehicle:	1994 Chevrolet CC1, plate 511 ZLB (the "vehicle")
Date of Appeal:	June 11, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on June 29, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The original certified documents of copies on file, from the Ministry of Transportation, were submitted by the Respondent. Documents received were filed on consent as Exhibit #1.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship, as provided in section 50.2(3)(d)?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am currently unemployed and a student at Humber College. I am an MCSE student and my course will be finished within the month. I am losing class time, and am unable to travel to exams due to the loss of my vehicle. I am usually driven by my brother (with my car). I also believe this will prevent me from finding future employment. I will be unable to pay the cost of impoundment, this is why I would like to retrieve my car as soon as possible, (to lessen the cost) my brother (who shares the car) will also lose his transportation to and from work. (subsection 3)

At the hearing the Applicant reiterated the points stated on the Notice of Appeal, emphasizing that the hardship he faces is the cost of the impoundment of the vehicle and that it might be an obstacle to his search for employment between the time his course finished and the conclusion of the impound period.

The Applicant further stated that the impoundment was causing some difficulty for his brother's ability to get to and from work.

Under questioning, the Applicant admitted that there were actually three other vehicles in the family household with current licence plates and that his family, consisting of father, mother, sister and brother were getting along and that no one has missed work or encountered an emergency situation where any family member was unable to obtain transportation due to the absence of the impounded vehicle. The Applicant pointed out that while there were three other currently plated motor vehicles, one of the three was unreliable.

The Applicant further acknowledged that even though his mother did not drive, the family has always cooperated in helping each other and that no inquiries or alternative actions had been taken to replace the impounded vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael F. Garcia;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS of Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 21, 2002.

Further, the Respondent also submitted original certified documents (entered as Exhibit numbers 3.1, 3.2 and 3.3) indicating that in addition to the Applicant's impounded motor vehicle, three other motor vehicles were registered to other members of the Applicant's household.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate

or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial hardship.

Is there no alternative to the impounded vehicle?

The Applicant testified that no inquiries had been made or steps taken to provide a replacement for the impounded motor vehicle.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O.Reg 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant did not submit any evidence to establish that he had incurred any loss of income or extra expenses which could be considered hardship.

The failure to establish that there was no alternative to the impounded vehicle and the failure to establish that the loss was immediate, significant and lasting prevents the Applicant from succeeding on the ground of exceptional hardship under the Regulation.

Further, the Applicant is one and the same as the person who was found to be driving disqualified and therefore does not meet the criteria set out in 22(3)(d)(i)(ii). The Tribunal may not consider any such loss with respect to him. This does not prevent the Applicant, subject to certain limitation in the Act, from establishing that the impoundment may result in exceptional hardship to a person other than himself.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established that the order of impoundment will result in exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: July 5, 2001

KHOULOU GEHA KAADI O/A KELLY'S AUTO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
KHOULOU GEHA KAADI O/A KELLY'S AUTO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KHOULOU GEHA KAADI O/A KELLY'S AUTO

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 31, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 a.m., on Friday, October 19, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 5, 2001

GAUTHIER

JOHN M. GAUTHIER

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the “Act”), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

JOHN M. GAUTHIER, Applicant
unrepresented

DATE OF HEARING: July 6, 2001

DECISION RELEASED: July 13, 2001 North Bay

REASONS FOR DECISION

A hearing was held on July 6, 2001, at North Bay, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	John M. Gauthier (the "Applicant")
Motor Vehicle:	1986 Chevrolet K10, plate no. WCK 799 (the "vehicle")
Date of Appeal:	June 19, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on July 6, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I need the vehicle to go to work and provide for myself and my children.

The person who borrowed the truck without my permission is at fault, because of this I have lost employment which would have earned my wages.

The documents that I have enclosed prove that what has happened proves me to be the innocent party.

Thank you for giving me the time to explain my situation.

Also would like vehicle returned to A&S Towing - 497-8565.
Truck impoundment # 1605207.

I John Gauthier would like my vehicle returned from the above company a.s.a.p.
I have already lost one weeks work as of now due to this situation.
As vehicle is needed for employment use, return a.s.ap. is imperative.

AFFIDAVIT

I Don Kingsbury of the City/Town/Municipality of North Bay make an oath or affirm and say as follows:

Donald Kingsbury removed and Borrowed my vehicle (VIN # 2GCEK14HOG1134527)
Alberta Reg. Licence Plate # WCK 799 on June 13/2001 at approx. 6:00 a.m. in the city of North Bay in the District of Nipissing without my consent or permission. I would like the return of my vehicle ASAP because I am self-employed and I have lost two days work due to this problem. I reported this to the North Bay Police Department about 10:00 AM on the same day as was stolen.

Sworn (or affirmed) before me at the City
Of North Bay this 15th day of
June 2001

"

signature of Commissioner

"

"

signature of deponent

The Applicant, Mr. Gauthier was sworn and gave the following testimony. He testified that on the evening of June 12, 2001 and the following day he and Mr. Kingsbury were drinking heavily. He was at Mr. Kingsbury's residence. According to the testimony of the Applicant, he stated that Mr. Kingsbury had awoken him to tell him that his truck had been impounded. Applicant said that he was very upset and wanted to get the vehicle back. He went to see the police and told them that the vehicle was taken without his permission yet according to the Applicant, the police would not file charges of theft against Mr. Kingsbury and he believes the reason to be that he was very intoxicated at the time.

Applicant stated that he required the vehicle for work. When questioned by the Representative for the Respondent, he stated that he did not have a registered company and that he had used Mr. Kingsbury on a few part time jobs only. He testified that he wanted to register a company but had not made up his mind as to when that may happen. He also testified that he may be returning to Alberta in the very near future and had been on a visit to Ontario for the past 2 months.

The Applicant claims that the vehicle was stolen by Mr. Kingsbury. The representative for the Respondent asked the Applicant if he believed that Mr. Kingsbury took the vehicle with the intention of permanently depriving him of the vehicle. The Applicant responded "I believe so, he took my vehicle without my permission or consent". There were not further questions for the Applicant and he was excused from the stand.

Mr. Kingsbury was called as a witness and was sworn. He gave testimony that he and Mr. Gauthier had been drinking heavily. Upon awakening decided to get coffee for himself and his boss, the Applicant. He borrowed the truck and drove to the donut shop. After purchasing two coffees, he left the donut shop He was subsequently pulled over by the North Bay Police. He was arrested for impaired driving after he provided two breath samples to police. As he was driving while under suspension the vehicle was impounded. Mr. Kingsbury was co-operative with police and was released on a promise to appear. Mr. Kingsbury returned to his apartment where he told the Applicant what had happened and what had happened to his vehicle.

After Mr. Kingsbury took the stand and presented his testimony, it became very clear that there was no intention to permanently deprive Mr. Gauthier of the use of his truck. The Tribunal asked Mr. Kingsbury who prepared the sworn affidavit which was presented in evidence. Mr. Kingsbury said that it was prepared by the Applicant. He said that he would not sign the affidavit as prepared because he claims not to have stolen the vehicle. The affidavit was altered with pen and the word "stolen" was changed to "borrowed" to which Mr. Kingsbury did sign his name.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Donald Kingsbury;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Licence Suspended under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 16, 2002.

The Respondent called to the stand Police Officer Andre Berube, Badge number 5526. The officer was sworn and gave testimony that on June 13, 2001, the driver of vehicle with Alberta plates #WCK799, was charged with impaired driving and driving while under suspension. Officer Berube testified that the driver provided samples of 209mg per 100 ml of blood and then 15 minutes later provided sample of 189mg/100ml of blood. The driver was arrested and then released on a promise to appear. The Applicant, the owner of the vehicle attempted to have the vehicle released by telling the officer that the vehicle was stolen. The officer and fellow officers who had had dealings with Mr. Gauthier did not believe the vehicle was in fact stolen. According to testimony, the Officer had informed the Applicant that he may face charges of mischief as he had placed a call to the insurance company and attempted to have the company pay for the impoundment fee as he indicated to the insurer that the vehicle was stolen. Subsequent telephone calls by the insurer to the police department led to the police closing the file.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of

- which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle that is the subject to the order was stolen at the time in respect of which the order was made as per section 50.2(3)(a)?

The evidence before the Tribunal is that Mr. Kingsbury's licence was under suspension at the time of the impoundment and that he in fact had borrowed the said vehicle with the intention of returning the property to Mr. Gauthier, the registered owner of the vehicle which was the subject of the impoundment.

The Tribunal found the evidence of Mr. Kingsbury to be forthright and credible and accepts his testimony. In contrast, the evidence of the Applicant was convoluted and fraught with missing details. The Tribunal attaches very little weight to the testimony of the Applicant.

The Tribunal after weighing all of the evidence before it, finds that the Applicant has not demonstrated that the vehicle was stolen,

The Applicant in this case has argued that the impoundment will result in exceptional hardship as described the Section 22(2). In order for his claim to be considered under Section 22(2), he must have demonstrated that all the requirements of Section 22(3) have been met. Furthermore, Section 22(4) of the Regulation sets out the criteria for demonstrating that every reasonable option has been considered and inquired into. The Applicant has not shown that he considered or inquired into alternative options.

The Applicant testified that he simply could not afford any alternative to the impounded vehicle.

With no evidence showing that every reasonable option had been considered and inquired into, the Tribunal finds that the Applicant has failed to meet the requirements of by Section 22(4) of the Regulation 632/98 and finds that the Applicant will not suffer exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: July 13, 2001

ZWIERS

WIEGERTJE ZWIERS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

WIEGERTJE ZWIERS, Applicant
unrepresented

DATE OF HEARING: July 12, 2001

DECISION RELEASED: July 19, 2001

By teleconference

REASONS FOR DECISION

A hearing was held *by teleconference* on July 12, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Wiegertje Zwiers (the “Applicant”)
Motor Vehicle:	1995 Oldsmobile, plate no. AELY718 (the “impounded vehicle”)
Date of Appeal:	June 20, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 12, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The reasoning of my appeal in regards to the impoundment of my car on June 11/01, will result in exceptional hardship as I have given my daughter Deborah Langdon the use of the vehicle for transportation back & forth to work & for emergencies.

I had no knowledge that my daughter had let her boyfriend Hugh Kirby drive the car while he was under suspension. My daughter also had no knowledge of this as well.

She also has 2 children.

I will not be able to pick up the car, as I just had surgery.

I am asking permission that my daughter can pick it up.

The Applicant is employed as an R.P.N. who works in a clinic 4 days a week. On June 6th, 2001 she underwent surgery in which her recovery period would take approximately 6 weeks. She is scheduled to see her physician on July 16th to determine whether she can return to work.

The Applicant resides with her husband in Lombardy, Ontario. The Applicant's husband is no longer employed and is collecting a pension. They currently own two vehicles, one vehicle being the impounded vehicle and the other for their personal use.

The Applicant took out a loan to purchase the impounded vehicle so that her daughter (who is a single mother of 2 children, ages 7 and 16) would have a means of transportation.

The week prior to the vehicle being impounded, the Applicant's daughter became employed at Sterling Lodge in Newborough. This place of employment was approximately 15 minutes from home. The Applicant's daughter has not been employed since the impoundment due to not having a means of transportation, and is again receiving social assistance. In her testimony, the Applicant did advise the Tribunal that her daughter would get her job back once the impounded vehicle was released.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Hugh Kirby;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 22, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every

reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d).

Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met.

Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

These criteria are cumulative. That is all of these criteria must be met before the Tribunal may consider the ground of "exceptional hardship" under section 50.2(3)(d).

The Tribunal finds this appeal to be solely based on section 22(3)(d)(i) "*the impact of the loss*

will be upon a person ordinarily transported by the motor vehicle". On the evidence, these criteria do not affect or have an impact on the Applicant, but rather on the Applicant's daughter. The Tribunal shall proceed and review sections 22(3)(a), (b) and (c):

- (a) "**no alternative to the impounded motor vehicle is available**". The Applicant testified that her daughter has not considered or has looked into taking taxis to and from Sterling Lodge. In actual fact, the Applicant has testified that she and her husband own another vehicle and this vehicle could be used by her daughter.
- (b) "**the loss will be immediate, significant and lasting**" The Applicant testified that:
 - (i) she has been off work for the past 6 weeks due to surgery and technically she has not missed any days of work or lost any wages due to his vehicle's impoundment. But since the vehicle was purchased for her daughter, her daughter chose not find a means of getting to work (i.e., taxis and/or the use of the other family vehicle);
 - (ii) there is no threat of loss of employment to the Applicant. There is also no threat of loss of employment to the Applicant's daughter since in her testimony, Sterling Lodge will re-employ her once the Applicant's vehicle is released from impound;
 - (iii) The Applicant has been unable to work due to surgery. The Applicant's daughter has chosen not to find a means of getting to work; and
 - (iii) The Applicant has not incurred a financial loss from her employment. She has suffered the financial loan repayments from her daughter due to her not being employed.
- (c) "**the impact of the loss will be upon a person ordinarily transported by the motor vehicle**". As stated above, the impact of the loss will be on the Applicant's daughter.

In considering the above requirement, the Tribunal is of the opinion that the Applicant has not investigated all reasonable alternatives to the impounded vehicle as required by section 22(4) of Regulation 574 as amended by Regulation 632/98.

There is a provision in Section 55.1(21) of the *Highway Traffic Act* to pursue compensation from the suspended driver, Hugh Kirby:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

In the Applicant's testimony, Mr. Kirby is quite remorseful for what has transpired and has indicated to the Applicant and her daughter that he will pay for the release of the impounded vehicle and related charges. The Tribunal was advised that Mr. Kirby has spoken to his employer to authorize the garnishment of his wages to cover the impoundment costs.

None of the claims presented by the Applicant have been substantiated by the evidence as being exceptional hardship. None of the losses presented in the Applicant's submissions have been proven to be immediate, significant and lasting.

After considering the above requirement, the Tribunal finds that the Applicant has an alternative to the impounded vehicle and the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: July 19, 2001

McDONALD

ALEX McDONALD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK,
 Presiding member

APPEARANCES: BRIGITTE HAMMOND,
 Representative for the Registrar of Motor Vehicles

ALEX McDONALD, Applicant
unrepresented

DATE OF HEARING: July 11, 2001

DECISION RELEASED: July 16, 2001

Oshawa

REASONS FOR DECISION

A hearing was held on July 11, 2001, at Oshawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Alex McDonald (the "Applicant")
Motor Vehicle:	1987 Ford COF, plate no. 570 4EP (the "vehicle")
Date of Appeal:	June 21, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 11, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals, which were entered into evidence as exhibit #3.

The Applicant had indicated on his Notice of Appeal (Exhibit #2) that his brother, Robert McDonald was driving the vehicle at the time of the impoundment. The Applicant stated that his brother was in possession of a valid driver's licence, and therefore the impoundment should be set aside. The documentation supplied by the Respondent indicated that it was the Applicant who was driving the vehicle at the time of the impoundment.

As the onus of proof rests with the Applicant, the Tribunal was not satisfied that the uncorroborated statement of the Applicant, as well as his documentary notation, was sufficient to meet his burden of proof. Therefore, the Tribunal finds that it was the Applicant who was driving the vehicle at the time of the impoundment.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of

the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

As I have a neurological problem (i.e. seizures) I cannot work my occupation of construction until a doctor okays it.

Without working my wife & kids will lose their home. (I am seperated and pay a big portion of their mortgage and my rent)

As I do not want to see them on the street, or in a shelter, I need my truck to make a living to provide for them.

My truck in my possession would enable my wife and kids to continue to live in the home as opposed to the street.

P.S. Will provide mortgage papers, kids birth certificates, separation papers, letter of unemployment, cost of living summary.

"Alex McDonald"

The Applicant testified that he uses the impounded vehicle as transportation for materials collected by his scrap and recycling business. The Applicant's father would normally drive the vehicle to the sites that he and the Applicant would clean up, and then to a scrap yard where the material would be unloaded for re-cycling.

At the time of the impoundment, the Applicant was at a scrap yard with his brother unloading the vehicle when they were met by police, who asked who the vehicle belonged to. The Applicant stated to the police officer that the vehicle belonged to him, and he was subsequently charged with driving while under suspension, and the vehicle was subsequently impounded.

The Applicant further testified that he is currently not able to work at his profession in the construction industry due to a medical condition. His only source of income is the scrap collections that he does with the impounded vehicle, and that his income is used to aid in the support of his ex-wife, and his children. His ex-wife currently owns and drives her own vehicle, and has an income from her dog grooming business.

The Applicant is considering renting a vehicle, however he stated that he has yet to make any inquiries as to the costs.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Alex McDonald;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 19, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner

of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or

circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and

- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider economic loss only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). In this case, the Applicant's scrap metal collection and recycling services have been affected, however the Tribunal was not satisfied that the impact of this temporary loss of this business was in fact significant and lasting as prescribed by the Act.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. The oral testimony of the Applicant was that he had not investigated renting as an alternative to the impounded vehicle, though was considering it. He stated that this alternative was likely not affordable for him, however, no supporting evidence was presented that would support that claim.

The Applicant has been able to maintain his daily activities and medical appointments through

the use of various alternatives such as public transit. Furthermore, the testimony of the Applicant was that his ex-wife currently owns and drives her own vehicle, and does not rely upon the impounded vehicle for basic transportation. The Tribunal recognizes that the Applicant has been inconvenienced by the loss of his vehicle, however no evidence was heard that would support a finding of exceptional hardship being experienced by his ex wife and his children, nor a loss that was significant or lasting, as required by the Act.

Therefore, the Tribunal finds that the Applicant has failed to meet the requirements of section 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: July 16, 2001

LATIMER

MARGARET JEAN LATIMER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

MARGARET JEAN LATIMER, Applicant
unrepresented

DATE OF HEARING: July 6, 2001

DECISION RELEASED: July 10, 2001

Kingston

REASONS FOR DECISION

A hearing was held on July 6, 2001, at Kingston, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Margaret Jean Latimer (the "Applicant")
Motor Vehicle:	1990 Plymouth Van, plate no. AJWP 526 (the "vehicle")
Date of Appeal:	June 19, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 6, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent noted that the Respondent did not receive the letter from Dr. Frank Adams, submitted by the Applicant, being entered as Exhibit # 4. At this point the Tribunal recessed for 15 minutes to afford the Respondent an opportunity to review the new evidence.

It was agreed that the hereinto before mentioned documents be filed at the hearing as evidence.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

May 16/2001

Attn: Licence Appeal Tribunal;

I'm writing this letter in regards to appeal my vehicle impoundment due to hardship and health issues. I've been unable to write before today because I've been very sick and I live in the country with 4 children age 12 and under and no vehicle. I've also had no money to pay the fee you require but finally managed to borrow it from a new friend. I've enclosed a copy of my mental diagnosis from Dr. Krishnaprasad, but I've been physically ill with fibromyalgia really bad for 4 years as well.

I really didn't know how to write a letter to you, but my R.N. and my occupational therapist helped me. I've also enclosed a copy of my functional assessment evaluation, it will better help to explain about me some more.

When Tyler Edson took my van from my yard, he was suppose to be baby sitting while I was sick upstairs in bed. I was unable to move around a lot or walk well that day. I didn't hear him put the babu to bed and leave. I had no idea he took my van and he didn't have my permission either. When Tyler called me from the Esso station after he was caught, he called me and woke me up. He told me he took the van, ran out of gas and the police towed my van.

I asked for the officer's name so I could call and find out what's going on and Tyler told me his name.

When I reached the opp station, the officer wasn't in and they said he'd call me back. By the time he called me back, Tyler was back at my house standing right beside me. Tyler is about 5'11 tall and weighs about 250 lbs. I guess I have to say he intimidated me. I wanted to tell the officer that Tyler took the van without permission, but the officer told me that Tyler had told him that I was his half-sister. I have no idea why?!?! We're not related in any way what so ever. I'm only 5'4 109 lbs myself.

I've missed several of my doctors appointments since this has happened. It takes 20 minutes-30 minutes for an ambulance to get to me if anything happened to me or my 4 children.

I'm a single mother who was wrongly taken advantage of and guess I just thought that since I have no money to pay for anything, whats the sense in me even trying?

I was just going to move back into town because I can't afford to pay \$1400.00 to get my van back, I can barely afford to pay the \$100.00 fee for appealing.

Please excuse my handwriting my muscle spasms and hand with very little fine motor skills some days.

I've also enclosed some information on both my physical and mental disability. I'm doing a lot better now than I was before thanks to my physiotherapist and psychiatrist. I'm able to confidently write to you this letter of appeal. Knowing full well that I have a legitimate grounds for hardship appeal.

I'm hoping this will be a positive decision. I really can't afford to move to town, but I really can't afford to miss my doctors appointments either.

Please reconsider the impoundment charge & fee.

Thank you
Sincerely
Jeannie Latimer

P.S. I'm sorry I didn't appeal sooner, but with the Bipolar Affective Disorder, I go from manic to severe depressive easily, and I've been so sick and scared of how can I manage without a vehicle. Thank God my friend did my grocery shopping for me to help.

P.S.S. Fibromyalgia is a widespread musculaokelta pain and fatigue disorder which means pain in muscles, ligaments, tendons, fibrosis tissue of the body. Other symptoms include: nausea, fatigue, "PAIN", sleep disorder, cognitive imparement etc.

A letter dated June 9, 1999 under the letterhead of Dr. Krishnaprasad, Psychiatrist diagnoses the Applicant as follows:

“Axis I. Chronic Post Traumatic Stress Disorder

Differential Diagnosis: Brief Reactive Psychosis

Depersonalization Disorder

Bipolar Disorder Mixed

Axis II Borderline Personality Disorder

Axis III Psychosocial stressors: Recurrent flashbacks from past traumatic incidents-Moderate

Axis IV Highest level of adaptive functioning during the pat year-poor GAF score around 50”

The Applicant provided an Internet sheet of “Quick Facts” on Fibromyalgia, and Flashbacks.

A letter dated October 3, 2000 under the letterhead of Frank, Adams, MD, FRCP, DAAPM, and a specialist in neuromedicine confirms the Applicant has “...long history of progressively increasing severe intractable pain diagnosed a fibromyalgia. Neurological accompaniment ...equally severely disabling, neurocognitive deficits ...can hardly walk ...muscles ...tense and in spasm ...developed hypokinesia, a brain neglect condition that causes objects to unexpectedly fall from her hands ...nominal dysphasia impairment of automatic word retrieval which results in word searching...

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ivan Tyler Edson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 26, 2001.

At the hearing, during examination in chief and in cross-examination, the Applicant reiterated the comments made in the letter supporting her grounds for appeal.

The Applicant confirmed that she is a single mother, on Canada Pension Disability, looking after 4 children, and that she has some health issues, which require frequent visits to physicians.

Although she drives, the Applicant testified that the assistance of her "dad" is needed to drive her around when she is too ill to drive herself.

The Applicant stated that she does own another vehicle but it is not in working condition and that she is unable to afford the rental of a vehicle or to expend \$20.00 for a one-way cab ride.

When asked if any extra expenses had been incurred due to the impoundment the Applicant replied "...not really...". As the Applicant is not currently working the only loss incurred was the cost of the impoundment.

Regarding health and safety the Applicant described an incident that had occurred a couple of

years ago and repeated the fact that although there was no emergency she did lose some medical appointments.

The Respondent called Constable Robert Angus Sinclair as a witness. Constable Sinclair testified that he has been with the Ontario Provincial Police "...for six years, one and a half in the Brockville area".

After relating the events leading up to the suspension as well as his subsequent contact with the Applicant to inform her of the impoundment, Constable Sinclair proceeded to tell the Tribunal about several other unrelated visits to the Applicant's home.

The Tribunal notes that at this point the Applicant began shouting several obscenities at the Constable. The Tribunal made several attempts to pacify the Applicant but she proceeded to leave the room. The Tribunal continued the Hearing in absentia.

The Respondent in the closing remarks contended that the Applicant had proven neither loss nor risk of health and safety. Precedents of previous decisions were submitted for the Tribunal reference.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with specific criteria the Applicant must meet to determine exceptional hardship under the Act will result from the impoundment. The onus is on the Applicant to establish the criteria is met.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. This includes the issue of whether or not Mr. Edson chose to drive the vehicle without the Applicant's consent, as well as any fees associated with the impoundment and subsequent release of the vehicle.

In considering its decision, the Tribunal has to consider several questions, which delineate the criteria and establish the merits of the evidence.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that there are alternate modes of transportation available such as a cab but she has not availed herself of this option.

As the Applicant has alternate methods of transportation available, the Tribunal may not

consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria set forth in O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant denied having incurred any financial burden, other than the cost of the impoundment.

The Applicant has accordingly not satisfied the Tribunal that she has in fact incurred any loss of income or extra expenses, which could be considered hardship.

Is the loss upon a person ordinarily transported in the motor vehicle?

There is no evidence of loss by any person or persons; therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

According to the Applicant there were no such losses.

After assessing the evidence presented, the Tribunal finds that the Applicant suffered no hardship. Accordingly, the Applicant's ground of appeal based on hardship is dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 10, 2001

VALUE VACATIONS LTD.

VALUE VACATIONS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION WITH IMMEDIATE SUSPENSION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

CHARLES A. PINNOCK, Agent representing the Applicant
TREVOR BRANION, Counsel representing the Registrar,
Travel Industry Act

DATE OF
HEARING:

July 12, 2001

Toronto

INTERIM ORDER

BACKGROUND:

This matter came for hearing before the Tribunal on July 12, 2001 to consider the appeal of Value Vacations Ltd. (the "Company" or the "Applicant") of a proposal of the Registrar, *Travel Industry Act* (the "Registrar" and the "Act"; respectively) to revoke the Registration of the Company under the Act. Charles A. Pinnock, agent for the Company requested an adjournment of the matter, and the Registrar's counsel asked for a continuation of the suspension of the Company ordered by the Registrar under section 7 of the *Travel Industry Act*. After hearing evidence respecting the continuation of the suspension, the Tribunal ordered that the matter be adjourned and that the suspension of the Company be continued.

REQUEST FOR ADJOURNMENT:

The adjournment was requested by the Applicant, Value Vacations Ltd. (the "Company"), through its president and owner Charles Pinnock. He informed the Tribunal that the Company needs six weeks to prepare and to seek legal counsel. The request was made with adequate warning to the Registrar in a letter dated July 11, 2001. The Tribunal found that the request was reasonable since the alleged infractions under the Act cover a long period of time and are complex with some 65 notations set out in the Registrar's decision letter dated June 12, 2001. In view of the complexity of the issues involved, a prehearing is required.

REQUEST FOR CONTINUATION OF THE INTERIM LICENCE SUSPENSION:

The Evidence of the Registrar, Michael Pepper

The Registrar gave sworn testimony. He indicated that this is a very serious situation not suitable for the imposition of conditions since there are so many concerns arising from contravention of the Act and Regulations over a lengthy period of time. An additional worry is that the Applicant Company had given inadequate financial information to inspectors making it impossible to impose the working capital requirements or to assess the risk of the Company's continued operation. In contrast, he noted that only a tiny proportion of Travel agents give problems, maybe 5% of the 2,5000 in the Province and of these nearly all of them are brought into compliance after negotiation with suitable conditions. This approach enables him to carry out his duty to ensure the Act is complied with in the public interest which is mainly directed at consumer protection set out in the legislation.

The Registrar gave two of examples of the Company's deficiency. Not disclosed by the Company, there is an amount of over \$57,000 owing to Sunquest Tours. Also, there is a judgement against the Company from another tour operator.

In addition there were other problems with the Company misusing credit cards, and charge-backs and by the Company wrongly purchasing travel service under an unlicensed name (Value Marketing and Promotions). In answer to a rhetorical question during cross-examination to the effect that everything was all right because the Company had made amends, the Registrar replied that correcting an abuse after the fact is not normal business practice.

The Registrar further condemned the continued use of Sunquest's services after this organization had issued both a verbal and a written stop and decess order to Value Vacations Ltd. He also took issue with the Company substituting a client's travel plans contrary to the Act, a matter referred to below in the evidence of the witness Michael Leader.

This situation, the Registrar said, falls outside his philosophy to get compliance from travel agents with compromise wherever possible. The Tribunal found that the Registrar's evidence was clear, convincing, fair and to the point.

The Evidence of Michael Leader

Michael Leader testified he purchased a vacation holiday for two from Charles Pinnock to go to the Nassau Beach Hotel in Jamaica. This did not materialize because the day before leaving he was told to go to Conquest at the Airport instead of to Sunquest. There he discovered he was booked into another hotel, the Clarion, at the opposite end of the island. This led to dissatisfaction and extra expense. Also important was the fact that he paid the \$1998 fee to the wrong unlicenced name, Value Marketing and Promotions, not to the Applicant Company. The complaint he made on returning remains unresolved.

The Evidence of Charles Pinnock

Charles Pinnock testified that he is now the sole owner of Value Vacations Ltd. (the "Company"). He worked in the travel agency business since 1980, gaining experience by managing The Last Minute Club for four years. In 1984 he set up this Company with a partner. Six years later, in 1990, a similar proposal to revoke the Company was commenced but terminated when the Company's registration expired which left nothing to revoke. Subsequently, he was charged with 20 counts of operating as an unlicensed agent but claims that he was successful on appealing this to the Supreme Court of Canada in 1991.

Respecting the evidence against his Company, he said there were mistakes made with credit cards but nothing deliberate was done with them or with the charge-backs. No one paid for a trip that they did not get although he admitted that he had switched on occasion. He claimed that the Company has not hurt consumers. He admitted there may be some \$57,000 owing to the North American Liesure Group Inc. operating as Sunquest and Alba Tours, but he is not sure of the exact amount. The debt apparently arose from the Company's share of advertisements put in newspapers.

He claimed his operation was being unfairly singled out as he had had up to eight visits a year from inspectors. As to the financial position of the company, he felt the security deposit of \$10,000 made by his Company was sufficient safeguard for the public.

With respect to the continued use of Sunquest services after the stop and decess order, Charles Pinnock claimed he was justified in doing so because Sunquest continued to send him solicitations by fax.

EXHIBITS:

The Registrar's decision letter was filed as an exhibit. In the letter he set out four reasons why the Company's registration should be revoked. Suffice it to say that the wide variety and the seriousness of non-compliances detailed in sixty five notations entirely support both the reasons given in the letter for the suspension and the evidence given by the Registrar himself.

Not mentioned in particular by the Registrar were quite a number of other concerns such as NSF cheques issued and essential money withdrawn to repay a loan.

An affidavit filed as an exhibit from the manager of accounts for Leisure Group Inc, d.b.a. Sunquest, and Alba Tours contained documents showing the amount owing by the Applicant Company is \$57,512.50. There was also a copy of a letter dated August 17 1999 directed to the Applicant Company ordering it to cease and desist use of Sunquest, followed by copies of advertisements showing that the order was ignored.

Copies of documents were also received giving the details of the witness Michael Leader's testimony dealing with the Company.

This Tribunal has no difficulty in accepting the evidence, both oral and written, submitted by the Registrar in its entirety. The evidence of Charles Pinnock, the owner of the Company, did little or nothing to mitigate the serious allegations being made. The Tribunal finds that the suspension of the Company's licence should be continued.

ORDER:

The Tribunal orders as follows:

- (1) the proceedings in this matter are adjourned peremptorily against the Applicant for a prehearing conference to commence at 9:30 a.m. on Wednesday, August 8, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
- (2) by virtue of the authority vested in it under section 7 of the Act, the time of expiration of the Registrar's Order of Interim Suspension of the registration of the Company under the Act be and the same is hereby extended until the hearing of this matter before the Tribunal is concluded.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh, Vice-Chair

RELEASED: July 27, 2001

RUNNING

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RYAN RUNNING

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RYAN RUNNING

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ryan Running, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 24, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Ryan Running
2229 Highway # 38, RR 1
Kingston, ON K0H 2X0

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Ryan Running (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant confirms that the circumstances surrounding the convictions are substantially as disclosed to the Registrar.
8. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within 60 days of the date of this Order.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past

or that may occur in the future.

Ryan Running (initials)

11. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
12. The Applicant will provide a copy of this order to his employer forthwith.
13. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of July 2001.

Ryan Running (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

KISSICK

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2

IN THE MATTER of an application by William J. Kissick to appeal the decision of the Registrar of Motor Vehicles pursuant to Section 55.1 of the *Highway Traffic Act*;

AND IN THE MATTER of

WILLIAM J. KISSICK

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an electronic hearing in the above matter was scheduled to be held on Wednesday, July 25, 2001 at the Tribunal;

AND WHEREAS a letter was filed, dated July 16, 2001, by the Applicant requesting an adjournment to provide sufficient time for him to receive a response to requests he made under the Freedom of Information and Protection of Privacy Act;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard at 9:30 a.m., on Thursday, September 20, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue W., 12th Floor, Toronto, Ontario,

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

JURGENS

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1504060 OWNED BY: Edward (Ted) Jurgens of: 2586 Robin Drive, Mississauga, Ontario L5K 2H9 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: July 1, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

EDWARD (TED) JURGENS

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Edward (Ted) Jurgens, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair

RELEASED: *July 13, 2001*

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Edward (Ted) Jurgens

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #1504060** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on July 1, 2001.
2. The applicant, **Edward (Ted) Jurgens**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating that **the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received information from the police, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

Edward (Ted) Jurgens

Kim Grosskurth

(signature of Applicant)

(signature of Registrar)

(date)

(date)

CENTENNIAL CONSTRUCTION AND CONTRACTING (NIAGARA) INC.

CENTENNIAL CONSTRUCTION AND CONTRACTING (NIAGARA) INC.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

CENTENNIAL CONSTRUCTION AND CONTRACTING
(NIAGARA) INC., Applicant

DARREN PETERS, Agent for Applicant

DATE OF HEARING: July 24, 2001

DECISION RELEASED: July 31, 2001

Hamilton

REASONS FOR DECISION

A hearing was held on July 24, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Centennial Construction and Contracting (Niagara) Inc. (the "Applicant")
Motor Vehicle:	1988 Ford CTV-Cube Van, plate # 127 4EB (the "vehicle")
Date of Appeal:	July 6, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on July 24, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To Whom It May Concern:

Brad Hitchcock who was the driver of the impounded company vehicle was hired with Centennial Construction and Contracting (Niagara) Inc. as a general labourer. He was not under any circumstances authorized to drive any company vehicles. Brad Hitchcock took it upon himself over the long weekend to take the keys to a company vehicle and proceeded to use it. Another employee of the company reported the situation to Darren Peters (company supervisor) who proceeded to contact the local police. The local police did not know the location of this vehicle. The supervisor proceeded to call the OPP who stated that this vehicle had been impounded. Centennial Construction and Contracting (Niagara) Inc. is treating this vehicle as stolen. Should you have any questions please contact the undersigned.

Best Regards,
"

Domenic DiLalla
Owner/President
Centennial Construction & Contracting (Niagara) Inc.

The Hearing was attended by Mr. Darren Peters who identified himself as being an employee of Centennial Construction & Contracting (Niagara) Inc. and also Brad Hitchcock's supervisor.

Mr. Peters advised that he was appearing as a witness on behalf of the Applicant as he (Peters) was the one with direct knowledge of the events pertaining to Mr. Hitchcock's use of the impounded vehicle. The witness then provided the following background points:

1. Brad Hitchcock had only recently been hired by the company and that Mr. Peters was the direct supervisor;
2. Mr. Peters knew that Mr. Hitchcock had just won custody of his son, had stopped drinking and was starting a new life;
3. Mr. Peters stated that on the Friday before the impoundment, Mr. Hitchcock had asked to use the company's van for a personal move;
4. Mr. Peters felt there was nothing wrong with this, he wanted to be helpful and he gave Mr. Hitchcock permission to use the van on the understanding that it was for a personal move in the area and it was expected that the van would be returned before the end of

the weekend;

5. Mr. Peters confirmed that he only learned about the impoundment on Sunday after his boss called and asked for the missing van;
6. Mr. Peters said he called the OPP and subsequently learned about the impoundment;
7. Mr. Peters confirmed he only reported the van missing as he did not want to place a theft charge against his employee;
8. Mr. Peters said that he was probably naïve in giving the employee permission to use the van because while all new employees are supposed to supply driver's licence information, Mr. Hitchcock had not done so and had Mr. Peters known about his employee's licence record, he would not have allowed him use of the van.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Bradley Hitchcock;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 29, 2001.

The Respondent indicated that in addition to the submitted documents, there were several questions which were of interest. In summary these were:

1. Did Mr. Peters personally give vehicle keys to his employee?
 - 1.1 Mr. Peters replied he did not.
2. Did Mr. Peters believe it was his employee's intention to not return the vehicle?
 - 2.1 Mr. Peters said that he did not know what his employee's plan was and he did not know what Mr. Hitchcock was doing in Mississauga and on his way to Cobourg, which the witness thought was too far from where his employee was supposed to be.
3. Did Mr. Peters give consent to use the vehicle?

3.1 Mr. Peters replied that he had given permission.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transportation of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The Applicant's appeal is based on the vehicle having been stolen. The evidence clearly establishes that the driver received his supervisor's permission to use the vehicle. In addition, there was no evidence to indicate that there was any "intent to deprive the owner of the benefit of ownership (or possession) permanently."

On the evidence, the Tribunal finds no evidence to prove that the Applicant's vehicle had been stolen at the time of impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: July 31, 2001

SALMON

CARL ANTHONY SALMON

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NORMAN MEALING,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

CARL ANTHONY SALMON, Applicant
unrepresented

DATE OF HEARING: July 26, 2001

DECISION RELEASED: July 30, 2001

Toronto

REASONS FOR DECISION

A hearing was held on July 26, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Carl Anthony Salmon (the "Applicant")
Motor Vehicle:	1988 Honda Accord, plate no, AKNT 688 (the "vehicle")
Date of Appeal:	July 9, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act. In addition, during the course of the hearing, the owner broadened the appeal to include the claim that the vehicle had been stolen [Section 50.2(3)(a) of the Act].

This matter came before this Tribunal on July 26, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal. In addition, during the course of the hearing, the Applicant amended his appeal to include the claim that his vehicle had been stolen.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship, or that the vehicle had been stolen?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The impoundment of my car is costing me time off my job and money I cannot afford, which now I am experiencing hardship.

- (1) Thursday 5th July 01 gave my car to employee of Gold Star Auto Repair at 1798 Dundas West Toronto for body work and paint job to be finished for pick up on Friday 6th of July.
- (2) Friday 6th/01 at 12 noon went to pick up my car and was told by owner work was been done on the car but they did not know where my car was because the person that performed the work on the car did not show up for work.
- (3) They made some phone calls trying to locate the employee who did not show for work and after words told me my car was in the pound for 45 days without any reason.
- (4) Friday July 6th/01 at 1pm I proceed to the near Police Station to report the matter, at that time I was given more information has to what happen.

My position at this time, is I am no guilty of any wrong doing of any kind and as an innocent citizen will ask for the release of my car. I will attempt to obtain a copy of the police report to support my grounds along with a oral appeal.

The Applicant reiterated his written statement in his oral testimony. He also indicated that, since his vehicle had been impounded, he had to refuse work offered by his employer, the Liquor Control Board of Ontario, due to the difficulty in arranging transportation to and from the workplace, and he estimated that he had lost about twenty hours of employment since July 6, 2001, a substantial number given his casual employee status.

He also indicated that the medication that he needed for treatment of hypertension was in his vehicle, and that he had been unable to retrieve it. He also explained that he had been unable to attend the gym in order to exercise, a part of the treatment regimen to deal with his medical condition. He concluded his testimony by saying that "he was taking the TTC as best as I can".

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Ishwar N. Singh;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 29, 2003.

The Respondent questioned the Applicant at length about his attempts to secure alternative transportation. She pointed out that Ministry of Transportation records indicated that he owned a second vehicle. In reply, the Applicant indicated that he had sold this car to "the wreckers" prior to acquiring the impounded vehicle. The Respondent questioned the Applicant on the use of the TTC as an alternative, and, in replying to this line of questioning, the Applicant indicated that, as a casual employee of the LCBO, he was subject to being called to work on very short notice, and could be, and had been, assigned to work on a variety of locations both within and outside the city, and that these two facts made exclusive reliance on the TTC impractical. The Respondent also questioned the Applicant with respect to car rentals, and support from family and friends to which the Applicant indicated that he could not afford the former, and that he had no family or friends that he could call on. Finally, in response to a question concerning whether or not he had approached the garage in question for assistance, the Applicant indicated that he had, and that he had been refused both financial support, and a "loaner".

The Tribunal then questioned the Applicant with respect to two areas, namely, had the Applicant given the garage owner or his staff permission to drive his vehicle, and had he considered having the individual who took his vehicle charged with theft. In response to the first query, the Applicant indicated that he had given no one permission to drive his vehicle, and, in response to the second query, the Applicant indicated that he had been advised by the police that a theft charge was not warranted but that a charge related to using a vehicle without the owner's permission would be laid. At this point, the Tribunal asked the Applicant if he wanted to broaden his appeal to include reference to the vehicle being stolen, and adjourned the hearing to allow the Applicant to consider this option.

When the hearing resumed, the Applicant advised that he wished the appeal to include reference to his vehicle having been stolen. There was no objection raised by the Respondent.

The Applicant provided no additional testimony, but the Respondent placed in evidence correspondence from the police which made no reference to any charges being laid relative to the unauthorized use of the vehicle in question. The respondent concluded by referring to an earlier Tribunal ruling in a similar case Thomas Bruce Murison vs. the Registrar of Motor Vehicles, where the decision to impound was confirmed.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in

subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a) and 50.2(3)(d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner

of the rights and benefits of ownership, and converts the vehicle to his own use. United States v. Turley, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;

- (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has filed his appeal under Sections 50.2(3)(a) and 50.2(3)(d) of the *Highway Traffic Act*.

Section 50.2.(3)(a) states that the order to impound may be set aside if the "motor vehicle that is subject to the order was stolen at the time in respect of which the order was made". In this particular case, no charges of theft have apparently been laid against the driver, although the Applicant has been given verbal indications that a lesser charge involving the unauthorized use of a motor vehicle would be laid. The circumstances surrounding that unauthorized use are that permission was not been given by the Applicant to the garage to drive the vehicle. The vehicle was in the garage for body work and a paint job and there is no implication in such work that the vehicle would require a test drive. There is no evidence that the vehicle was impounded while on its way back to Gold Star Auto Repair which could imply that the taking was temporary only. The incident which resulted in the impoundment occurred at 8:48 p.m. in the evening of July 5, 2001. The garage owner simply knew that the employee who performed work on the car did not show up for work and did not know the whereabouts of either the vehicle or his employee [the driver] at noon on July 6, 2001. The Applicant would be justified in considering that his vehicle had been stolen when the incident occurred leading to the impoundment. In these unique circumstances, the evidence favours the conclusion that the taking of the vehicle was to permanently keep it from the Applicant and, therefore, the vehicle

was stolen at the time of its impoundment.

Section 50.2(3)(d) states that the order to impound may be set aside if "the order will result in exceptional hardship". Regulation 632/98 further describes exceptional hardship in terms of health [22.1(a)], available alternatives [22.3(a)], losses [22.3(b)], and impact on a person other than the driver [22.3(d)(l)]. In this particular case, the Applicant has demonstrated that treatment of his hypertension has been prejudiced, that no alternative exists which reasonably meets of his transportation needs, that he has experienced immediate economic loss through lost employment opportunities and that the loss is significant given the particular nature of his employment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: July 30, 2001

HEANEY

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SEAN HEANEY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 6, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SEAN HEANEY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Sean Heaney, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 24, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Ryan Running
2229 Highway # 38, RR 1
Kingston, ON K0H 2X0

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Ryan Running (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
5. The Applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant confirms that the circumstances surrounding the convictions are substantially as disclosed to the Registrar.
8. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within 60 days of the date of this Order.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the

past or that may occur in the future.

Ryan Running (initials)

11. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
12. The Applicant will provide a copy of this order to his employer forthwith.
13. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of July 2001.

Ryan Running (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

MURDOCH GROUP INC.

**HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by Murdoch
Group Inc. to appeal the decision of the Registrar
of Motor Vehicles pursuant to Section 55.1 of the
Highway Traffic Act;

AND IN THE MATTER of

MURDOCH GROUP INC.

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an electronic hearing in the above matter was scheduled to be held on Tuesday,
August 7, 2001 at the Tribunal;

AND WHEREAS a letter was filed, dated July 30, 2001, by the Applicant requesting an
adjournment as he will be out of town on August 7, 2001;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard by teleconference at 9:30 a.m., on Wednesday,
August 8, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue W., 12th Floor, Toronto,
Ontario,

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place,
the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

EASTERBROOK

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JUSTIN EASTERBROOK

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 9, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JUSTIN EASTERBROOK

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Justin Easterbrook, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 31, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Justin Easterbrook
397 Manly Drive
Belleville, ON K8N 4Z4

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Justin Easterbrook (hereinafter referred to as "the Applicant") and in accordance with section 4.1 of the Statutory Power Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
3. The Applicant agrees to complete the OMVIC certification course within 60 days of the date of this order.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
5. The applicant shall not be an officer, director, owner or partner in a dealership.
6. The Applicant will not be the final signatory on any bills of sale.
7. All sales completed by Justin Easterbrook will be supervised and signed by an authorized representative of the dealership.
8. The Applicant agrees that he will make full written disclosure of all material facts with respect to any motor vehicles he sells, whether sale is retail or wholesale.
9. The Applicant agrees that he is under a positive obligation to disclose in writing, all material facts about the vehicles he sells to customers, including other dealers. Material facts include, but are not limited to, salvage, previous salvage, rebuilt, accidented and repaired, theft recovery, previous taxi cab, previous police car, unibody damage, previous daily rental, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.

10. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
11. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
12. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
13. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
14. The Applicant will provide a copy of this order to his employer forthwith.
15. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
16. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
17. These Terms and Conditions shall remain in place for 2 years from the date of the order.
18. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this day of _____, 2001.

Justin Easterbrook

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

643-NoShow

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF
HEARING: July 17, 2001

Windsor

DECISION

A hearing was held on July 17, 2001, at Windsor, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 18, 2001

643-NoShow

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF
HEARING: July 17, 2001

DECISION
RELEASED: July 18, 2001

Windsor

REASONS FOR DECISION

A hearing was held on July 17, 2001, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on July 18, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated June 12, 2001, and was received by the Tribunal on June 18, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

The Applicant failed to appear. A thirty-minute grace period was granted during which the Applicant's home in Michigan was called. There was no answer and no answering machine.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal Form received at the Tribunal June 18, 2001.

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation Submissions received at the Tribunal July 11, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence

under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant’s Driver’s Licence was suspended “May 26th 2001” as per Notice of Appeal (Exhibit # 1)

Applicant’s Evidence:

Page 2 of the Notice of Appeal was prepared by the Applicant’s physician of 5 years, Physician # 1.

Under the heading “Details and Diagnosis” Physician # 1 writes: “*Due to patient’s significant pulmonary disease, the effort that the patient gave you, was the best he could do ... enclosed pulmonary function study*”.

Physician # 1 describes the Applicant’s history as follows: “...*has chronic congestive heart failure which further increases his overall weakness*”.

As for the heading “ Relevant details of last visit: Physician # 1 confirms, “ 6/8/01 - *pt was in congestive heart failure and lost 13 1/3 lbs. of fluid, from his pulmonary fluid overload.*”

By letter dated June 8, 2001, attaching the Pulmonary Function Study results, Physician # 1 confirms the Applicant's condition *"...presently being treated for Chronic Obstructive Pulmonary Disease and Congestive Heart Failure"*, and opines that *"...Either one of these conditions, would make it difficult at best, to perform a breath sample..."*

The Respondent provided the following Documents:

1. Medical opinion on the Applicant prepared by Physician # 2, dated July 4, 2001.
2. Notice to the Registrar, certified June 22, 2001.
3. Ministry of Transportation's Suspension Record of the Applicant, certified June 21, 2001.

The Respondent's evidence further contains a letter from a specialist in respiratory medicine. Physician # 2, FRCP (C) a consultant in respiratory medicine with Rosedale medical Centre, in a letter dated July 4, 2001, qualifies that she has been in practice since 1982, and that she has *"...extensive experience in the management of chronic respiratory illness such as obstructive lung disease and asthma."* Physician # 2 goes on to describe her qualifications: *"...lengthy experience with performance and interpretation of pulmonary function tests ...Assistant Professor at the University of Toronto...know the background evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest...aware of breath sampling criteria required to provide acceptable information using the above instrumentation."*

After reviewing the evidence before her, Physician # 2 notes that there is no report from a cardiologist and no indication of the medication taken by the Applicant. Physician # 2 concludes that in expert opinion *"...Although the spirometry which is provided is consistent with moderately severe COPD the flow rate that this individual is able to generate which is consistent with 41% FEV1 for his predicted height and age is not incompatible with the ability to give a breath sample ...failure to provide a sample is inadequate effort ...a breathalyzer is an effort dependent test and is not only dependent on underlying heart or lung disease."*

The Respondent called the officer involved in the incident as witnesses.

Windsor Police Services Police Officer # 1 testified that he is a qualified Intoxilyzer Technician and detailed the events leading up to and surrounding the breathalyzer test session.

Police Officer # 1 confirmed that the Applicant after being read his rights and receiving instructions on how to blow into the machine, the Applicant was given four opportunities to provide a breath sample. The Applicant appeared to be blowing. He *"...puffed his cheeks and turned red..."* But no audible sound was heard from the machine denoting that air was not going in. After his third attempt the Applicant informed the Constable that he suffered from asthma as needed to use his "puffer".

At no time did Police Officer # 1 observe the Applicant being afflicted with respiratory or any other physical difficulty, nor did the Applicant request medical assistance.

In closing, the Respondent asked that the Tribunal confirm the decision of the Registrar based on the evidence presented.

The Respondent reiterated the Constable's evidence, emphasizing that the Applicant did not demonstrate visible signs of breathing difficulties, and quoted passages from the text of Physician # 2's report. The Respondent, further, pointed out that the Applicant did not request medical assistance nor see his physician until two weeks after the incident.

APPLICATION OF THE LAW TO FACTS:

As the Applicant failed to appear the hearing was held in absentia.

At issue is, how does the medical condition of the Applicant relate to Section 50.1(2)(b) of the *Highway Traffic Act*, and did this medical reason cause him to fail or not comply with the breath demand. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

It is unfortunate that the Applicant did not appear to state his case before the Tribunal. The Tribunal has a medical report from the Applicant's physician confirming that the Applicant suffers from "*Chronic Obstructive Pulmonary Disease and Congestive Heart Failure*". In Physician # 1's opinion "...*Either one of these conditions, would make it difficult at best, to perform a breath sample...*" This evidence is refuted by Physician # 2 who contends that "...*Although the spirometry ...is consistent with moderately severe COPD the flow rate that this individual is able to generate ...is not incompatible with the ability to give a breath sample...*"

As Physician # 2 is a respiratologist with 20 years experience and with extensive "...*background evaluation of instrumentation such as Intoxilyzer 5000 cc...*" the Tribunal must give more weight to Physician # 2's considered judgement.

The Tribunal notes that according to Police Officer # 1 the Applicant did inform him that he suffered from asthma and needed to use an inhaler. Nonetheless, the Tribunal refers to Physician # 2's report wherein she clarifies that "...*a breathalyzer is an effort dependent test and is not only dependent on underlying heart or lung disease.*" Physician #2 concludes that the Applicant's inability to provide a breath sample was due to "...*inadequate effort...*" The Tribunal concurs.

The Tribunal's position is further substantiated by the fact the Police Officer # 1, attested that the Applicant showed no visible signs of respiratory or any other physical afflictions.

According to Police Officer # 1's testimony, the Applicant's behaviour during the breathalyzer session, i.e. puffing his cheeks but not blowing into the machine, is consistent with someone avoiding to provide a breath sample.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated May 26, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: July 24, 2001

664-ALCL

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant

Counsel for Applicant

DATE OF
HEARING: July 16, 2001

Ottawa

DECISION

A hearing was held on July 16, 2001, at Ottawa, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: July 18, 2001

664-ALCL

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant

Counsel for Applicant

DATE OF
HEARING: July 16, 2001

DECISION
RELEASED: July 18, 2001

Ottawa

REASONS FOR DECISION

A hearing was held on July 16, 2001, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on July 18, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated June 22, 2001, and was received by the Tribunal on June 27, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant's counsel requested that the Tribunal disallow the statement of Police Officer # 3 which was sent by fax and received by the Applicant's solicitor on Friday, July 13, 2001. The Tribunal ruled that the faxed transmission was not going to be allowed into evidence. This was not contested by the Respondent.

The representative for the Respondent presented the true and certified copies of the Notice to Registrar, a vehicle search and driver's search, which were added to the Respondents' prior submissions. There were no other preliminary matters, and with the consent of both parties the documents submitted were entered into evidence and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal received by the Tribunal on June 27, 2001.

By the Respondent:

- a) Exhibit # 2 MTO submissions 23 pages into total received July 11, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and gave the following testimony.

The Applicant testified that she had difficulty breathing and could not provide a breath sample. She was also under the care of Physician # 1. Her major complaints were that she had emphysema (a chronic lung condition) which was aggravated by allergies and car exhaust. She stated that she was exposed to the car exhaust while waiting at the side of the road for the police which she claims caused her to have increased difficulty in breathing. The Applicant testified that the police officers refused to allow her to use her inhaler.

The Applicant was taken to the Police station where she attempted to provide a sample of her breath. The Applicant stated that she attempted to provide a suitable sample on four separate occasions, but was unsuccessful. The Applicant stated she asked for her "puffer" but was initially denied the use of it, however she was eventually allowed to use it. The Applicant also testified that she suffers from "Thrush", which is a yeast infection in her throat. The medication used to treat this has as part of its composition an alcohol base. The Applicant believes that this was the "odour of alcohol" which the police claim that they had smelled on her breath.

The Applicant further testified that, she told police that she wanted to see a doctor in order to take a blood sample which would prove that she was not impaired.

The Applicant asked for her medication for her headache and was allowed to take her medication.

When asked how long she had been with her present physician, the Applicant responded, since January 2001. The Applicant indicated that Physician # 1 is a General Practitioner and not a specialist. Prior to this, she was under the care of a lung specialist. She was last seen by the lung specialist in 1983. She has had two pneumothorax and eventually underwent surgery. Physician # 1 had taken x-rays in January 2001 which confirmed the presence of her disease. (Exhibit 1). The Applicant admitted that she still smokes, "mainly due to stress".

The Applicant also admitted that she had consumed alcohol, "3 beers". The counsel for the Applicant had presented a medical report dated May 2, 2001 written by Physician # 1. Counsel for Applicant indicates that Physician # 1 is of the opinion that the Applicant "Because of her emphysema, she will have difficulty in performing a breathalyzer test which will be suboptimal because of her underlying medical condition. In such circumstances, it is often better to perform a blood alcohol level rather than do a breathalyzer test to see if someone is impaired."

The Applicant further testified that her lungs were sore, she was co-operative with the Police and that she attempted to provide the sample that was requested of her. The Applicant did state that on one attempt, a sample was obtained and she believed that it was an acceptable sample however the police were not satisfied that it was suitable.

The Representative for the Respondent called Police Officer # 1 to the stand. The officer was sworn and gave the following testimony.

On April 30, 2001 at approximately 5:30 p.m., Police Officer # 1 received a call to a single vehicle accident on the Queensway at St. Laurent. When he arrived on the scene at approximately 5:30 p.m., he saw a blue escort nose first into the guard rail and two females outside of the vehicle. The driver, identified as the Applicant, approached Police Officer # 1 and said "I got cut off by a fucking goof in a burgundy intrepid" Police Officer # 1 testified that he detected the odour of an alcoholic beverage on her breath. The second female at the scene was identified as a witness to the accident. Police Officer # 1 asked the Applicant to get into the rear seat of his police cruiser. The Applicant, according to Police Officer # 1's testimony became very angry, yelling and screaming and refused to get into the back of his cruiser. The Applicant finished her cigarette and then got into the cruiser. Police Officer # 1 stated that the Applicant tried to keep the door of the cruiser open. The Applicant told that she was being followed by two men. Police Officer # 1 asked the Applicant if she had consumed any alcohol? The Applicant replied, "I had three beers today." Police Officer # 1 testified that

he formed the opinion that the driver, was impaired by alcohol and he was going to transport her back to the detachment in order to have a breath technician gather a breath sample from the driver.

Police Officer # 1 arrived at the detachment at approximately 6:25 p.m. The Applicant was turned over to Police Officer # 2 at approximately 6:47 p.m. Police Officer # 1 testified that he did not observe the Applicant to be in any medical distress. Counsel for Applicant asked Police Officer # 1 if he recalled seeking the Applicant's eyes and if they were bloodshot? Police Officer # 1 replied, "no, she was wearing sunglasses."

The Representative for the Respondent called Police Officer # 2 to the stand. Police Officer # 2 was sworn and gave the following testimony. Police Officer # 2 testified that he took custody of the Applicant.

Police Officer # 2 testified that at that time, he detected the odour of an alcoholic beverage on her breath. The Applicant was read the breath demand. The Applicant stated that she understood what was required of her. She was also allowed to speak to counsel for Applicant. The Applicant was given numerous opportunities to provide a suitable sample. The Applicant on her first attempt, created a tight seal around the mouthpiece yet there was no air entering the instrument. The next sample provided the Applicant registered 91mg to 103mg per 100ml of blood which in the opinion of Police Officer # 2 was not a suitable sample and not acceptable. The next sample that the Applicant provided produced a reading of 95 to 112 mg/100ml of blood. The other attempts failed because the Applicant either puffed out her cheeks and blew no air into the instrument or not a sufficient pressure of air entering the instrument to obtain a proper reading. According to Police Officer # 2, during his dealings with the Applicant, he observed her to have excessive mood swings as well as behaviour ranging from co-operative to combative. During the final attempt to get a suitable sample, the Applicant pulled on the instrument mouthpiece causing the machine to move off of the table. Police Officer # 2 caught the machine, and forcibly removed the Applicant from the breath room and placed her in a cell. Police Officer # 2 had no further dealings with the Applicant.

The Tribunal accepts the evidence of Police Officer # 1 and 2. Neither Police Officer # 1 and 2 are trained medical personnel but have taken first aid and are trained observers. Neither of these officers observed the Applicant to have any shortness of breath or difficulty breathing which would have required them to seek out medical attention for the Applicant.

Counsel for Applicant submitted that the Applicant had provided enough medical evidence to meet the onus required of the Applicant. In the report from it was Counsel for Applicant contention that Physician # 1's opinion with respect to the Applicant's chronic lung condition

was all that was required to support his position that the Applicant would not be able to provide a suitable sample of breath. In his report, Physician # 1 states “because of her emphysema, she **will have difficulty** in performing a breathalyser test which will be suboptimal because of her underlying medical condition.”

The Tribunal finds that the medical documentation provided by the Applicant does not support the conclusion that the Applicant's condition would preclude her from providing a suitable sample. It goes not further than stating that she “will have difficulty”.

The report of Physician # 1, the Applicant's medical practitioner, fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act*. Given the diagnosis of Chronic Obstructive Pulmonary Disease, Physician # 1 confirms the diagnosis by radiological examination as indicated in the report dated January 9, 2001. The opinion of this report is “COPD. No acute pulmonary disease.” Physician # 1's report has not provided a documented history from the lung specialist who cared for the Applicant. Physician # 1 did not see the patient until May 16, 2001 for follow up for injuries sustained in a motor vehicle accident. Physician # 1's report does not provide any pathology tests, i.e. PFT to corroborate his medical opinion. Physician # 1 stated “the Applicant is a new patient in Jan '01 and I have never performed pulmonary function testing. My only diagnostic test is the chest x-ray report.”

Of greatest importance to the Tribunal, Physician # 1 has not indicated how the Applicant's condition would prevent her from providing a suitable sample.

In an appeal of this nature, the onus is on the Applicant to substantiate her position. The documents submitted by the Applicant do not substantiate her claim to the effect that she has a medical condition which precluded her from providing a breath or blood sample.

In addition to the report, the Tribunal has before it the evidence of the Applicant, Police Officers # 1 and 2. That evidence does not support the Applicant's position that a medical condition prevented the Applicant from providing a breath sample.

APPLICATION OF THE LAW TO FACTS:

Reviewing the foregoing facts, the Applicant did not relate her medical condition to Regulation 574 and Section 50 (1)(2)(b) of the Act.

The evidence establishes that the Applicant refused to provide a suitable sample for no established medical reason. The evidence submitted suggests the action of the Applicant were such as to lead this Tribunal to believe that she had no intention of giving a proper breath sample. In testimony provided by Police Officer # 2, the Applicant repeatedly puffed out her

cheeks without allowing air to enter the machine. The Tribunal concludes from the evidence that these are the actions to prevent a suitable sample from being retrieved and not the actions of someone having difficulty providing a sample because of a medical condition. The Applicant indicated that she required her "puffer" to help her breath. Her own testimony indicated that she did use the puffer twice within a 1 hour period. Once released, the Applicant did not then seek medical attention for a breathing problem, and was not seen by Physician # 1 until May 16, 2001.

The Applicant has not discharged the onus under section 50.1 of the HTA to establish a medical reason for her failure to provide and her refusal to comply with a demand made under Section 254 of the Criminal code (Canada) to provide a sample of breath.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 30, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: July 25, 2001

OTTAWA DRIVEAWAY LTD. AND RAYMOND BARRETTE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATIONS of
OTTAWA DRIVEAWAY LTD. AND RAYMOND BARRETTE
as a motor vehicle dealer and salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

OTTAWA DRIVEAWAY LTD. AND RAYMOND BARRETTE

Applicants

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), Ottawa Driveaway Ltd. and Raymond Barrette (the "Applicants") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, dated June 5, 2001 in terms of which the Registrar proposed to revoke registrations of the Applicants as a motor vehicle dealer and salesperson;

AND WHEREAS, the Applicants have failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicants have not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicants pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicants' request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal dated June 5, 2001 to revoke the registrations of Ottawa Driveaway Ltd. and Raymond Barrette.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: July 23, 2001

CAMERON

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, Chapter 0.31

IN THE MATTER OF a CLAIM by
CRAIG CAMERON

AND IN THE MATTER OF the DECISION of the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 16(1) of the Act

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

CRAIG CAMERON

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), Craig Cameron (the "Applicant") initiated an appeal under section 16(2) of the *Ontario New Home Warranties Plan Act* from a Decision Letter issued by the Program dated May 9, 2001 in terms of which the Program denied the Applicant's claims;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the \$100.00 filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedures Act*, as amended, this proceeding initiated by the Applicant's request for a hearing before this Tribunal is dismissed;
2. Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Ontario New Home Warranty Program to deny the Applicant's claims.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: July 3, 2001

CARPPI

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

EMIL CARPPI

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor Vehicles
made pursuant to section 55.1 of the *Highway Traffic Act* of an Order to
Impound a motor vehicle for a period of 45 days dated May 10, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said
ORDER

EMIL CARPPI

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Emil Carppi (the "Applicant") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of that Act, dated May 10, 2001 to impound the Applicant's motor vehicle for a period of 45 days;

AND WHEREAS, the Applicant has failed to commence an appeal by filing a notice of appeal with the Tribunal within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to commence an appeal within the 15 day period;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated May 10, 2001, to impound Emil Carppi's motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: July 12, 2001

GATES

HIGHWAY TRAFFIC ACT

Section 50.2 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

KEITH AND JACQUELINE GATES

IN THE MATTER of an APPEAL of AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

AND IN THE MATTER OF an ORDER of the Registrar of Motor Vehicles
made pursuant to section 55.1 of the *Highway Traffic Act* of an Order to
Impound a motor vehicle for a period of 45 days dated June 17, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said
ORDER

KEITH AND JACQUELINE GATES

Applicants

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Keith and Jacqueline Gates (the "Applicants") initiated an appeal under section 50.2 of the Order of the Registrar of Motor Vehicles pursuant to section 55.1 of that Act, dated June 17, 2001 to impound the Applicants motor vehicle for a period of 45 days;

AND WHEREAS, the Applicants have failed to pay the filing fee within the 15 day period prescribed by section 20(1) of the Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicants have not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicants pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.2(5) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated June 17, 2001, to impound Keith and Jacqueline Gates' motor vehicle for a period of 45 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: July 27, 2001

644-SEIZ

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: July 23, 2001 Written

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Notice of Appeal Form received at the Tribunal June 15, 2001, filed by the Applicant.

Exhibit # 2 - Tabulated documents (1-9) received July 13, 2001, from the Ministry of Transportation.

Exhibit # 3 - Conviction Report, dated September 20, 2000.

FACTS:

This was a written appeal.

The Applicant had his driver's licence suspended by the Ministry on July 29, 2000 (Exhibit 2, Tab 2) after an unsolicited Medical Condition Report (tab # 1) was received on February 15, 2000 from Physician # 1 at the Credit Valley Hospital. Physician # 1 simply stated "seizure like activity".

On March 22, 2000, the Ministry received a letter from Physician # 2, an internist at the Brampton Memorial Hospital (Ex #2 tab #3). Physician # 2 stated that he had examined the Applicant in the emergency room in January, 2000 after the Applicant had experienced two seizures with syncope in the previous 24 hours, which he felt were alcohol related, yet he did not report these facts to the Ministry. He apparently did not order any tests to confirm his assumption that the cause of the seizures was alcohol. There is no mention of follow-up and yet he contends the Applicant has been seizure free since January and recommends he should be allowed to drive again.

The Applicant requested and had an Administrative review on October 17, 2000 and stated he had not driven since January 2000. His driving record, however, indicates he had disobeyed a red light signal on September 2, 2000.

On three occasions the Ministry advised the Applicant he must obtain an assessment from a neurologist or a physician specializing in addiction medicine to have licence reinstatement considered. The only medical report available is the one from Physician # 2, dated March 13, 2000, which is outdated and short on details.

The Applicant failed to have the Ministry's Alcohol Assessment form completed and has provided no evidence that a rehabilitation program has been successfully completed or that he has remained seizure free.

The Canadian Medical Association's "Determining Medical Fitness to Drive" standard states "patients who have suffered an alcohol related withdrawal seizure must complete a recognized rehabilitation program for substance dependence and remain alcohol free and seizure free for 12 months before recommencing driving".

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "----suspend or cancel" a driver's licence for "any----sufficient reason---". The Applicant's licence was suspended after the Ministry received an unsolicited letter from Physician # 1, indicating the applicant had a seizure disorder.

The Tribunal finds the Ministry acted properly and in accordance with the Regulation, at the time of suspension. In the letter of suspension, dated February 29, 2000, the Ministry outlined certain specific steps the Applicant must take, in order to have his licence reinstated. Following this, a letter was received from an internist, Physician # 2, which did not provide any details of an investigation of the seizures or any information about the Applicant's apparent alcoholism, as requested by the Ministry.

Without up to date and reliable information, it is impossible to assess the Applicant's appeal. The Applicant has relied completely on Physician # 2's letter with the recommendation that "he should be allowed to drive without restriction" and has not bothered to fulfil any of the Ministry's requests for further information. Physician # 2 has relied upon the Applicant for information. However, the Applicant's credibility comes into question with his conviction for failing to obey a red light occurring six weeks before his statement to the Administrative Reviewer that he had not driven in the past eight months. This casts doubt on the Applicant's statement in his letter to the Ministry, dated May 22, 2001, that he has been abstinent, since there is no other evidence to support this statement.

The Tribunal finds the Applicant has made no effort to provide any medical evidence to substantiate his own claims of being seizure free and remaining abstinent from alcohol. The Ministry has acted in accordance with governing legislation and regulations and has applied the appropriate medical standards. The Tribunal accepts the medical evidence which is clear and uncontradicted and within the scope of the authority granted under the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 11, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section

50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: July 25, 2001

649-TUM

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: July 20, 2001 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

On December 27, 2000 the Applicant was involved in a minor motor vehicle accident at which time it appeared that he had had a seizure. He was taken to hospital; a report from the hospital to the Registrar of Motor Vehicles triggered his licence suspension on medical grounds.

Investigation in hospital revealed a brain lesion and he came to surgery on January 15, 2001. A right Temporal craniotomy revealed a chronic inflammatory process which was resected. Tissue pathology proved it to be a Tuberculous origin. He was transferred to the care of a specialist in Infectious Diseases and was started on a course of anti-T.B. medication as well as anticonvulsant drugs. He progressed very well, did not have any further seizures and the anticonvulsant drugs were discontinued in February 2001. Neurologist report on July 3, 2001 states that his medical and neurological conditions are normal, that his risk of seizure is low but to further reduce this risk, he was started again on anticonvulsive drugs.

Throughout his recovery, medical reports were sent to the Ministry of Transportation recommending reinstatement of his driver's licence. However, the medical review section of the MTO decided that his licence remain suspended awaiting a neurological assessment to confirm that he has remained seizure free for 12 months.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

In an attempt to be guided by the Canadian Medical Association "Guidelines to Determine Medical to Drive". The relevant sections are:

Section 5.2 Febrile or toxic convulsions

Where convulsions are directly related to a toxic illness, either in childhood or in adult life, and the patient has fully recovered from the illness, these convulsions are of no concern in evaluating his or her medical fitness to drive.

and

Section 5.8.1 Benign tumours

If a patient's judgement, coordination, visual fields, sense of balance, motor power and reflexes are all found to be normal after the removal of a benign intracranial tumour, there is usually no reason to recommend any permanent driving restrictions. If a seizure occurred either before or after the removal of a tumour, the patient should be *seizure free for at least 12 months with or without medication before resuming driving*.

Unfortunately, this case cannot be categorized into either of these sections but has elements of both.

Re: Section 5.2

The Tuberculous lesion is an infective process and the seizure could have been caused by its toxicity - in which case its resolution would not prevent him from resuming to drive.

Re: Section 5.8.1

A Tuberculous mass is a tumour of sorts in that it is a mass but is not a new growth implied by the word tumour benign or malignant. This "growth" has been excised and we have the assurance of his medical attendants that it will not recur. The restrictions applied by the Ministry of Transportation are based on this section.

The Applicant has been attended by specialists related to his unique situation - a neurosurgeon - a neurologist and an infectious disease internist - all of whom attest to his excellent progress, favourable prognosis and recommend his driver's licence be reinstated.

The Applicant will continue to be medically monitored. His last M.R.I. in May 2001 was negative. At the hearing he appears cooperative and in no distress. In fact he states that he feels better now than before the operation.

This Tribunal finds that on the evidence that the Applicant does not suffer from a physical disability likely to significantly interfere with his ability to drive a motor vehicle.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 18, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: July 25, 2001

660-EPLI

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: July 23, 2001 Oshawa

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Notice of Suspension of Driver's Licence, Issued by the Ministry of Transportation, dated October 27, 2000.

Exhibit # 2 - Notice of Appeal Form received at the Tribunal June 26, 2001, filed by the Applicant.

Exhibit # 3 - Applicant's Driving Record dated July 3, 2001.

Exhibit # 4 - Medical Advisory Committee Report, dated July 17, 2001.

Exhibit #5 - Reasons for Appeal filed by the Applicant.

FACTS:

The Applicant, a 38 year old cement truck driver, had his driver's licence suspended November 5, 2000 after the Ministry received an unsolicited letter, dated September 13, 2000, from Physician # 1, a neurologist. Physician # 1 reported that the Applicant had suffered a seizure at home, following a weekend of heavy drinking.

On September 7, 2000, the Applicant collapsed at the breakfast table and seized for approximately 30 seconds. He bit his tongue, was very confused and aggressive until he was taken to the Ajax Pickering Hospital. A neurological examination, CT scan and EEG were all reported negative.

A week later he was seen by Physician # 1. A repeat EEG disclosed an epileptic diathesis. Carbamazepine, an anticonvulsant, was ordered and he was advised to quit drinking. Physician # 1 recommended the Applicant be allowed to drive.

On October 23, 2000, the Applicant was seen by Physician # 2, another neurologist. His neurological examination was normal and he ordered another EEG and MRI. Dr. Bruni discontinued the Carbamazepine from October 26 until December 5, 2000, when he received the test results. The EEG was abnormal showing right temporal sharp wave activity. He ordered Tegretol, another form of Carbamazepine, and increased the dose because with the focal abnormality found, there is a great risk of recurrent seizures. During that period without drugs, the Applicant did not suffer any seizures or drink alcohol.

The Applicant did not accept that he was an epileptic and stopped his medication early in March, 2001. On a Sunday evening, late in March, he had a few drinks while watching a hockey game with some friends. The following morning he had another seizure. This episode convinced him that the blackouts were directly related to his consumption of alcohol without medication. He went away the long weekend in May with his friends, but he refrained from drinking.

The Applicant is very annoyed, because the Ministry considers him to be an alcoholic. He claims that he drinks very little and only when he is on a holiday with his friends.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (g) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the

Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

On receipt of the letter from Physician # 1, advising the Ministry of the Applicant's seizure, the Registrar had no other recourse, but to suspend the Applicant's driver's licence. Section 47(1) empowers the Registrar to "-----suspend or cancel" a driver's licence for "any -----sufficient reason---".

Regulation 390/94, Section 14(b) is clear in that:

"An applicant for a holder of a driver's licence must not,

- a) suffer from mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely---".

The Applicant suffered two seizures as a result of alcohol withdrawal. The second one might be considered an experiment, to prove to himself that he really did not have a problem. Unfortunately, it proved that he did.

The Tribunal accepts the Applicant's statement that he is not an alcoholic, just an occasional drinker, but his abnormal EEGs, demonstrate an epileptic diathesis. The Canadian Medical Association's "Determining Medical Fitness to Drive" states "patients who have suffered an alcohol related withdrawal seizure" must complete a recognized rehabilitation program for substance dependence and remain alcohol free and seizure free for 12 months before recommencing driving".

The Tribunal does not believe the Applicant requires a rehabilitation program but he should complete a 12 month period of being seizure free. It is only 5 months since the Applicant disregarded the directions given to him by two neurologists and a Medical Drug Reference on the drug "Carbamazepine", discontinued the medication, had several drinks and seized.

DECISION:

Upon the application by the Applicant to appeal the decision dated November 5, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: July 26, 2001

663-ALCL

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

Applicant

Counsel for Applicant

DATE OF
HEARING: July 25, 2001

Cornwall

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant's first driving offence was January 27, 1991, when he was found to be driving with a blood alcohol level above the legal limit. His next alcohol related offence was on August 13, 1996 which earned him a one year licence suspension. Two more alcohol related offences and driving while his licence was suspended resulted in an accumulated suspension until January 22, 2000. Because of this history, his name came up for medical review by the Ministry of Transportation before reinstatement. Unfortunately, he did not receive notification from the Ministry of Transportation because he had moved and did not register his new address. As a result, his licence was again suspended for failure to meet the medical requirements to satisfy the Ministry of his ability to operate a motor vehicle safely.

Eventually, The Applicant went through the medical process and submitted reports from his family doctor, Physician # 1 of Cornwall, the required blood tests and a review by a specialist Physician # 2 in Ottawa on May 8, 2000. Nothing in these reports point to any psychiatric disorder or impulse control disorder which may lead to addiction to alcohol. Physically he suffers from angina pectoris requiring nitroglycerin. His blood tests of August 1999 do show certain abnormalities viz; elevated M.C.V. G.G.T. cholesterol and blood sugar. His family doctor does not explain the elevated liver function test. The specialist, Physician # 2, is unable to vouch for the Applicant's fitness to drive based solely on these blood tests. The tests were repeated on February 9, 2001. The M.C.V. went down slightly to a reading which is only slightly above the upper limits of normal. The G.G.T. is also down but is still considerably abnormal. On March 12, 2001 his FD reports that he could find no physical evidence of alcohol abuse. On March 20, 2000 the Medical Review Section of the Ministry of Transportation decided again that his licence remain under suspension.

The Applicant sought the advise of his counsel in making his appeal and was led to believe that the Ministry of Transportation was obliged to reinstate his licence automatically on completion of his terms of suspension. His counsel makes the argument that a clause in the 1998 revision of the *Highway Traffic Act* which requires a driver to undergo a medical review before reinstatement, does not apply retroactively to a 1997 conviction. To support his argument, he presented a collection of legislative material and extracts of case law from other Canadian provinces (Exhibit 4).

The Ministry's representative stated that this Tribunal sits to adjudicate matters relating to the *Highway Traffic Act* Section 47.(1) and section 14 of regulation 340/94 and that the Ministry of Transportation appears to have just cause to request a medical review prior to considering two reinstatements of his driver's licence because of prior convictions for alcohol related violations.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (h) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Tribunal is not required to address the question of whether the Ministry acted improperly by failure to reinstate the Applicant's driver's licence automatically or requesting a medical review.

The Applicant has consumed alcohol for many years and at times has driven an automobile while legally impaired. For these violations he has had several convictions and has lost his licence for almost four years. During this time, he has apparently modified his lifestyle eg. moved close to his place of business, does not drink with his customers, engages in community affairs etc.

Under section 47 of the *Highway Traffic Act* (the "HTA"), the Registrar of Motor Vehicles is required to show sufficient reason to suspend a driver's licence. The Registrar argued the evidence before this Tribunal that the evidence supports a finding that the Applicant is addictive to alcohol to an extent likely to significantly interfere with the Applicant's ability to drive a motor vehicle as prohibited under section 14 of Regulation 340/84.

The Applicant's medical reports do not confirm addiction or chronic alcoholism. He does have coronary heart disease with stable angina. His high liver function tests may indicate a yet undiagnosed liver disease.

This Tribunal therefore finds that the Applicant does not suffer from any disability or addiction to drugs or alcohol to an extent likely to significantly interfere with his ability to drive a motor vehicle safely.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 15, 1997 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

MEHTA

GULSHAN AND SUKHDEV MEHTA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

DAVID A. STEIN, counsel, representing the Applicants
ANDREA YORK, counsel, representing the Ontario New Home Warranty
Program
MICHAEL A. COHEN, counsel, representing the Added Party,
Town Wood Homes Limited

DATES OF March 5-9, 2001 &
HEARING: April 19, 2001

Toronto

ORDER

WHEREAS the matter was heard in part before the Tribunal on March 5-9, 2001, and April 19, 2001 when upon the latter date it was adjourned until July 23-26, 2001;

NOW TAKE NOTICE, upon being informed in writing by counsel for the Applicants by letter dated July 3, 2001, that the subject matter of the hearing has been settled between all parties and the application for a hearing has been withdrawn by the Applicants, the Tribunal orders on the consent of all parties that the claim in this matter is hereby withdrawn and this matter is concluded in accordance with the settlement reached between the parties.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,

MAHADEO

STEVEN MAHADEO

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES OF
THE MOTOR VEHICLE DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES:

STEVEN MAHADEO, appearing on his own behalf
AVIVA R. HARARI, Counsel, representing the Board of Trustees
of the Ontario Motor Vehicle Dealers Compensation Fund

DATE OF
MOTION:

July 31, 2001

Toronto

RULING

Following attendances on July 31, 2001 at a motion before the Licence Appeal Tribunal of Steven Mahadeo, appearing on his own behalf (the "Applicant") and Aviva R. Harari, Counsel for the Ontario Motor Vehicle Dealers Compensation Fund (the "Fund");

WHEREAS an application for an adjournment was made at the motion on July 31, 2001, by the Respondent, and the Applicant was present after a delay of 30 minutes and indicated that he did not consent to the adjournment of the hearing;

The Tribunal granted the request of the Respondent for an adjournment. The parties agreed to the date of September 10, 2001.

The adjournment was granted on the basis of the motion record filed as an exhibit at the motion and the verbal agreement of the Respondent.

The Respondent had acted promptly to request an adjournment upon being served with the Notice of Hearing. The Respondent prepared a motion record which was served upon the Applicant. That motion record stated that counsel for the Respondent was unavailable due to previous trial commitments and a key witness for the Respondent would be out of town and not available to testify on August 7, 2001. These are reasonable grounds to ask for an adjournment.

The Applicant had refused to consent to the adjournment as he felt the dealership would not attend if the hearing were to be delayed. The Tribunal explained to the Applicant that the motor vehicle dealership did not have to be present for him to claim against the Compensation Fund. The Applicant then was agreeable to a short adjournment.

The Respondent asked for costs of the motion. The Applicant had received notice of this request for costs in the letter of July 19, 2001 which was filed as an exhibit at the motion.

This request for costs was based on section 8 of the *Licence Appeal Tribunal Act*, 1999. The Tribunal denied this request.

Under section 17.1 of the *Statutory Powers Procedure Act*, as amended, the Tribunal has the authority to order the payment of the other party's costs. It reads:

Section 17.1

(1) Subject to subsection (2) a tribunal may, in the circumstances set out in a rule made under section 25.1, order a party to pay all or part of another party's costs in a proceeding.

(2) A tribunal shall not make an order to pay costs under this section unless,

(a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and

(b) the tribunal has made rules under section 25.1 with respect to the ordering of costs which include the circumstances in which costs may be ordered and the amount of the costs or the manner in which the amount of costs is to be determined.

(3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under section 25.1.

(4) Despite section 32, nothing in this section shall prevent a tribunal from ordering a party to pay all or part of another party's costs in a proceeding in circumstances other than those set out in and without complying with, subsections (1) to (3) if the tribunal makes the order in accordance with the provisions of an Act that are in force on the day this section comes into force.

Section 17.1 of the *Statutory Powers Procedure Act* is more broadly based than section 8 of the *Licence Appeal Tribunal Act*, 1999 which reads:

8. If, on the application of a party to a hearing before the Tribunal with notice to the other parties, the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing or may terminate the hearing at any time and make an order of costs as it considers appropriate in the circumstances.

Section 17.1 of the *Statutory Powers Procedure Act* speaks of "unreasonable, frivolous or vexatious or a party has acted in bad faith", while section 8 of the *Licence Appeal Tribunal Act*, 1999 speaks of "frivolous or vexatious".

The Licence Appeal Tribunal has not yet under section 25.1 of the *Statutory Powers Procedure Act* made rules in respect to costs. This should happen in the near future. If such rules were in place, this Tribunal would have to consider carefully the request of the Respondent, particularly as to whether the conduct of the Applicant has been unreasonable.

As stated under section 17.1(4) this Tribunal can look to another Act, in this case the *Licence Appeal Tribunal Act*, 1999 as to an order for costs.

There are two barriers to the Tribunal granting the request of the Respondent under section 8 of the *Licence Appeal Tribunal Act*, 1999. The first is that the section specifically uses the word "hearing" not the more broadly based word "proceedings". This request is within the context of a motion. The Respondent is not asking that the application for hearing be struck out. The Tribunal does not feel it can stretch the word "hearing" to include a motion within a hearing.

The second barrier deals with the use of the words "frivolous or vexatious". Black's Law Dictionary 6th edition speaks of frivolous as "of little weight or importance"... A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense". "Vexatious" is defined in the Black's Law Dictionary 6th edition as "without reasonable or probable cause or excuse".

The Tribunal does not find that the conduct of the Applicant in refusing to consent to the adjournment or in arriving late for the motion to be within the confines of frivolous or vexatious. The defense of the Applicant that he was worried that a delay would mean the dealership would not participate in the hearing and therefore he would lose his ability to ask for compensation was misguided and wrong. But the Applicant is not a person familiar with the complex language of the *Motor Vehicle Dealers Act* or its regulations, and his worry is not without some merit in that context. This matter has had a convoluted legal history

before this Tribunal and in other courts. The Tribunal cannot say his concern is frivolous or vexatious.

NOW THEREFORE this Tribunal Orders that:

1. this matter is adjourned *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, September 10, 2001.
2. there is no order as to costs under section 8 of the *Licence Appeal Tribunal Act*, 1999.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: August 7, 2001

KETER

MORRIS KETER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair, Presiding

APPEARANCES:

MORRIS KETER, representing himself
ANDREA YORK and ANDREW LEWIS, Counsels representing the
Ontario New Home Warranty Program
MICHAEL COHEN, Counsel representing the Added Party,
Townwood Homes Inc.

DATES OF

HEARING: March 16, 2001 and June 6 & 7, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an Appeal by Morris Keter (the "Applicant") to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the "Program") contained in a decision letter dated August 14, 2000 (the "Decision Letter").

By a Proof of Claim dated July 4, 2000, the Applicant asserted a right to the return of his deposit on the basis that the house was not built according to the Agreement of Purchase and Sale as it did not conform to the house plan submitted to the Municipality and that it contained unauthorized modifications and major deficiencies rendering it unfit for habitation. The principle deviation from the home plan that the Applicant complained of was the addition of four windows.

The position taken by the Program as outlined in its Decision letter was that the Applicant's claim for financial loss resulting from non return of his deposit by the Added Party under an Agreement of Purchase and Sale (the "Agreement") was not available under the Ontario New Home Warranties Plan Act (the "Act") for the following reasons:

1. The Applicant did not establish that the Added party failed to perform the Agreement. From the material presented to the Program for consideration it appeared that the Added Party was willing and able to complete the transaction and that Applicant failed to close due to the lack of rectification of deficiencies identified by the Applicant.
2. The Municipality had approved the home for occupancy as required by the Agreement.
3. The construction deficiencies listed by the Applicant did not constitute a failure to perform through fundamental breach and the Applicant's proper course would have been to close the purchase and seek damages for breach of warranty under the Act.
4. The addition of four windows to the home did not constitute a fundamental breach such as to allow the Applicant to terminate the Agreement; and indeed the windows were not raised with the Added Party until after the closing date had come and gone.
5. In summary the Applicant's refusal to close was itself a wrongful repudiation of the contract.

It was the position of the Applicant that he would have closed the purchase if his demands regarding further work to the property would have been met. He further asserted that, despite legal advice to the contrary he was not bound by the provisions of the Agreement for the reasons stated above.

The Agreement was duly executed between Townwood Homes Inc., the Added Party, as Vendor and the Applicant as Purchaser on November 4, 1999, with a deposit of \$20,000.00. There were amendments to the Agreement also duly executed on November 14, 2000. The Applicant signed the Agreement pursuant to legal advice.

A delay of 2 to 3 weeks in the closing date of May 25, 2000 was sought by the Applicant and confirmed by his solicitor to solicitors for the Added Party by letter dated May 24, 2000. By return letter the following day solicitors for the Added Party agreed to a postponement of closing to June 1, 2000.

On June 1, 2000 there was no appearance by the Applicant or his solicitor at the Registry Office where closing was to take place. The Added Party asserted tender and claimed forfeiture of the \$20,000.00 deposit pursuant to the terms of the Agreement.

The Applicant claimed against the Program for the amount of the deposit as financial loss as evidenced by an executed and sworn "Proof of Claim" dated July 4, 2000.

The Added Party adopted the reasoning of the Program and added that the evidence was most consistent with a conclusion that the Applicant's failure to close was due to a lack of available funds for closing and not with his assertions of non conformity to the house plan and construction defects. The Added Party relied upon the provisions of the Agreement of Purchase and Sale in support of its position that there was no fundamental breach of the contract and, that there was no validity in the Applicant's position that he was not bound by its provisions.

EVIDENCE:

The Applicant denied the allegation of the Added Party that the Applicant's failure to close resulted from his lack of funds. The Applicant said it was the result of his dissatisfaction with the house. When he was challenged on the point, the Applicant declared that such funds were available but, he was unwilling to produce evidence to that effect.

The Tribunal must determine whether there had been a repudiation of the Agreement by the Added Party to allow the Applicant to claim compensation under section 14(1)(a) of the Act. A summary of the dealings between the Added Party and the Applicant subsequent to the execution of the Agreement on November 4, 1999 follows.

1. The first letter in the chronology dated April 27, 2000 was from the solicitor for the Added Party to the solicitor for the Applicant urging him to forward title instructions for the preparation of the deed as they had yet to be provided despite numerous requests. These instructions were required under the Agreement 30 days prior to the closing date of May 25, 2000.
2. The Town of Richmond Hill issued a Certificate of Occupancy on May 17, 2000. This document represents the opinion of the Building Inspector that the dwelling was constructed pursuant to the requirements of the Ontario Building Code and is thereby suitable for occupancy.
3. An inspection was carried out and notations made on a form provided by the Added Party on May 20, 2000. There was no mention of additional windows.
4. On May 23, 2000 there was an inspection carried out by Majestic Home Inspection on the Applicant's behalf. There were defects listed but no mention of windows. On cross-examination, the Applicant admitted that this was not forwarded to the builder.

5. On May 24, 2000 the Applicant's solicitor requested a postponement of closing in order that some defects could be rectified up and the dust cleared out prior to occupancy as the Applicant had an asthmatic child. There was no mention of special circumstances of an asthmatic child in the Agreement. There was no reference to windows under the "major defects" claimed in the letter.
6. On May 25, 2000 the solicitors for the builder (Added Party) wrote to the solicitor for the Applicant agreeing to extend closing to June 1, all other terms and conditions remaining the same.
7. On May 31, 2000 solicitors for the Applicant informed solicitors for the Added Party that as there were numerous deficiencies left uncorrected, he was under instructions to say that closing would not occur until such deficiencies were cleared up. The deficiencies listed include cracks in the basement, ridges on the walls and compound on the floor, but there was no mention of extra sets of windows or of the house not being built to Plan.
8. On June 1, 2000 solicitors for the Added Party wrote to solicitors for the Applicant that there would be no postponement of closing.
9. On June 2, 2000 solicitors for the Added Party wrote solicitors for the Applicant stating that as there was a failure to close at the appointed time, tender was effected and the deposit forfeited.
10. On June 6, 2000 Applicant's solicitor wrote to solicitors for the Added Party denying their right to retain the deposit.
11. On June 8, 2000 the Applicant requested a deposit claim form from the Respondent.
12. On June 15, 2000 solicitors for the Applicant wrote solicitors for the Added Party claiming the house did not conform to the Plan in that it had four extra windows. This is the first evidence before the Tribunal of the rationale for refusing to close on the part of the Applicant having anything to do with windows.
13. The claim in the Applicant's letter of June 15, 2000 was denied by the Added Party in a letter of June 19, 2000.

14. A further letter on the subject of the windows was sent from the Applicant's solicitors to those of the Added Party pointing out two not four windows in the family room of the house.
15. On July 6, 2000 a "Deposit Refund" claim was lodged with the Respondent.
16. Correspondence between the parties and the Respondent took place and the Respondent issued the Decision Letter of August 14, 2000 denying the Applicant's claim.
17. The Applicant filed his Appeal to the Tribunal August 23, 2000.

The Agreement of Purchase and Sale as stated was executed upon legal advice with each page initialed by the Applicant:

Several provisions of the Agreement were relied upon by the Added Party and the Respondent :

Schedule 1(a) " The Vendor will construct if not already constructed and complete upon the property a dwelling ("the Dwelling") of the type herein before indicated in accordance with the plans and specifications already examined by the Purchaser and filed or to be filed and approved by the Municipality. The Dwelling shall be deemed to be completed when all interior work has been substantially completed as determined by the vendor and the Purchaser agrees in such cases to close this transaction, without holdback of any part of the Purchase Price..."

Schedule 2(e) " Acceptance of construction, sitting and grading by the Municipality shall conclusively constitute acceptance by the Purchaser. The Vendor shall have the right to substitute materials of those designated in the plans/and or specifications provided the quality is equal or better, and also to make minor changes in plans, siting and specifications, provided there is no objection from the Municipality."

Schedule S 4 "...Provide further that 'tender for any reason by the Vendor shall be deemed as sufficiently made when the Vendor or his solicitor appears at the recording land registry office for the property on the Closing Date or any extension thereof and tender shall be accordingly deemed to have been sufficiently made by the Vendor notwithstanding the nonappearance of the Purchaser or his solicitor at such date."

Schedule S 8 " This offer is to be read with all changes of gender or number required by the context, when accepted shall constitute a binding contract of Purchase and Sale, and time shall in all respects, be of the essence. The deposit monies are expressly deemed to be deposit monies only and are not partial payments. Default in payment of any amount payable pursuant to this agreement on the date or within the time specified, shall constitute substantial default hereunder, and the Vendor shall have the right to terminate this Agreement and forfeit all deposit monies in full".

Mr. Jeffery Reid a building official from Richmond Hill was called by the Applicant. Mr. Reid was the inspector who issued the Certificate of Occupancy for the subject house. Ostensibly Mr. Reid was called to bolster the Applicant's case that the four extra windows constituted a significant deviation from the plans to which the house was built. Instead Mr. Reid testified that as the house was on a corner lot the extra windows were permitted for design reasons. There were revised plans lodged with the Municipality by the Added Party to satisfy the notification of installation of the extra windows. The Certificate of Occupancy remained in effect and in the words of Mr. Reid speaking for the Municipality, there was no problem with the house.

As to the Respondent's position, Ms. Susan Scheunemann, the customer service representative who issued the Decision Letter of August 14, 2000 was called. She explained clearly the Respondent's procedures for dealing with claims for deposit returns. Essentially ONWNP relies upon the Certification by the Municipality and the contents of the Agreement of Purchase and Sale to determine whether it should intervene and order a return of a deposit after an aborted closing. She undertakes essentially the same analysis as would a Court in order to determine whether there was a fundamental breach which would have justified the refusal to close the transaction as called for in the Agreement of Purchase and Sale. In this case, she was presented with no evidence that the windows were an alteration not contemplated by the terms of the Agreement, or that they diminished the value of the house. Indeed in her experience windows generally increase the worth of a house not the opposite and in any event they were not even a subject of his complaint to ONHWP until after the date of closing. Finally, as the municipality was satisfied with the property, she saw no reason to disagree with the issuance of the Certificate of Occupancy. She stood by her decision that the Applicant's failure to close was itself a wrongful repudiation of the Agreement.

THE LAW:

The Applicant's appeal is based upon the provisions of section 14(1) of the Act. Prior to May 5, 2001 the section stated:

14(1) Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damages subject to such limits as are fixed by the regulations.

On and after May 5, 2001, the section states:

14(1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

(a) the person has exercised a statutory right to rescind the contract before closing: or,

.....

For the purposes of the case, the Applicant is claiming return of the deposit, and that type of claim is contemplated under both versions of subsection 14(1).

Section 6(1) of Regulation 892 to the Act reads:

A purchaser who has a claim under 14(l)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.00.

APPLICATION OF THE LAW TO FACTS:

The Applicant asserts that he had no obligations remaining under the Agreement of Purchase and Sale at the date of closing due to the non-performance of the Added Party as vendor. He therefore further asserts that tender by the Added Party is of no effect and the Added Party's claim to forfeiture of the deposit monies is without merit.

The Respondent and the Added Party submitted that for the Applicant to make out a claim under Section 14(1)(a) he must as the section indicates prove to the Tribunal that he has made out a cause of action against the vendor, in this case for financial loss. In order to make out such a cause of action, the Applicant would have to satisfy the Tribunal on the balance of probabilities that the vendor had committed a fundamental breach of the Agreement of Purchase and Sale. If the vendor had committed a fundamental breach, the purchaser could treat the contract as at an end. And in their joint submissions they argue that he has not done so.

Fundamental Breach:

Explanations of the notion of fundamental breach abound in case law and in the texts. Essentially it arises from the doctrine of substantial performance. If a party has substantially completed his promises under a contract, the law will not allow the other party to declare the contract void and thereby be released him from his obligations on the basis of some minor non completion. The remedy for the aggrieved party in such cases is to complete his part of the bargain and seek a remedy in damages. The converse also holds true that if there is substantial non completion or as the cases put it "the very thing bargained for has not been provided" the aggrieved party should not be left to the mercies of some possibly ephemeral action in damages and should be able to treat the contract as though it never existed, rescind it and be returned to his original position – here, have the return of the deposit.

A good general description of the operation of the doctrine of substantial performance is given by E. MacDonald J. in the case of *Townwood Homes v Khanna* [1994] OJ No. 940. In that case, the court was faced with the situation of a house having been built with a single as opposed to a double garage door. Townwood argued that the mistake about the garage door was a minor not a fundamental breach and, in any event, variations to plans were contemplated and agreed to by the Agreement of Purchase and Sale. This being the case Mr. Khanna should have closed and sued for damages. It was the position of Mr. Khanna that he was entitled to a house with a double garage door and having not received it, he was entitled to walk away from the contract. The court looked at some surrounding details prior to ruling on the issue of fundamental breach. As in the present case, the court was less than satisfied that there was financing available to close. As well there was no substantial as opposed to aesthetic reason for the house to have a double garage door.

The single door did not affect the habitability of the house. In short, there were no grounds for asserting that "the very thing bargained for has not been provided" by the builder.

On the evidence presented, it is clear to the Tribunal that the reason the Applicant failed to live up to his obligation to close under the terms of the Agreement of Purchase and Sale was in not connected to the issue of four extra windows in the house. In any event, the windows could in no way be considered a fundamental breach of the Agreement such as to allow the Applicant to treat the contract as at an end and be entitled to the return of his deposit. There was no evidence that the windows were an issue until after the closing date. In the opinion of the Tribunal, the Applicant used the issue of the windows as an excuse to justify his claim. There are no grounds for asserting that "the very thing bargained for has not been provided".

The Respondent and the Added Party were correct in their interpretation of the Agreement of Purchase and Sale that the addition of the windows was a variation contemplated by its terms.

The Tribunal finds no ground upon which to overturn the decision of the Respondent contained in the Decision Letter of August 14, 2000.

DECISION:

Pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: August 29, 2001

CASTLETON CUSTOM HOMES DESIGN & BUILD LTD.

CASTLETON CUSTOM HOMES DESIGN & BUILD LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel, representing the Applicant
ANDREW LEWIS, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATES OF HEARING: April 9, 2001, May 10, May 23
and August 1, 2001

Toronto

ORDER

Following attendances on August 1, 2001 at a continuation of hearing before the Licence Appeal Tribunal of Brian M. Campbell, counsel on behalf of Castleton Custom Homes Design & Build Ltd. (the "Applicant") and Andrew Lewis, counsel on behalf of the Registrar, Ontario New Home Warranty Program (the "Registrar");

WHEREAS at the hearing on August 1, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

JANECZEK

WILLIAM JANECZEK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM MCINTOSH, Vice -Chair

APPEARANCES:

WILLIAM JANECZEK, representing himself
DENNIS FAUBERT, Agent, representing the Ontario New Home
Warranty Program

DATE OF
PREHEARING: July 25, 2001

Sudbury

ORDER

Following attendances before the Licence Appeal Tribunal (the "Tribunal") on July 25, 2001, at a prehearing of William Janeczek, representing himself (the "Applicant"), and Dennis Faubert, Agent representing Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order:

- 1) The Parties present came to no resolution of the issues which are the subject of the Appeal.
- 2) The only Parties to be present at the hearing of the Appeal will be the Applicant and the Respondent.
- 3) The hearing is to commence at the Holiday Inn Sudbury, Suite 134, 50 Brady Street, Sudbury, Ontario, at 9:30 a.m. on Monday, September 10, 2001 and to continue September 11 and 12, 2001, if necessary.

- 4) By August 21, 2001 each of the Parties shall submit to the other statements of facts and a chronology of events. By August 29, 2001 each of the parties shall deliver to the other their responses. By September 1, 2001, the parties shall forward to the Tribunal their agreed statement of facts or failing agreement the chronology of events.
- 5) The Parties shall comply with the disclosure provisions of the Tribunal's Rules of Practice, and
 - a) Should the Applicant intend to rely upon expert testimony at the hearing, he shall deliver to the Respondent the items called for in Rule 6.4 of the Tribunal's Rules of Practice.
 - b) The Applicant shall provide to the Respondent within the time allotted by the Tribunal's Rules of Practice (10 days before the date set for the hearing) all other documents and other things to be relied upon at the hearing.
- 6) By August 29, 2001, the Applicant will advise the Respondent which employees of the Respondent the Applicant wishes to call as a witness, and the Respondent shall forthwith advise the Applicant of the availability of such employees.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Released: August 10, 2001

T-MAG MARKETING INC. O/A VISCOUNT HOMES

T-MAG MARKETING INC. O/A VISCOUNT HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

JULIA COOK, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING: May 28, 2001 Windsor

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar issued a Notice of Proposal dated January 12, 2001 in which he refused to renew the registration of the Applicant. The refusal was based on two grounds: 1. That the Applicant failed to execute a Vendor and Builder Agreement; 2. That the Applicant failed to substantiate the assets listed in the personal net worth statement for Albert J. Viscount.

The Applicant filed a Notice of Appeal dated January 18, 2001 in which he requested a hearing from the Licence Appeal Tribunal. In his Notice of Appeal the Applicant stated that the execution of the Vendor and Builder Agreement infringed his constitutional rights, that his company has an excellent building history and that proper documents have been filed with renewals of registration.

The Notice of Hearing was issued on February 21, 2001. There was no prehearing in this matter. The parties were in attendance for a hearing in Windsor on May 28, 2001.

ISSUE:

Does the failure of the Applicant to sign the new Vendor and Builder Agreements provide the Registrar of the Ontario New Home Warranty Plan with the grounds to refuse to renew the registration of the Applicant?

Does the failure of the Applicant to provide supporting documentation to substantiate the net worth statements provide the Registrar of the Ontario New Home Warranty Plan with the grounds to refuse to renew the registration of the Applicant?

PRELIMINARY MATTERS:

1. The Applicant in his Notice of Appeal had stated that signing the Vendor and Builder Agreement was against his constitutional rights. He did not comply with the procedural requirements as stated in section 8 of the Rules of Procedure of the Licence Appeal Tribunal. He did not serve on the other parties, the Tribunal, the Attorney General of Ontario and the Attorney General of Canada a notice of constitutional question. Accordingly the Tribunal would not listen to any constitutional or Charter arguments.
2. The Applicant provided to the Tribunal a number of documents which had not been served upon the other parties to the action. The Applicant described these documents as letters of reference and his plans for future building proposals. The Tribunal ruled that these documents had not been disclosed as required under section 6 of the Rules of Procedure of the Licence Appeal Tribunal. The documents were not relevant to the issues before the Tribunal. Accordingly, the Tribunal refused to allow the documents to be entered as exhibits in the proceeding.

TESTIMONY:

Opening Statement of Program:

There are two issues: 1. The failure to sign the two agreements, the Vendor Agreement and the Builder Agreement.; 2. The failure to provide documents to substantiate net worth statement of Applicant

Counsel for the Program stated that this Applicant had initially applied for registration in 1994. It was granted on May 15, 1995. The Applicant had signed the "old agreement" which was a combined Vendor/Builder agreement. Albert Viscount signed as the guarantee. The registration was renewed by the Program until the spring of 2000.

In the spring of 2000, the Applicant submitted an application for a renewal of registration. The Applicant was asked to sign new Agreements and to provide supporting documents for the personal net worth statements. The Applicant has not done so.

The Home Builders Advocacy Association uses the acronym HBAA. The Ontario Home Builders Association uses the acronym OHBA. They are two separate and distinct organizations.

Opening Statement of the Applicant:

The agent for the Applicant stated that the position of the Applicant is contained in the letters of May 10, 2000 and October 10, 2000 sent by the Applicant to the Program.

The Home Builders Advocacy Association was started in 1998. It has 4232 members who are builders. The Ontario Home Builders Association has approximately 3800 members of which 921 are builders and the rest are associate members. There are 5976 builders in Ontario.

Testimony of Gregory Baker:

Mr. Baker is the vice president of risk management for the Program. His responsibility includes business analysis and policy creation. He has held this position since September, 1997 and also acts as the Deputy Registrar. He has a Bachelor of Finance degree and a MBA. He is not a member of the Law Society of Upper Canada nor can he practice law in Canada.

The old Vendor/Builder Agreement was discontinued as of April 1, 2000. It had been last updated in 1987. The Applicant had previously signed such an Agreement. Clause 5.1 of that Agreement provided that the Agreement could be modified or supplemented in the following words: "This agreement shall remain in full force and effect throughout the registration of the Vendor under the Plan; provided that the Vendor shall enter into such further agreements with the corporation as the Registrar may require for the purpose of modifying or supplementing any of the provisions hereof or for the purpose of superseding this agreement."

As of April 1, 2000 there are now two Agreements: a Vendor Agreement and a Builder Agreement. Both are effective for renewals from April 1, 2000. Approximately 4800 builders have executed these new Agreements.

Prior to the implementation of the two new Agreements, the Program had consulted with the industry members for a number of years. Mr. Baker testified that his task when he joined the Program in 1997 was to facilitate such consultation. There is an OHBA/ONHWP liaison committee which considered these two Agreements. The Agreements were approved by the local members of the OHBA, then approved by the Board of Directors of the OHBA, then approved by the Board of Directors of the Ontario New Home Warranty Program ("ONHWP" or the "Program").

The OHBA/ONHWP Liaison Committee has between 30 and 40 builder representatives. The whole process of consultation took over 4 years. The various drafts of the two Agreements were circulated to the local areas for consultation with their members.

Mr. Baker stated that the OHBA is the formal industry voice. It has approximately 3500 members of which some are builder members. They nominate people for membership on the Board of Directors of the ONHWP. The participants in the consultation process were builder members who were industry representatives, not ONHWP representatives.

Mr. Baker stated that the ONHWP is an independent corporation. Its management policy is to try to work with its stakeholders. It uses liaison committees as its formal consultative mechanism. It does not make business sense to deal with each individual in the industry. ONHWP communicates with individual registrants through newsletters and Annual Reports. An Announcement on the New Vendor and Builder Agreements was sent out to individual registrants. This Announcement had the logos of both the ONHWP and of the OHBA. It was mailed on January 28, 2000 for a April 1, 2000 launch. It is the policy of the ONHWP to give 60 days notice of any impending changes.

Mr. Baker testified that the new Agreements in substance are not much different from the original Vendor/Builder Agreement. The clauses in the new Agreements are more specific while the old Agreement was vague in its language. The new Agreements spell out the statutory and regulatory obligations of the parties. Under the old Vendor/Builder Agreement those obligations were set out in the Regulations to the legislation.

Mr. Baker stated that the Program had responded to the letter of concern from Mr. Viscount dated May 10, 2000 by its letter of August 28, 2000. Mr. Viscount by his letter of October 10, 2000 stated he was not prepared to sign the new Agreements.

Under cross-examination, Mr. Baker stated that all the builders in Ontario would have received the new Agreements with their renewals of registration. If a builder does not belong to the OHBA, he would still have received mailings and the Annual Reports of ONHWP. There was no formal liaison by the ONHWP with the HBAA. The new Agreements have not been changed since their inception in April, 2000.

Mr. Baker stated that he was aware of ONHWP trying to meet with the HBAA but to his knowledge this has not happened. He is not aware of any communications between the Ministry of Consumer and Commercial Relations and HBAA.

Testimony of Adil Darr:

Mr. Darr is a senior underwriting analyst with the Program. He assesses risk respecting builders and sets terms and conditions for their registration. He has a Bachelor of Commerce degree and is a chartered accountant.

Mr. Darr is familiar with the application for registration of the Applicant. Mr. Viscount had signed as a guarantor in July, 1994. The Vendor/Builder Agreement was signed in 1994 as well. The Applicant received its renewals of registration after that time. When it was time for the renewal of the registration in 2000 Mr. Darr needed to do a risk assessment based on the information received from the builder.

The risk assessment procedure is outlined in #28 Builder Bulletin. A number of factors are considered, such as: the size of the builder, that is, the number of homes the builder has constructed in the past; the tenure of the builder, that is, how many years has the builder been registered; and the technical rating of the business based on the after sales record, with a new builder having a different test. Also considered is the Financial Information supplied by the builder to determine the equity per unit and the need for a guarantor. All of these factors must be combined to determine what, if any, terms and conditions are required for that builder.

Mr. Darr had examined the Personal Net Worth statement of the guarantor, Mr. Viscount. This was received by the Program on May 16, 2000. The Personal Net Worth statement is a summary of the assets and liabilities of the individual who is the guarantor. Normally, the Program would ask for updated information every year. There is a requirement that the Applicant provide supporting information to substantiate the figures provided on the personal net worth statement. These documents assist Mr. Darr as to who owns the assets and the evaluation value of the assets. Mr. Darr was not provided with tax assessment or Transfer/Deed to provide a value for the property. No bank statements were provided. There was no identification of the second property or documents to prove its value. On September 9, 2000 a letter was sent to Mr. Viscount asking for this information and documents. A deadline of October 15, 2000 was provided to Mr. Viscount to comply with the request. Mr. Viscount provided neither the information nor documents requested by the Program. Accordingly, Mr. Darr gave the personal net worth statement zero value. As the December 31, 1999 Financial Statement of the company showed a deficit of \$87,043.00 Mr. Darr could not consider the company to have passed the risk assessment on the financial requirements.

Under cross-examination, Mr. Darr stated that he was not aware of any serious concerns by the Program regarding the Applicant during the period of 1995 to 2000. Mr. Darr agreed that in the past the Applicant had not been required to post security for homes that he was constructing.

Testimony of Albert Joseph Viscount:

Mr. Viscount testified that his father had been a contractor. He had previously been registered with the Program. He had worked in the Yukon and British Columbia as a contractor. He allowed his registration to lapse and had gone into the motel business. Then in the mid 1990's he re-registered with the Program and built some homes.

Mr. Viscount stated that he refused to sign the new Vendor and Builder Agreements. He had called the Program about his complaints with these new Agreements and he had been advised to send in his application with his cheque and a covering letter outlining his concerns. He had been working on a project regarding land development for the past eighteen months, and he had intended to build empty nester homes in this project.

Although he had been registered in good standing with the Program from 1995 to 2000 he had some real concerns about the new Agreements.

Mr. Viscount's concerns were the following:

1. He did not want information on his business and credit information being distributed to people with whom he is not doing business dealings. He objected to his personal information being given to strangers.
2. The Program could send confidential information on his business to other suppliers. He did not want to deal with telephone solicitations from these other suppliers.
3. The Program could determine the number of houses that he could build in the course of a year. He objected to this as he would have to pre-sell a number of units in order to get bank financing for the project he was considering which might possibly be 54 units. Under the new Agreements, the Program could determine not only the number of units he could build in this project but also the amount of security that he should provide per unit. Under the old Agreement he just paid a per house registration fee.
4. Under the new Agreements the Program could come into the Applicant's business premises and seize its books and records.
5. Under the new Agreements the Program can demand that Mr. Viscount provide them with his driver's licence and birth certificate, which had no bearing on how he built homes.

6. If the Program felt there was a problem, which the Applicant could dispute as something that was the homeowner's responsibility, nonetheless the Program could distribute the information about this problem. The Applicant's reputation for after sales service would suffer and yet the matter was really in dispute between the Program and the Applicant. Further, the Program could tell people about any conciliations that had occurred between the Applicant and the homeowners.

Mr. Viscount stated that he had not been told about the new Agreements before they were imposed upon him. He had never been a member of the OHBA as he never needed to join that organization in order to make a living as a builder. Mr. Viscount felt the OHBA was just a social club.

Mr. Viscount testified that when he was given the application for renewal in May of 2000, he was told that he must sign these two new Agreements. He was never given the opportunity to provide his comments on these new Agreements.

Mr. Viscount stated that he is a member of the HBAA. He wants the HBAA to advocate for new legislation on secondary insurance of homes. Mr. Viscount did not feel that he should have to subsidize the Program by providing it with security deposits on each house that he builds. He stated that such security deposits are causing the small builders not to build houses. Before, suppliers and tradespeople would work for small builders and collect their monies upon the sale of the house, but, he stated, that could not happen under this system.

Regarding the personal net worth statement, Mr. Viscount felt that if he did not provide supporting documentation the information supplied "may be discounted" but not ignored. He always completed this statement, had it notarized by a lawyer, and it has been accepted. He did not want to give the Program a copy of the deed to his house so they can attach the house. In the past, he was never obliged to put in any supporting documentation with his personal net worth statement. Mr. Viscount has all the required supporting documents, but he made the decision not to send them to the Program.

Mr. Viscount agreed that the corporate financial statement for 1999 shows a deficit for 1999. He cannot recall if previous corporate financial statements showed a deficit or not, but he thought some might have had a deficit.

Under cross-examination, Mr. Viscount testified that he had signed the original Vendor/Builder Agreement. He had probably read it in the past. At some point he had probably read the Regulations to the *Ontario New Home Warranties Plan Act*. Mr. Viscount was not aware of the Homebuyer's Guide that is produced by the Program. Although he is a fairly busy businessman, he stated that he tries to read the materials that come into his office.

Mr. Viscount stated that he joined the HBAA after the Program said they were not going to renew his registration. He has received newsletters from the HBAA. As well, Mr. Viscount agreed that he did receive some newsletters from the Program, but only after the Program had said he was to sign these two new Agreements. He remembered getting a newsletter about the new Agreements, but only after he had received the Notice of Proposal from the Program. Reading the newsletter which is issued jointly by the ONHWP and the OHBA did not change his mind about the issues of stripping of his rights and the invasion of his privacy. He stated that it would not have mattered if he had received this newsletter at an earlier stage in this proceeding.

Mr. Viscount remembered receiving the letter from Mr. Varcoe of the Program dated August 28, 2000. That letter did not change his mind about his concerns with the two new Agreements.

Further Testimony of Mr. Darr:

The Tribunal permitted the recall of a previous witness, Mr. Darr.

Mr. Darr testified that in 1997 the Program changed its policy, and from then on supporting documents were required on personal net worth statements.

Mr. Darr testified that there is a certain threshold that builders can build without the Program requiring backup information. To his recollection, that threshold was about 4 to 5 homes. Mr. Darr checked his records for the Applicant. He stated that the registration forms show that in 1996 the Applicant was listed at building between 0-6 homes; in 1997 the Applicant was listed as building no homes; in 1998 the Applicant was listed as building no homes; and in 1999 the Applicant was listed as building one home.

Mr. Darr was unsure if between 1995 and October, 1998 there was a consistent policy of requiring backup information in order to do the risk assessment. That policy was in consistent operation by October, 1999. Mr. Darr was unsure if the change in policy on backup information was communicated to all of the stakeholders of the Program.

Closing Statements:

By the Program:

Counsel for the Program stated that the Applicant had not complied with the requests of the Program. The issue is whether these requests are grounds for the refusal to renew the registration of the Applicant.

The Program contended that the failure of the Applicant to sign the new Agreements is a breach of section 1.3 of Regulation 894 and a breach of section 1.5 of Regulation 894. The Applicant had signed the Vendor/Builder Agreement in 1994 which contained clause 5.1 which requires the Applicant to enter into further agreements as are found necessary by the Program. It does not matter whether or not the Applicant received the communiques from the Program regarding these new Agreements. There is an obligation under this clause to enter into the new Agreements. It is a condition of registration.

Counsel cited the case of Ontario New Home Warranty Program v Lukenda 1991 2 O.R.(3d) p.675 (Ontario Court of Appeal) as support for its proposition that the Ontario New Home Warranty Corporation has the capacity of a natural person and can therefore require that a registrant sign its new Agreements.

Counsel stated that the new Agreements were done under the authority of section 5.1 of Regulation 894. As well, the Program had consulted with such stakeholders as the Ontario Home Builders Association when it was preparing the new Vendor Agreement and the new Builder Agreement. It was not feasible to consult with each and every builder in the Province of Ontario.

Counsel stated that the new Agreements do not impose any new significant obligations on builders. The old Vendor/Builder agreement had vague language and was a short document. The new agreements have specific language and are long documents. The new agreements codify existing practices, the Regulations and add some business clauses. Clause 4.4(e) of the old agreement permitted the Program to request personal documents as does section 1.5 and 1.6 of the Regulation 894. Search and seizure powers were provided in clause 4.4(c) of the old agreement and under section 1.2 of Regulation 894. While the old agreement was silent as to the Program's ability to collect information, there was no confidentiality clause and the Program had the power to use the information as required. But the new agreements impose limitations on the use of and disclosure of such information by the Program.

Regarding the complaint that the Program was disclosing information to anyone concerning after sales performance records, Counsel stated that the Program was issuing such information to those who requested it prior to the implementation of the Vendor Agreement. A Guide to After Sales Service brochure had been sent out to registrants and it dealt with this process. Under the new Vendor Agreement, the registrant now has fifteen days to challenge the use of this information.

As well, the new Vendor agreement has a clause dealing with correcting information being disclosed. This was not part of the old Vendor/Builder agreement, but it codifies existing practice. It is designed to protect the public while ensuring the builder that the information disclosed is correct.

Counsel for the Program stated that under the new Agreements the builders now have a clearer understanding of their rights and obligations and that consumers can obtain information on builders from the Program.

Regarding the issue of not providing supporting documents for the Personal Net Worth statement, Counsel stated that the old Vendor/Builder agreement contained the Applicant's consent under clause 4.4(e). A personal net worth statement is information relating to financial affairs. The supporting documents are important to know who owns the property and to support the statements of the guarantee. Under the *Ontario New Home Warranties Plan Act* section 7(1)(c), the Program is required to assess the financial position of the registrant. As well, consumers consider that a builder registered with the Program has a financial stamp of approval. Supporting documentation of personal net worth statements is critical to the effectiveness of providing consumer protection under the Act.

Counsel for the Program referred to the Skinner & Laprise General Contractors Ltd. case by the Commercial Registration Appeal Tribunal released May 5, 1999. The leading case of Brenner 19 CRAT 59 is discussed regarding the power of the Tribunal to act if it finds that the Registrar was in error in his conclusions regarding the Applicant's financial situation. In particular, Counsel drew attention to the following statement;

"This Tribunal has noted on numerous occasions in the past that it is the nature of a regulated industry that certain requirements for continued registration must be met for the mutual advantage of the industry and the consumer. In this fashion, the consumer is guaranteed a measure of protection against business failures with negative consequences for consumers and those regulated companies reap the benefit of working in an industry with enhanced public credibility as a result of effective regulation."

Counsel for the Program requested that the Tribunal carry out the Notice of Proposal of the Registrar. Counsel submitted that terms and conditions would be difficult as a proper risk assessment has not been carried out and would mean having to do a supplementary proposal.

Closing statement by Applicant:

Mr. Viscount decided that he wished to make the closing statement rather than the Applicant's agent. The Tribunal permitted this.

Mr. Viscount found it totally unacceptable that these new Agreements had to be signed just because the old Agreement had been signed.

Mr. Viscount stated that he has the evidence to substantiate his personal net worth statement, but he is worried as to what other documents the Program will ask of him, such as his birth certificate or driver's licence.

Mr. Viscount stated that he did not feel the new Agreements were any improvement over the old ones and therefore as he had signed the old one it should stand. He stated that the only reason the Program wanted him to sign the two new Agreements was to violate his rights.

Mr. Viscount stated that he felt the new agreements are an invasion of privacy. The Program can publicize disputes over after sales issues. The Program can circulate his private information. There are no sanctions against the Program for doing this.

In conclusion, Mr. Viscount stated that he has no problems with providing proof of personal net worth and his status as a businessperson, but he has a problem with signing documents that totally take away his rights and prevent him from supporting his family.

LEGISLATION:

The relevant statute is the *Ontario New Home Warranties Plan Act* and its Regulations:

.....

Section 8 (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 23(1) The Corporation may make bylaws,

- (a) governing applications for registration of vendors and builders and the expiration and renewal of registration;

.....

- (f) governing agreements entered into between the Corporation and vendors;

.....

- (l) requiring vendors and builders to be bonded in such form and terms and with such collateral security as are prescribed, and providing for the forfeiture of bonds and the disposition of the proceeds;

.....

- (n) prescribing any matter required or authorized by this Act to be, or referred to in this Act as, prescribed by the regulations;

- (o) prescribing forms for the purposes of the Corporation;

(2) A bylaw passed under subsection (1) shall be deemed to be a regulation to which the *Regulations Act* applies.

.....

Regulation 892

Part III Registration

9(1) Each applicant desiring registration under the Plan shall complete, execute and deliver to the Registrar such form or forms of application as the Registrar may require from time to time.

.....

(3) The applicant shall furnish to the Registrar:

1. An agreement between the applicant and the Corporation providing for the respective rights and obligations of the parties as to the enrolment of homes under the Plan, the performance of work by builders, the sale of homes by vendors and such other matters as the Corporation may reasonably require, such agreement to be in such form as may be required by the Corporation and to be fully completed and executed by the applicant in duplicate.

.....

3. Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.

.....

5. Such additional documentation related to the application as the Registrar may reasonably require.

10(3) Every applicant for renewal of registration shall complete, execute and deliver to the Registrar such form or forms of application and such other documentation as the Registrar may provide from time to time.

Regulation 894

Terms and Conditions of Registration of Builders and Vendors

1. The following are conditions of every registration under the Plan:

.....

3. The registrant shall diligently perform or cause to be performed all obligations imposed under the Plan and under any agreement made with the Corporation in respect of the Plan;

.....

5. The registrant shall from time to time, at the registrant's expense, furnish the Registrar with such documents relating to the Plan as the Registrar may reasonably require.

6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

.....

ANALYSIS:

This is a case where a registrant has refused to comply with certain requirements as stated in writing by the Program. In particular, this registrant will not sign the new Agreements entitled Builder Agreement and Vendor Agreement nor will the registrant provide supporting documentation for his personal net worth statement. The Registrar, after attempts to have the registrant provide these documents and to sign the Vendor Agreement and the Builder Agreement, has issued a Notice of Proposal to refuse to renew the registration of this registrant. It is agreed that the Applicant (registrant) has been registered with the Program since 1995; that the Applicant has received renewals of his registration from that time until the date for renewal in 2000; and that there is no history of any problems with the Program until the

renewal of registration in 2000. There is no proof before the Tribunal that prior to 2000 the Applicant was asked to provide supporting documentation for his personal net worth statement. It is unclear if prior to this renewal period the company T Mag Marketing Inc. o/a Viscount Homes had suffered financial losses. It is agreed that the financial statement for the company for the time period of January, 1999 to December 31, 1999 shows that the company did have a loss for that fiscal year of \$87,043.00.

The Applicant had proposed to make an argument based on constitutional grounds but neither the Applicant nor his agent had complied with the requirements of the Rules of Practice for the Tribunal and served a Notice of Constitutional Question upon the relevant parties. The Tribunal could not consider this argument due to this deficiency. It is unfortunate that the Applicant had not received proper legal advice on this point. This Tribunal cannot urge strongly enough that applicants prepare their cases thoroughly and have read carefully the Rules of Practice of the Tribunal which is given to every applicant when they have filed their Notice of Appeal. The Licence Appeal Tribunal is an administrative tribunal without the inherent powers of the higher courts. The Tribunal can only look at matters within its statutory mandate and that have been processed properly. The Tribunal can look at issues of constitutional importance but only after the Notice of Constitutional Question has been served in accordance with the rules.

The Applicant argued that he was under no obligation to send the two new Agreements or to provide supporting documentation for his Personal Net Worth Statement. The Tribunal cannot find any support for that argument, either in the Act and its Regulations or in the original Vendor/Builder Agreement which was voluntarily signed by the Applicant on May 15, 1995.

The original Agreement has under Clause 3.1 the authority of the Program to limit the number of houses to be constructed by the vendor. It states "The Vendor acknowledges that the conditions of his registration in the Plan or the conditions of any renewal of such registration may require the Vendor to obtain the written consent of the Registrar prior to commencing the construction of homes in excess of the maximum number permitted to be constructed or prior to commencing the construction of homes of any clause, the construction of which is restricted." The Applicant was saying that now under the new Agreements he is restricted as to the number of homes and as to the security deposits required on those homes. That authority was in the original Agreement.

Under Clause 4.4 of the original Agreement it states, "(e) The Vendor at his own expense shall supply to the Corporation upon request whether for purpose of initial registration or renewal, documentation in the form of guarantees, surety bonds, letters of credit, statements of personal net worth, bank statements and other such documentation and records as the Corporation may reasonably require." The Applicant argued that since he never had to provide supporting documentation in the past, therefore he should not have to do so now. It may be that over the past years of registration the Program did not specifically ask this Applicant for such documentation, but the Program has clear authority not only under the legislation but in the

agreement signed by the Applicant to ask for such documents. Whether or not the Program wanted such documents previously, the Program has stated clearly in writing what documents it needs from the Applicant. The document request is not unreasonable, particularly when you consider the debt load of the Applicant's company as stated in the financial statement ending December 31, 1999.

Finally, under Clause 5.1 of the original Agreement it states, "This Agreement shall remain in full force and effect throughout the registration of the Vendor under the Plan; provided that the Vendor shall enter into such further agreements with the corporation as the Registrar may require for the purpose of modifying or supplementing any of the provisions hereof or for the purpose of superseding this agreement....". The Vendor signed this original agreement. Whether he understood it or not, by so doing he placed himself in the legal position of having to sign the two new Agreements that were drafted and implemented by the Program after a long period of consultation within the building industry.

The Applicant is not just bound by the contractual obligations of signing the original Vendor/Builder Agreement in May of 1995. He is bound by the *Ontario New Home Warranties Plan Act* and Regulations 892 and 894. He wishes to work in a regulated industry. The Government of Ontario has for many years regulated the building industry as it relates to new homes and condominiums. The legislation passed by the Province and binding on all who wish to build new homes and condominiums in Ontario is clear in its intent that a corporation, now entitled the Ontario New Home Warranty Program, has widespread powers to control builders within Ontario. Section 8(2) of the Act permits the Registrar of the Program to refuse to renew or suspend or revoke registration if the builder breaches terms or conditions of the registration. Failure to provide financial documentation or failure to sign the new Agreements is a breach of terms and conditions of registration. Section 23 of the Act makes it clear that the Program has the authority to make bylaws governing applications for registration, the governing agreements between the Program and the vendors, types of collateral security, kinds of forms, the fees to be paid and many other items. Regulation 892 states in section 9 that the Applicant must provide financial documents, other additional documents and sign an agreement between the Program and the applicant. Section 10 makes it clear that this applies to renewals of registration. The terms and conditions as stated in Regulation 894 ensure that the registrant must perform his obligations under the agreement with the Program and provide documents, be they financial documents or any other documents, to the Registrar.

Whether the Applicant agrees or not with the broad powers granted by the Government of Ontario to the Ontario New Home Warranty Program those are the powers granted. The issue to be decided by this Tribunal is whether in the circumstances of this case the Program's request of the Applicant are an exercise of those powers. The Applicant's arguments as stated in this case do not overrule the authority of the Program as given to it by the Act and Regulations and originally agreed to by the Applicant in signing the Vendor/Builder Agreement in May of 1995.

The Applicant has stated in writing by letters to the Program and verbally in testimony before this Tribunal that he will not sign the new Agreements. He has also stated before this Tribunal that although he has all the supporting documentation requested by the Program, he will not provide it as he feels it is an infringement of his privacy. Due to these statements it is not appropriate for the Tribunal to consider a renewal of registration based on terms and conditions.

The Tribunal found the Applicant to be a sincere and honest individual. The Tribunal hopes that in the future the Applicant changes his position and again applies for registration on the basis of signing the two new Agreements and providing the Program with the documents supporting his personal net worth statement. It is unfortunate that the Applicant has not understood the legalities of working in the building industry in Ontario as it is presently regulated by the *Ontario New Home Warranties Plan Act* and its Regulations. This Act and its Regulations are there to protect the new home buying public in the Province of Ontario through the registration of builders. The Applicant must understand that to work in a regulated industry, it must comply with the applicable regulation requirements. Where there is a conflict between the Applicant's wishes and the Regulation's requirements, the Regulation's prevail.

ORDER:

Accordingly, based on the evidence and under the authority of section 9(4) of the *Ontario New Home Warranties Plan Act* the Tribunal confirms the Notice of Proposal of the Registrar, Ontario New Home Warranties Program, to refuse to renew the registration of T-Mag Marketing Inc. o/a Viscount Homes under the Act.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: August 22, 2001

RANCE

CARLTON RANCE

APPEAL FROM A DECISION OF THE ONTARIO
MOTOR VEHICLE DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair Presiding
RICHARD C. DELANEY, Member

APPEARANCES:
CARLTON RANCE, representing himself
LARRY A. BANACK, Counsel representing the
Ontario Motor Vehicle Dealers Compensation Fund

DATE OF
HEARING: June 5, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from the decision of the Ontario Motor Vehicle Dealers Compensation Fund ("the Fund") dated January 25, 2001, wherein the Applicant's claim for compensation was disallowed. The claim was for a total of \$2,509.45. As set out herein, the Tribunal found that the claim should be denied and that the Applicant is not entitled to succeed in the claim against the Fund for the reasons hereinafter set out.

ISSUES:

The issues to be determined in this matter are as follows:

- 1) Does Mr. Rance have a "claim" as defined by Regulation 801?
- 2) If he does have a claim, does it meet the requirements of Section 12(3) of Regulation 801?

APPLICABLE LAW:

Section 1 of the *Motor Vehicle Dealers Act* states:

"motor vehicle" means an automobile, truck or other vehicle propelled or driven otherwise than by muscular power, including a motorcycle, but not including a motorised snow vehicle or a farm tractor or other self-propelled machinery primarily intended for farming or construction purposes.

"motor vehicle dealer" means a person who carries on the business of buying or selling motor vehicles, whether for the person's own account, or the account of any other person, or who holds himself, herself or itself out as carrying on the business of buying or selling motor vehicles.

Section 24 of the *Motor Vehicle Dealers Act* states:

The Lieutenant Governor in Council may make regulations,
.....

(o) providing for the establishment, maintenance, and administration of the Motor Vehicle Dealers Compensation Fund including prescribing provisions relating to the investing and paying out of money from the Fund.

(q) providing for payment out of the Fund of claims and procedures to be followed in respect thereto.

Regulation 801, Schedule

Terms of Compensation Fund

12(1) The Fund is established as of the 1st day of July, 1986, to stand in the place of a participant for the payment out of the Fund of claims of customers of the participant where the transactions occurred during the period when the participant was registered under the Act and where the participant has refused after demand or is unable to pay the claims.

(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgement in respect of the claim and the judgement has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgement, and statement of claim, for payment of the unsatisfied portion of the judgement and costs as assessed.

.....

(10) Despite subsections (1), (2), (3) and (6) and subsection 15(3) of this Schedule, there shall not be paid out of the Fund,

(a) more than \$15,000.00 exclusive of costs, to each claimant in respect of each transaction in respect of a claim or claims against any one participant;

(b) any amount of interest, including interest on a judgement or on costs;

(c) where there is a judgement, any amount for costs in excess of actual disbursements and fees as assessed;

....

FACTS:

The Fund disputes the entitlement of the Applicant to compensation under Section 12 (10)(c) of the Schedule to Regulation 801 the *Motor Vehicle Dealers Act* (the "Act").

APPLICANT'S EVIDENCE:

During the month of September 1997, the Applicant, Carlton O. Rance (hereinafter "Rance") negotiated with a representative Al-Maz Motors, 125 Ashwarren Road, Downsview, Ontario to purchase a 1990 Honda Accord (hereinafter "the Honda"). These negotiations concluded on or about September 23, 1997 and are evidenced by a Vehicle Purchase Agreement of the same date (Tab 1, Exhibit 3, P. 8).

During the negotiations, Rance dealt directly with an Al-Maz representative and another individual who was identified as Al-Maz's financier. Also present during the negotiations was Marvalin Bonnick (hereinafter "Bonnick"). Bonnick was Rance's girlfriend at the time. Bonnick was also the purchaser of the vehicle as Rance had financial problems at the relevant time. Bonnick did not testify before the Tribunal.

The Honda was test driven prior to purchase. The Al-Maz representative drove the vehicle with Rance and Bonnick present. The test drive was limited to city streets around the dealership and was concluded in under one-half hour. Other than a malfunctioning cruise-control light, no other problems were observed or reported by Rance or Bonnick.

Rance testified that he discussed an extended warranty with Al-Maz and the financier during the purchase negotiations. He vaguely recalled mention of a six-year or 60,000 kilometre extended warranty. No limitations on the warranty or exclusions for electronic malfunction were recalled. The cost of this warranty was \$150.00.

The \$150.00 premium was apparently to purchase warranty coverage from Lubrico Warranty Inc. This coverage was never placed by Al-Maz Motors Inc. as evidenced by a letter dated February 5, 1999 from Lisa Norcross of Lubrico Warranty Inc. (Exhibit 3, Tab 1, page 16).

Rance indicated he began experiencing difficulties within a month of purchasing the vehicle. A green "S-light" was flashing most of the time. No other problems were experienced with the Honda.

In January 1998, Rance was still having difficulties with the Honda. He took it to Ortis Automotive Centre Inc. on or about January 25, 1998 complaining that the automatic transmission was not shifting properly. The Honda had a performance feature in the shifting procedure. Rance complained that this performance feature was malfunctioning. At that time he received an estimate from Ortis of \$2,241.30 for a rebuilt transmission and fluid replacement.(Exhibit 3, Tab 1, page 24)

Rance did not effect the repairs estimated by Ortis.

On or about December 28, 1999, Rance took the Honda to AP Automatic Transmissions complaining of flashing green light and transmission shifting troubles. The vehicle was left for about one hour following which an estimate was provided for, among other things, a rebuilt transmission and speed sensor replacement (Exhibit 3, Tab 1, page 25).

Rance did not effect the repairs estimated by AP Automatic Transmissions.

On or about January 20, 2000, Rance again took the Honda to a repair shop to check the "s-light". The car was taken to Dalt's Honda. The Honda had previously been taken to Dalt's Honda with respect to the transmission problem. However, Rance was unable to confirm the date of the first visit to Dalt's Honda or that any repairs were done at that time.

Dalt's Honda was asked to provide an estimate for a rebuilt replacement transmission, and the estimate was \$3,550.00 (Exhibit 3, Tab 1, page 26). Rance never completed the repairs estimated by Dalt's Honda.

Rance or Bonnick have been driving the vehicle since it was purchased to the present.

On or about March 8, 1999, Rance and Bonnick commenced a Small Claims Court action in the North York Small Claims Court against Al-Maz Motors. After some procedural delays, Rance and Bonnick obtained default judgement against Al-Maz Motors on November 23, 2000 in the amount of \$2,300.15. The Judgement appears to be based on the Ortis Automotive Centre Inc. estimate of \$2,241.30 dated January 1, 1998.

EVIDENCE FOR THE FUND:

Bob Redinger is the Secretary Treasurer and General Manager of Ready Honda. Mr. Redinger has extensive experience in the automotive industry and, in particular, with Honda vehicles. He has been extensively involved on a full-time basis in the Ready Honda dealership since 1983.

Mr. Redinger was very familiar with the 1990 Honda Accord model. He was at Ready Honda when the model was introduced. He stated the model enjoyed a four-year run and that it is still sold as a used vehicle today.

Mr. Redinger has never examined the Rance Honda and based his testimony on the evidence given by Rance.

With respect to the warranty issue presented in the matter, Mr. Redinger was quite familiar with the products offered on the market to consumers. He was specifically familiar with the third party warranty company Lubrico and their warranty products.

Mr. Redinger testified that 100% of all warranties issued by third party warranty companies cover only mechanical or "sudden failure". "Sudden failure" was described as when an item just stops working. Issues characterised as reduced performance would not be covered under these warranties.

If a transmission is inoperative then the vehicle cannot be driven. This is an example of transmission "sudden failure". However, if a vehicle is driveable and can be operated then there is no "sudden failure".

According to Mr. Redinger, Ready Honda issues dealer warranties in about 1% of all sales. However, they are always time-limited and strictly cover "sudden failure".

He testified that two types of problems are typical with transmission function. First, there are mechanical problems that result in a vehicle that cannot be driven. Second, there are problems with the electronic system such as the speed sensor. The latter problems are not covered by even the best warranties available to consumers.

When asked if he was aware of any warranty that would cover a driveable transmission, Mr. Redinger responded "...not for any money". Also, he was certain that a six-year warranty would not be available for the price of \$150.00 from any warranty company.

Mr. Redinger also reviewed the operation of the sport shift function on the 1990 Honda Accord model. Absent the engagement of the shift feature, the vehicle will shift automatically between gears one and four. The "s-light" stays off and the vehicle shifts more slowly between each gear. When the feature is engaged, the driver is able to accelerate faster between gears.

The "s-light" on the dashboard indicates to the driver that the sport feature has been engaged. When the "s-light" is flashing, as was the condition described by Mr. Rance, this indicates a malfunction. However, the malfunction is not one that affects the operation of the transmission. Mr. Redinger stated that, based on the problems described by Rance, the likely cause of the vehicle problems was a faulty wiring harness in the transmission or a problem with the speed sensor. In either case, the issue is electronic and would not be covered by any known warranty product. Had the problem been diagnosed in 1997, the necessary repairs would have been \$300.00-\$400.00. Today, the same repairs would cost \$600.00-\$700.00.

Mr. Redinger reviewed all of the estimates provided by Mr. Rance and concluded that they revealed probable electronic malfunctions. However, nothing was apparent that suggested the need to replace the transmission.

FACTS FOUND PROVEN:

The Tribunal finds the following facts to have been proven:

- 1) Rance and Bonnick purchased the Honda on or about September 23, 1997;
- 2) Included in the negotiated purchase price was an extended warranty which cost \$150.00;
- 3) The extended warranty was a dealer warranty;
- 4) The extended warranty would have covered only "sudden failure" or mechanical problems and not electronic problems;
- 5) Rance or Bonnick have never effected repairs to the Honda, having only obtained estimates;

- 6) The Honda has always been able to be driven and is still being driven today;
- 7) Rance's complaints regarding the Honda's function reveal an electronic malfunction.

APPLICATION OF LAW TO FACTS AND ISSUES:

The issues in this matter were:

- 1) Does Mr. Rance have a "claim" as defined by Regulation 801?
- 2) If he does have a claim, does it meet the requirements of Section 12(3) of Regulation 801?

As to issue number one, "claim " is defined in the regulation as follows:

"claim" means a claim *for pecuniary loss* arising out of a trade in a motor vehicle.
(emphasis added)

Black's Law Dictionary describes "pecuniary loss" as follows:

...a loss of money, or of something by which money or something of money value may be acquired...

Mr. Rance has never made repairs to the vehicle in question and has not suffered any pecuniary loss as a result.

With respect to the second issue, there was no evidence of any mechanical or "sudden failure". The Honda has always operated and continues to be driven today. Mr. Redinger testified that there was no warranty coverage available for the problems described by Mr. Rance. Therefore, even if one accepts that Mr. Rance purchased a premium, six-year warranty for \$150.00, there is no evidence that the complaints would have even enjoyed warranty coverage. Quite to the contrary, the likely problems with the vehicle were beyond the scope of coverage of even the best warranty products.

Moreover, there is evidence a third party warranty application was not processed by the dealership. Therefore, if Rance purchased any warranty coverage it was some limited warranty coverage from the dealer. Mr. Redinger testified that these warranties are rare and are time-limited and would not have covered an electronic system malfunction.

DECISION:

Therefore, by virtue of the authority vested in it under the *Motor Vehicle Dealers Act*, Regulation 801, Section 15(3), the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair
Presiding

Richard C. Delaney, Member

RELEASED: August 14, 2001

ELLIOTT

KEITH ELLIOTT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

JOEL E. LEVITT, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

June 13, 2001

Toronto

REASONS FOR DECISIONS AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated November 25, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Keith Gordon Elliott (the "Applicant") as a motor vehicle salesperson under the provisions of the Act. The Applicant appeals the Notice of Proposal to the Tribunal.

The Registrar's Notice of Proposal to refuse registration states as follows:

"The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register (sic) Keith Gordon Elliott as a motor vehicle salesperson."

The Registrar's Notice of Proposal also states that the following are the particulars upon which the Registrar relies:

1. Keith Gordon Elliott submitted an application for registration as a motor vehicle salesperson to the Registrar on or about November 3, 2000.
2. On the application for registration submitted to the Registrar's office, the applicant failed to disclose that he had a charge pending for theft over.
3. The applicant had previously applied for registration on or about January 16, 1998. At that time the applicant made disclosure relating to an assault, but failed to disclose the theft over charge which was pending at the time the application for registration was submitted on January 16, 1998.
4. The application for registration submitted January 16, 1998 was ultimately abandoned by the Applicant.
5. The applicant had submitted an application for registration on or about April 27, 2000 but said application was not processed as the applicant had submitted an out of date application form.

THE EVIDENCE:

The first witness for the Registrar was Detective Jack Haze. Detective Haze is a police officer with the Major Fraud Unit, Durham Regional Police. On May 29, 1996 Detective Haze swore an Information charging the Applicant with theft over \$5000.00 contrary to the Criminal Code (Ex. 4, Tab 9). Detective Haze testified that he first became involved with this case as an investigator in 1995. The charge relates to the theft of approximately \$16,000.00 from The T.D.L. Group, trading as Tim Hortons, between October 30 and November 10, 1995. During this period, the Applicant was employed as a Manager for two Tim Hortons stores in Whitby, Ontario. According to Detective Haze, the Applicant's duty was to look after the day to day operation of the stores, including responsibility for the daily deposits.

In late 1995, just prior to the Applicant ceasing employment with Tim Hortons, approximately \$16,000.00 was found missing from the deposits of the Whitby stores. As part of the investigation, a forensic audit was conducted which revealed irregularities in the deposits dating back to June, 1995. In addition, it was discovered that the Applicant was not depositing the monies in the proper accounts. When confronted by the police, the Applicant stated that some monies had been deposited into the accounts for other Tim Hortons stores. According to Detective Haze, this explanation was denied by the other store managers and the bank.

Detective Haze stated that at the time that the charge was laid, the Applicant agreed to make full restitution to The T.D.L. Group on the condition that no criminal conviction be entered. Detective Haze testified that The T.D.L. Group agreed to this stipulation, however no restitution was forthcoming from the Applicant. Accordingly, the matter was returned to the Court for legal process.

The Court Certified Information and docket (Ex. 4, Tab 9) shows that between June, 1996 and March, 2001 there were numerous trial dates set and adjourned. On March 12, 1998, the Applicant was charged with failing to appear. On November 30, 2000 the Applicant appeared without counsel to enter a plea of guilty to the charge of theft over \$5000.00. According to notes from the Crown Attorney's file, introduced into evidence by Detective Haze, the following written proposal was made to the Applicant for sentencing (Ex. 5):

- (1) If Mr. Elliott pays all restitution up front, the Crown will seek a 6 month conditional sentence, with a house arrest except for work, medical appointments, and a set 3 hour period each week for shopping and errands. Mr. Elliott is open to make whatever sentencing submissions he wishes.
- (2) If Mr. Elliott does not pay the restitution up front, the Crown will seek 6 months real jail time plus probation with a stand alone restitution order. Mr. Elliott will again be open to make whatever submissions he wishes.

Re: FTA charge – once he is sentenced, w/draw. On this count, Mr. Elliott claims that he showed up later in the day and Paul Greenaway had the warrant rescinded. I spoke to Greenaway and he said that this is possible. If at a later date Mr. Elliott strikes his plea on the theft, I'd run the FTA and see if the Judge believes his story.

According to the evidence of Detective Haze, the Court adjourned the matter to March 15, 2001 in order to allow the Applicant to arrange restitution. On March 15, 2001 the Applicant failed to appear before the Court and a bench warrant was issued for his arrest. The Applicant was subsequently jailed for three days (Ex. 4, Tab 11).

According to Ex. 5 filed, the Crown Attorney having carriage of the criminal prosecution, wrote the following note in the file:

May 3/01
R v Keith Elliott
.....

The matter was adjourned for four months for Mr. Elliott to pay the restitution as he said this is how long it would take. Stone ordered the matter back up after a couple of months so he could monitor Mr. Elliott's progress with restitution.

What has happened since is this:

- (1) Elliott didn't show up for the "monitor progress" date so he now has a new FTA. Crown should seek a short custody (7 – 10 days) on this is my view as it was a pseudo-sentencing date.
- (2) Elliott showed up today and said he can pay the money through his company but he hasn't paid any of it yet. Matter adjourned to May 11 #8 for Elliott to show some progress on payment...

The final note in the file is dated May 11/01:

Accused (sic) came in today with a personal (uncertified) cheque for \$1000. Stone is really losing patience with him accused. Put over to June 19,01 #3, marked for sentence on theft under. Cheque received today.

Detective Haze was cross-examined closely on the issue of the cause of the delay in processing the theft over charge. He acknowledged that he could not comment on the reason why the matter was adjourned by the Court on each and every occasion between June, 1996 and March, 2001. Detective Haze did state that on May 13, 1997 the Applicant was offered a deal by the Crown Attorney's office whereby the criminal charge would be withdrawn, with no conviction, if full restitution was made by the Applicant. As no restitution was ever made, the offer was rescinded.

Laura Gordon also testified for the Registrar. Ms. Gordon is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC, which was created in 1997, is charged with enforcing and ensuring compliance with the Act and its Regulations. Her duties include overseeing compliance with the Act and Regulations which includes receiving applications for registration as salespersons.

Ms. Gordon reiterated that the Registrar's Proposal to refuse registration dated November 28, 2000 is based on the following grounds:

1. An application for registration received November 3, 2000 failed to disclose the charge pending for theft over.
2. A previous application received January 16, 1998 disclosed an assault matter but failed to disclose the charge pending for theft over.

Ms. Gordon reviewed three separate applications for registration made by the Applicant dated January 16, 1998, April 27, 2000 and November 3, 2000 (Ex. 4, Tabs 7,6 and 5).

With respect to the January 16, 1998 application, Ms. Gordon noted that a handwritten letter signed by the Applicant and attached to the application, states that the Applicant was the subject of a peacebond in 1996 or 1997 for assault. There is no mention in the handwritten letter of the pending theft over charge. Ms. Gordon testified that the Applicant did not disclose any information about the theft over charge in this application. It should be noted that a complete copy of the 1998 application was not available to the Tribunal at the time of the hearing. Ms. Gordon also pointed out that the Applicant made no mention of his employment with Tim Hortons on this application.

On April 27, 2000, OMVIC received a second application from the Applicant. At item 10, the Applicant answered in the affirmative to the following question:

10. Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional or absolute discharge has been ordered.

If yes, attach full particulars on a separate signed and dated statement.

Note: Where the applicant has been previously registered, list only those convictions, conditional discharges absolute discharges or charges which have not previously been disclosed.

According to Ms. Gordon, the Applicant did not attach full particulars of his pending charge on a separate signed and dated statement.

The third application was received by OMVIC on November 3, 2000. At item 3 of the application, the Applicant indicated that his sales licence with OMVIC had been refused "pending legal outcome". At item 8, the Applicant stated that there was an unpaid judgment outstanding against him in the amount of \$3000.00. At item 9, the Applicant answered "No" to the question:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered). If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary)."

Ms. Gordon testified that an Ontario Provincial Police CPIC check revealed that the Applicant was awaiting disposition on a fail to appear charge and theft over charge in Durham Region (Ex. 4, Tab 8).

By letter dated November 10, 2000, the Applicant wrote to OMVIC, explaining the charges (Ex. 6):

“In 1995, I was charged with fraud over \$5000 by The T.D.L. Group, my employer at the time. Since '95, a hearing or trial has been scheduled 5 times, each time being delayed by the Crown. I am eager to prove my innocence but have been unable due to the delays. The next trial date is set for November 30, 2000.”

Ms. Gordon stated that the Applicant made no disclosure about the theft over charge until he was specifically asked. In addition, he failed to disclose his previous employment with The T.D.L. Group. The Registrar views non disclosure by any Applicant as a serious breach of trust. Ms. Gordon also notes that the criminal charge involves theft of funds from an employer. In his employment as a motor vehicle salesperson, the Applicant will come into contact with purchasers funds and credit card information. Lastly, Ms. Gordon stated that despite the Notice of Proposal dated November 28, 2000 and the fact that the Applicant is not registered under the Act, he was working as a salesperson at Mississauga Toyota in May, 2001.

On cross-examination, Ms. Gordon stated that all three applications have the letters V.I.P. written on the first page which means that a verification of the Applicant's criminal record/pending charges was done. Ms. Gordon also stated that the April, 2000 application was never processed because it is an out of date form. She recalls receiving other out of date forms from the same dealership in Mississauga. She agreed that she could not be certain that the Applicant was advised by OMVIC that this application was outdated. Ms. Gordon also agreed that the Applicant answered in the affirmative to the question of whether he had convictions or pending charges.

Ms. Gordon also agreed that the Registrar did not have information that the Applicant had pleaded guilty to the theft over charge when the Notice of proposal was issued on November 28, 2000. However, she stated that the nature of the charge was known to OMVIC and was of grave concern to the Registrar.

Ms. Gordon stated that she became aware that the Applicant was working as a salesperson for Mississauga Toyota in May, 2001. She testified that dealers are well aware of the requirement that all salespersons be registered. She also stated that the Applicant would be well aware of this requirement as he had completed the OMVIC Certification Course. The Tribunal notes that at page 4 of the November 3, 2000 application, directly above the Applicant's signature, it states:

“I understand that I may not buy or sell vehicles for a motor vehicle dealer unless I am registered under the Act as a salesperson.”

The Applicant gave evidence on his own behalf. He is 36 years old with a university education. He has sold vehicles at various dealerships "off and on" since 1986. The Applicant was first registered under the Act on October 31, 1986. It is not clear when his registration lapsed. In 1994, he commenced employment with The T.D.L. Group/Tim Hortons as a District Manager. He left that position in October, 1995 to open his own restaurant. In 1998, he returned to car sales for approximately 1 ½ years, leaving the business again to "go travelling" in 1999. In April, 2000 he decided to return to car sales and commenced work as a salesperson at Mississauga Toyota.

It is the Applicant's evidence that he was not aware that he was not allowed to work as a motor vehicle salesperson pending his appeal. On May 16, 2001 he was advised by his employer that he had to cease work.

With respect to the first application dated January 16, 1998 the Applicant stated that he did not disclose any information about the theft over charge because he had understood that the charge would be withdrawn or dismissed if he paid restitution. He claims to have received this information from his former lawyer. He also stated that he and his wife had separated and he was hoping to pay restitution with his share of the proceeds from the sale of his matrimonial home.

With respect to the April, 2000 application, the Applicant stated that he believes that he did attach a letter providing particulars about his pending charge. He stated that he did not intend to hide anything from OMVIC. He also testified that prior to submitting his April, 2000 application, he met three or four times with "Stan", an OMVIC employee, to discuss the completion of his application.

The Applicant maintains that when he completed and signed the November, 2000 application, he was not aware that it was an application for registration to OMVIC. He stated that he thought that it was an internal document for use at the dealership. According to the Applicant, he was approached by the company controller to complete the form during the course of an audit of the dealership. He testified that he completed the form as fast as he could because he was very busy. He testified that he was not aware that the April, 2000 application had been abandoned. The Applicant stated that when he received a request from OMVIC on November 10, 2000 to disclose all information pertaining to his criminal charges, he thought that the request was in reference to his April, 2000 application.

The Applicant testified that his "paperwork is always in order".

On November 30, 2000 the Applicant pleaded guilty to the theft over charge because a) the matter was dragging on too long, and b) he felt responsible for the lost money. At the time of this hearing, the Applicant had paid back only \$1000 of the \$16,000 stolen. The Applicant states that he has not made full restitution for the following reasons: he lost all his assets (house and business) through divorce, he is paying \$1600 per month child support and his salary is being garnished for a judgment outstanding to the federal government.

On cross-examination, the Applicant acknowledged that he achieved 98% on his OMVIC Certification Course in October, 2000. He also agreed that he personally completed and signed the three applications and that all three documents clearly state OMVIC on the first page. The Applicant stated that since 1986, he has completed five or six such applications and he is aware that OMVIC and his employer rely on the information provided. The Applicant agreed that he clearly understood the question asked about convictions or pending charges.

The Applicant testified that the Court stayed his plea of guilty until the return date of the sentencing hearing. The Applicant stated that he still believes that all charges will be withdrawn; however, on cross-examination, he admitted that the Crown Attorney's resolution notes make no mention of the withdrawal of charges under any circumstances.

The Applicant admitted that he never received confirmation of his registration from OMVIC in the form of a certificate after the three applications were submitted. He stated that he abandoned the January, 1998 application when his then employer, Formula Honda, advised him that his application had been refused.

The Applicant steadfastly denies stealing the \$16,000.00 but claims that he pleaded guilty because he felt responsible as the District Manager in charge of the stores. The Applicant claims that he handles significant sums of money working as a salesperson at Mississauga Toyota and "not a penny has ever gone missing."

ISSUES:

The issue before this Tribunal is does the Registrar have reasonable grounds for refusing to grant registration of the Applicant as a salesperson?

THE LAW:

The relevant portion of the Act that is applicable to these proceedings is section 5(1)(a) which reads:

1. An Applicant is entitled to registration or renewal of registration by the Registrar except where,...

(b) the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and Honesty;....

As established by the Divisional Court of Ontario in the decision of R.G. Brenner v Registrar of Motor Vehicle Dealers, March 9, 1983, unreported,

...the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

APPLICATION OF LAW TO THE FACTS:

The Registrar based her refusal on two grounds: first, the fact of non disclosure by the Applicant, second, the pending charges and the circumstances surrounding these charges which go straight to the issue of the Applicant's ability to carry on business in accordance with the law and with integrity and honesty.

The Tribunal concludes, based on all of the evidence, that the Applicant did fail to disclose information relating to his past conduct and did attempt to mislead the Registrar. The Applicant admitted that he clearly understood the questions on the applications asking whether he had convictions or charges pending. With respect to the January, 1998 application, the Applicant admitted that he did not disclose information about the pending theft over charge because he thought that the charges would be withdrawn when he made restitution. However, the uncontraverted evidence is that the Applicant did not make any restitution until May, 2001—six years after the offence occurred. In the face of this fact, the Applicant's testimony that he believed that the charge would be withdrawn is simply not credible.

With respect to the November, 2000 application, the Tribunal does not accept the Applicant's testimony that he thought that he was filling out an internal document for his employer. The document is clearly titled 'OMVIC - Ontario Motor Vehicle Industry Council - Application for Registration under the Motor Vehicle Dealers Act – Individual Application.'

The words "ALREADY SENT" are printed on page 4 above the words "Have you attached your Cheque or Money Order?" Moreover, the Applicant testified that his paperwork is always in order, he has a university education, he scored 98% on the OMVIC Certification Course and he had completed at least five or six OMVIC applications prior to that date. It is not believable that he mistook this document for anything other than an OMVIC application form.

Further, when asked to provide particulars on November 10, 2000, the Applicant continued to mislead the Registrar by stating "I am eager to prove my innocence". Twenty days later he pleaded guilty to the theft over charge.

In *Cooke(Re)* (1999) OCRATD, No. 4, the Tribunal held at paragraph 16:

The question asked of the Applicant in both applications is highly relevant and of great importance to the Registrar in his consideration as to whether or not an applicant is a worthy candidate for registration. The Applicant when signing both applications certified that the information provided in support of those applications was to the best of his knowledge and belief true. The Registrar's faith in and belief in the integrity and honesty of the Applicant must understandably be destroyed when such Applicant not only once, but on a second occasion conceals relevant information specifically requested of him in the application for registration.

The Tribunal is of the opinion that the dishonest answers to the questions in the January, 1998 and November, 2000 applications afforded the Registrar with reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

Secondly, the Tribunal finds that the economic nature of the charge against the Applicant, and subsequent conviction, directly relate to a lack of honesty and integrity on the part of the Applicant. The Applicant argues that it would be more appropriate to consider the offence date of 1995 rather than the recent conviction date of November 28, 2000. The Applicant further argues that the conviction may be stayed if and when restitution is paid, and this is a relevant factor for the Tribunal to consider. The Tribunal disagrees. If the Applicant was serious about making restitution in order to avoid criminal conviction, payment would have been made years ago. The overwhelming evidence is that the Applicant has delayed, and continues to delay, legal process of the criminal charge in an attempt to avoid restitution and conviction. Further, the Applicant shows no remorse for the serious theft that he committed six years ago. He testified that he pleaded guilty, not because he committed the theft, but because he felt responsible in his position as manager.

Finally, the Applicant knew that his application had been refused yet he continued to flaunt the requirements under the Act by working unregistered until May, 2001. Infact, it became apparent through the Applicant's own evidence that he worked at several dealerships in 1998 and 1999 without being registered. This is further evidence that the Applicant cannot carry on business in accordance with the law and with integrity and honesty.

This Tribunal, therefore, finds that the Registrar has acted reasonably and properly in refusing to allow the Applicant to be registered as a motor vehicle salesperson and in accordingly proposing to refuse the Applicant's registration.

DECISION:

By virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealer Act*, this Tribunal directs the Registrar to carry out his proposal dated November 28, 2000 to refuse the registration of Keith Gordon Elliott as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill,
Vice-Chair

Released: August 23, 2001

MacLELLAN and PAPROSKI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DAMIAN MacLELLAN AND PETER PAPROSKI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAMIAN MacLELLAN AND PETER PAPROSKI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

CLARIDGE HOMES (SOMERSET) INC.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 7-9, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Added Party* to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 a.m. on Monday, November 5, 2001 and to continue November 6 and 7, 2001, if necessary

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 1, 2001

STANGE

THOMAS HENRY STANGE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE THE REGISTRATION

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair
NEIL J. MACPHEE, Q.C., Member

APPEARANCES: DOUGLAS SULMAN Q.C., Counsel for the Applicant
A. MICHAEL ROTHE, Counsel for the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: July 31, 2001 Windsor

REASONS FOR DECISION AND ORDER

BACKGROUND:

This Appeal comes to the Tribunal by way of a Notice of Appeal dated April 9, 2001 brought by Thomas Henry Stange (the "Applicant") pursuant to the right granted in section 7(2) of the *Motor Vehicle Dealers Act*, R.S.O. 1990 Chapter M. 42 as amended (the "Act"). The Appeal is in response to the service upon the Applicant pursuant to section 7(1) of the "Act" by the Registrar of *Motor Vehicle Dealers Act* of a Notice of Proposal to Refuse the Registration under the *Motor Vehicle Dealers Act* of the Applicant as a salesperson (the "Proposal").

On February 1, 2001 the Applicant completed and submitted an application to the Ontario Motor Vehicle Industry Council ("OMVIC") for registration as a motor vehicle salesperson under the Act. Every application, if granted, is initially for a 60 day conditional period. Included in the application form is a section which obliges the motor vehicle dealer which employs the Applicant to certify that the form has been reviewed with the Applicant to ensure the accuracy of the answers. This was done. A person is prohibited under the Act from acting as a salesperson unless he is a registrant under the Act. The Applicant answered "NO" to the question dealing with past criminal records even though the form states that a search of such records will be made and that it was an offence not to disclose such records.

On February 22, 2001 OMVIC informed the Applicant's employer Richmond Motors Ltd in writing that a search had been made, and the Applicant's name had come up showing a criminal record. As the application required further answers on the Applicant's background, his conditional registration was cancelled. This cancellation of the conditional registration also included a demand that any undisclosed criminal records be forwarded to the Registrar.

The Applicant had on two previous occasions applied for and been granted registration as a motor vehicle salesperson, in 1993 and in 1996. The latter registration lapsed which required the submission of the application under review.

The "Particulars" section of the Proposal gives the reasons for the Registrar's decision for the revocation of the Applicant's registration. The Registrar informed the Applicant that his conditional registration was being revoked as he had not disclosed his criminal record on his application form as required and had subsequently failed to fully disclose such record when requested.

The Applicant requested a pre hearing conference pursuant to Rule 9.2 of the Tribunal's Rules of Practice. The Registrar did not consent to a pre-hearing and the Appeal proceeded without one.

EVIDENCE:

The Criminal Record:

The evidence before the Tribunal disclosed the following list of charges and convictions as they appear from the search of the records of the Ontario Provincial Police.

1) 1980: Armed robbery; two cartons of cigarettes from an IGA store. He breached the terms of his recognizance for the offence by not being in his residence during the times required. The disposition was 2 months for the offence plus one week concurrent for the breach of recognizance. The Applicant was 16 years of age at the time.

2) 1986: Theft under \$1,000.00. Disposition: 1 day.

3) 1987: Uttering and illegal possession of company cheques. A forged cheque in the amount of \$150.00 drawn on a Winnipeg bank. Disposition: none, as the applicant failed to appear to answer the charges. There was surety of \$2,500.00 according to the endorsements and the issuance of a bondsman writ in 1989. There was no evidence led as to whether the company cheques were those of an employer or otherwise.

4) 1989: Possession of narcotics. Disposition: \$100.00

5) 1990: Fraud, two counts. Disposition: \$50.00 each

6) 1992: Driving under the influence of alcohol. Disposition: \$700.00, I-D 5 days, loss of licence 3 months

7) 1997: Theft by person required to account. Disposition: suspended sentence and 3 years probation. Plea of guilty entered in 1999 and restitution of \$1,671.00 ordered.

The Application Forms:

The 1993 form submitted by the Applicant to the Registrar had the following wording to the question regarding past criminal records:

“Have you ever been convicted or found guilty of an offence under any law or are there any charges pending? If yes attach full particulars on a separate signed and dated statement.

NOTE: Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing.”

The 1996 form had the following wording to the same question:

“Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered.

If yes attach full particulars on a separate signed and dated statement.

Note: where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not previously been disclosed.”

The 2001 form which prompted the present appeal contains the following words to the question:

“Have you ever been found guilty of an offence under any law or are there any charges pending? (This includes those instances where a conditional or absolute discharge has been ordered.) If yes, list all charges and/or convictions, and the circumstances surrounding each (attach additional sheets if necessary).”

All forms included the warning that submitting false information is an offence. The 2001 form goes on to state that applicants are subject to a background check and criminal record searches.

The 2001 form does not include the provision as do the other two that instances of charges or convictions prior to the application being submitted which have previously been disclosed need not be listed. The reason for this change in requirements was not made clear.

The Answers and follow up procedures:

On the 1993 form, the Applicant the Applicant submitted the following answer to the query about criminal records:

“Impaired Driving -1991”

Subsequent to the receipt of the application, there was a conversation between OMVIC and the Applicant regarding non disclosed criminal records. The Applicant submitted a letter which disclosed in addition to the 1991 impaired driving charge, the charges as are listed above with the exception of the Winnipeg uttering. He included a 1990 failure to remain charge not listed for which he was fined \$200.00. There was some discussion whether he actually disclosed the 1990 fraud charge as he described it as “false pretences”. He did disclose the two \$50.00 fines, and the Tribunal can only conclude that the reference in the Applicant’s letter of explanation was indeed to the actual fraud charge.

On the 1996 form the Applicant answered the criminal records query thusly:

“Previously disclosed”

There does not appear to have been a follow up to this application, and the Applicant was re-registered as a salesperson.

On both the 1993 and 1996 applications there is the attestation of a representative of the employer Andre Lanoue Pontiac that to the best of that representative’s knowledge the information on the form was accurate. The Applicant was retained in the employ of this dealership after learning of the extent of the Applicant’s record.

On the 2001 form as stated, the answer to the criminal records question was “NO”, a flat denial with no explanatory note such as “previously recorded”. This application was filed while the Applicant was in the employ of a new employer Richmond Motors, which was unaware of the record. The Applicant admitted that he purposely belied his record to his employer and to

OMVIC. As stated, this was a new form with different criteria regarding the answer to the question regarding past records. Unlike the two previous forms, this one did not allow for leaving out records already on file preceding the registration. The form required the listing of all previous convictions and charges previously recorded or not.

Upon receipt of the 2001 application, a check was run and a reply sent out to Richmond Motors dated February 22, 2001. In it OMVIC informed the employer that the Applicant's conditional licence was being cancelled and that upon the receipt of a written explanation as to the failure to reveal his record, his application would be processed further. If the explanation proved unsatisfactory, the refusal of the registration would continue; if satisfactory, a new application would be called for.

A written explanation was received by OMVIC May 15, 2001 signed by both the Applicant and Richmond Motors. In it his previously disclosed record was set out in part. There was no mention of the as yet undisclosed 1987 Winnipeg charge of uttering or of the 1990 fraud charges previously disclosed in his letter of explanation to OMVIC of April 1994.

A summary of the evidence adduced on the Applicant's record appears to reveal that at the time of the 2001 application, the Respondent would have had on file all but items 3) and 6) of the above noted record.

When the Respondent asked the Applicant for an explanation as to why the Applicant's record was not disclosed as required, the Applicant stated that not doing so was an error in judgment and that he hoped OMVIC would "grandfather" the issue given his prior applications. He attributed his record of criminal behaviour to alcohol abuse.

The witness on behalf of the Respondent stated that as regulator on behalf of the consumer, OMVIC was particularly concerned with crimes of an economic nature, namely any offence with a fraudulent component. This, it was stated, was in keeping with the regulator's duty under the Act.

Employment history:

The Respondent testified that the records at OMVIC did not reveal any complaints against the Applicant while employed as a salesman.

The Applicant's current employer was called. He testified he was disappointed that the Applicant had not confided in him about his record but accepted the answer that it was due to embarrassment. He demanded a long interview during which the record was discussed. Some of the specifics of the discussion could not be remembered on cross-examination, for example he did not recall the Winnipeg charge being raised. As well, he checked with prior employers. As far as the Applicant's continued employment was concerned, the employer testified it did not matter. He went on to describe how the Applicant was charged with handling sums of

money and had his complete trust. The Applicant was a good employee and was wanted as a salesman.

At the commencement of the hearing, counsel for the Applicant submitted for the Tribunal's consideration three letters of endorsement from organizations for whom the Applicant had worked. Counsel for the Respondent objected on the grounds that they were late disclosure and as the authors were not present to be cross-examined, the Respondent would be prejudiced. Applicant's counsel assured the Tribunal that one of the authors would have been available save for a scheduling problem with the Tribunal. The Tribunal accepted this submission, and in any event, these matters may have been dealt with in the pre hearing requested by the Applicant. The letter in question is from a firm which does fundraising for various charities including the Chatham Police Association, crime stoppers and drug and alcohol awareness programs. The letter refers in glowing terms to the Applicant's ability and trustworthiness as a fundraiser. He was, according to the letter, in charge of handling sums of money and there were never any complaints about his trustworthiness.

THE LAW:

The Tribunal receives its authority to adjudicate and rule upon the matter before it from section 7(4) of the Act. It states:

7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection 2, the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Section 5 of the Act states:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with honesty and integrity.

Section 8 of the Act states:

8. A further application for registration may be made upon new or other evidence or where it is made clear that material circumstances have changed.

Section 22 of the Act states:

22(1) Every person who, knowingly,

(a) furnishes false information in any application under this Act or in any statement or return required to be furnished under this Act or the Regulations;

“.....is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than one year, or both.

As stated above, on the application form under review, under the question regarding past criminal records there is the following note:

“Note: Applicants are subject to background and criminal record searches. Submitting a false or incomplete disclosure is an offense under the MVDA and will result in disqualification. Do not assume that convictions are automatically deleted from your record. If you have any questions about the information you must disclose please call OMVIC.”

In the case of a salesperson's application, it is also necessary to have the applicant's criminal record shown to the Applicant's employer as the employer must attest to the information on the form prior to its submission to the Registrar under the Act.

ISSUES:

The Registrar has two fundamental concerns with the Applicant's application for registration: one, that the Applicant deliberately did not properly disclose his record on the form as required; two, that the criminal record contains offences which are inconsistent with conduct required by registrants in the industry.

APPLICATION OF LAW TO FACTS:

The non disclosure would be an indicator to any regulator that the Applicant is at this primary contact point already proving to be generally dishonest, which the regulator is charged to look out for in fulfilling the role as protector of the consumer.

The Applicant's criminal record revealed charges of fraud and uttering which reasonably give rise to specific concerns when authorizing someone to deal with the public.

The evidence before the Tribunal appears to cut two ways. On the one hand, there is undisputed evidence that no complaints were lodged against the Applicant when acting in the past as a motor vehicle salesman. As well, there is the evidence from people for whom he has worked who gave glowing accounts as to his suitability as an employee and of his trustworthiness. On the other hand, there is the undisputed testimony that he knowingly mislead both the regulator and his employer in his attempt to become licenced.

There is, in keeping with the duty imposed upon the Respondent in section 5(1)(b), evidence that would support the finding of the Registrar that there were reasonable grounds for concluding that the Applicant's past record described a person not suitable to deal with the public. There is also the evidence that his actual record as a motor vehicle salesman revealed no complaints.

Counsel for the Applicant urged that this actual record should be more persuasive as evidence of trustworthiness than the assumption of future dishonesty based upon a criminal record which in any event was largely already on file and despite which previous registrations had been granted. Counsel's closing submission was that at worst the Applicant's registration should be allowed to continue with conditions attached.

The Tribunal was impressed with the attempts of the Applicant to put his past behind him and is optimistic that he will continue to do so.

The Tribunal, however, must remain cognizant of the fact that the Act is consumer protection legislation. The Registrar has as a primary duty under the Act the protection of the purchasers of motor vehicles. To that end, the Respondent has set up certain screening criteria for those seeking to become salespersons under the Act. The first contact with the regulator is the application form. Of all the instances when honesty is called for from a potential registrant, surely it is at this ab initio stage.

It is the legislated duty of the Registrar to assess whether or not an applicant can be expected to deal with the public within the criteria established in section 5 of the Act quoted above. The past conduct of an individual is an obvious starting point as a guide to predicting future behavior. Disguising such past conduct removes from the regulator an important part of his ability to make that assessment.

It is true that to a large extent the Applicant's record was already on file for the Registrar's assessment. However, the Tribunal does not see how this somehow excuses the deliberate misleading of both his employer and the Registrar. Assessing the evidence before it, the Tribunal finds that the Registrar's cancellation of the Applicant's conditional registration was a reasonable exercise of the Registrar's duty under the Act. As such, the Tribunal sees no reason to interfere with the Registrar's decision.

The Applicant is entitled to reapply for registration pursuant to the criteria set forth in section 8 of the Act. Hopefully with the continued support of his employer and others in the community he will do so.

DECISION:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to carry out his proposal dated March 28, 2001 to refuse the registration of a Thomas Henry Stange as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

Neil J. MacPhee, Q.C., Member

Released: August 31, 2001

BANKS

DOREEN AND TERRY BANKS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

TERRY BANKS, representing himself and Doreen Banks
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program,
ENZO SALVATORI, representing the Added Party, Beaverbrook
Homes Inc.

DATE OF
HEARING: August 13, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Terry and Doreen Banks (the "Applicants") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated April 3, 2001;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS the hearing was to commence on August 13 and 14, 2001;

AND WHEREAS, upon commencement of the hearing on August 13, 2001, the Tribunal was advised that the parties have come to a verbal agreement;

AND WHEREAS, in reference to claim number 1 in the decision letter, the Program agreed to pay \$800.00 to the Applicant within 7 days of today's date and the Applicants agreed to withdraw their claim number 2;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

RELEASED: August 13, 2001

BANKS

DOREEN AND TERRY BANKS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

TERRY BANKS, representing himself and Doreen Banks
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program,
ENZO SALVATORI, representing the Added Party, Beaverbrook
Homes Inc.

DATE OF
HEARING:

August 13, 2001

Toronto

REVISED ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Terry and Doreen Banks (the "Applicants") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated April 3, 2001;

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS the hearing was to commence on August 13 and 14, 2001;

AND WHEREAS, upon commencement of the hearing on August 13, 2001, the Tribunal was advised that the parties have come to a verbal agreement;

AND WHEREAS, in reference to claim number 1 in the decision letter, the Added Party agreed to pay \$800.00 to the Applicant within 7 days of today's date and the Applicants agreed to withdraw their claim number 2;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

RELEASED: August 20, 2001

PEEL CONDOMINIUM CORPORATION NO. 498

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
PEEL CONDOMINIUM CORPORATION NO. 498

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

PEEL CONDOMINIUM CORPORATION NO. 498

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

SUNDIAL HOMES (OSPREY) LIMITED

Added Party

ADJOURNMENT ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Peel Condominium Corporation No. 498 (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated April 23, 2001;

WHEREAS the Applicant filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 23, 2001;

AND WHEREAS, the Tribunal was advised that the parties on consent have agreed to adjourn the scheduled prehearing and hearing;

NOW THEREFORE upon consent of the parties, this Tribunal Orders:

1. the prehearing in this matter is adjourned to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, September 26, 2001;
2. that the hearing dates in this matter which have been set for September 24, 25 and 26, 2001 will be rescheduled to new dates by the Tribunal at the prehearing.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23, 2001

FALBO

PREHEARING

JOHN FALBO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

RONALD W. PRICE, Counsel for Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program

DATE OF
PREHEARING: August 7, 2001

By teleconference

ORDER

Following attendances by teleconference before the Licence Appeal Tribunal (the "Tribunal") on August 17, 2001 at a prehearing of Ronald W. Price, Counsel for the John Falbo (the "Applicant"), and Netanus Rutherford, Counsel for the Program (the "Respondent");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant and the Program.
- 2) There is no settlement of the issues.
- 3) The hearing dates of September 4-6, 2001 in Ottawa are adjourned on consent to commence at 9:30 a.m. at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, on Thursday, December 20, 2001 and to continue December 21, 2001, if necessary.

- 4) The parties are aware of their obligations and shall fully comply with Rule 6.3 and Rule 6.4 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

Released: August 13, 2001

DEVLIN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
PATRICK AND DEBRA DEVLIN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

PATRICK AND DEBRA DEVLIN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

KANSUN HOMES LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 8, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Applicants* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, September 11, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 9, 2001

GEORGIA EQUIPMENT INC.

TRIBUNAL: DAVID J. HUNT, VICE-CHAIR, PRESIDING
ALAN HOLBROOK, MEMBER
CLARKE WALLACE, MEMBER

PATRICK MOORE,
Counsel for the Respondent

DATE OF HEARING: August 21, 2001 Toronto

FOLLOWING attendances on August 21, 2001 at a hearing before this Tribunal of Armando Herman Carreiro, Agent on behalf of Georgia Equipment Inc. (the "Applicant"), and Patrick Moore, Counsel on behalf of Deputy Registrar of Motor Vehicles (the "Respondent");

AND WHEREAS the Applicant filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS an oral hearing was to be held on August 21 and 22, 2001 at the Tribunal's Chambers, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

AND WHEREAS at the commencement of the hearing on August 21, 2001, the agent for the Applicant advised the Tribunal that on consent of both parties, the Applicant withdrew his appeal;

NOW THEREFORE this Tribunal orders, on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair,
Presiding

Alan Holbrook, Member

Clarke Wallace, Member

RELEASED: August 23, 2001

PERGUNAS

PREHEARING

MARGARET PERGUNAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS C. MACKINTOSH, VICE-CHAIR

APPEARANCES:

ORREN LOUCH, Agent, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
RICHARD WALKER, Agent, representing the Added Party,
1160773 Ontario Limited

DATE OF
PREHEARING: August 22, 2001

By teleconference

ORDER

Following attendances at a prehearing by teleconference before the Licence Appeal Tribunal (the "Tribunal") on August 22, 2001, of Orren Louch, Agent representing Margaret Pergunas (the "Applicant"), Netanus Rutherford, Counsel and Frank Caskenette for the Ontario New Home Warranty Program, (the "Respondent"), and Richard Walker and Bill Farmer, for 1160773 Ontario Limited (the "Added Party");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant, the Ontario New Home Warranty Program and the Added Party.

- 2) There was no resolution of the issues between the parties and the four claims made by the Applicant remain in dispute.
- 3) The parties shall fully comply with the Tribunal's Rules of Practice respecting disclosure, including the disclosure requirements of Rules 6.3 and 6.4.
- 4) The hearing will commence at 9:30 a.m. at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario, on Thursday, October 4, 2001 and to continue October 5, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh,
Vice-Chair

Released: August 23, 2001

GRAND PACIFIC TRANSPORT INC.

TO APPEAL A SUSPENSION AND SEIZURE ORDER ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

APPEARANCES: GRAND PACIFIC TRANSPORT INC., Applicant
No one Appearing

PATRICK MOORE,
Counsel for the Respondent

DATE OF HEARING: August 15, 2001 Toronto

An oral hearing was held on August 15, 2001 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.(1) of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Suspension and Seizure Order imposed by the Registrar of Motor Vehicles pursuant to section 47(1) of the HTA.

BACKGROUND:

This is an appeal under section 50.(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar") made a decision to issue a suspension and seizure order under section 47(1) of the Act.

The Applicant filed an appeal of this suspension and seizure order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 filing fee. The Tribunal conducted a prehearing on June 19, 2001 and sent the prehearing order to the parties on June 26, 2001 by fax, which indicated that the date of the hearing before the Tribunal was August 15, 2001.

The Applicant by a fax dated August 13, 2001 (Exhibit 3) notified the Tribunal that there would be no representative attending the hearing on August 15, 2001 and requested an adjournment. The reason given was that the Applicant was "pre-occupied in compiling the information desired by the Office of Superintendent of Motor Vehicles" in British Columbia for a Show Cause Hearing regarding a proposal to cancel the company's National Safety Code Certificate. This information was required by August 14, 2001.

The Tribunal by fax advised the Applicant that without the consent of the other party to an adjournment, the Applicant was required to have a representative attend at the hearing to request an adjournment and that if the Tribunal did not grant an adjournment, the hearing would proceed in the absence of the Applicant. At the opening of the hearing before this Tribunal on August 15, 2001, no one appeared for the Applicant.

Ms. Stacy Murphy the Group Leader at the Tribunal testified that she had contacted the Applicant by telephone on August 15, 2001 prior to the commencement of the hearing and spoke to Mr. Dale Kooner. She testified that he advised her that Mr. Daljit Singh Kooner was not available and that a fax had been sent requesting an adjournment. Ms. Murphy advised him that two subsequent faxes had been sent to the Applicant by the Tribunal advising the Applicant that the Registrar of Motor Vehicles did not consent to an adjournment and that it was necessary for someone to attend on behalf of the Applicant.

After recessing for 30 minutes, the Tribunal asked Counsel for the Registrar if he wished to make any submissions on the request for adjournment. After hearing his submissions, the Tribunal refused the adjournment on the basis that the Applicant had not complied with Tribunal's Rules of Practice respecting adjournments, that an adjournment was prejudicial to the Registrar of Motor Vehicles and that the Applicant had not provided sufficient grounds to justify an adjournment of the hearing before the Tribunal.

The hearing proceeded.

ISSUES:

Should the Tribunal confirm, modify or set aside the decision of the Registrar to issue a suspension and seizure order for 30 days and until all fines are paid?

FACTS:

Ms. Burnadette McKenna testified that she is a Carrier Safety Rating Administrator with the Ontario Ministry of Transportation and has had twenty five years of experience with that Ministry. One of her duties is to prepare an analysis of carriers to rate them for safety and performance, and to identify those which should be subject to sanctions. She reports to Ms. Margaret Mooney who is the head of Control and Sanctions for the Ontario Ministry of Transportation, who reports to Mr. Beatty who is the Deputy Registrar of Motor Vehicles. It is Mr. Beatty who makes the decisions as to sanctions. Ms. McKenna explained how the CVOR rating system operates, and how there is a point system for various types of infractions including accidents, convictions, and deficiencies found during inspections and audits. In this case, an audit had been conducted by the Department of Motor Vehicles in British Columbia and the results forwarded to the Ontario Ministry of Transportation. This system was explained in the Ontario Carrier Safety Rating and Commercial Vehicle Operators Registration System Public Guideline (Exhibit 5, Tab 21).

Ms. McKenna produced the Applicant's CVOR Abstract showing all accidents, convictions and inspections from April 19, 1998 to January 4, 2001 (Exhibit 5, Tab 9) together with her Analysis (Exhibit 5, Tab 7) which set out the history of the company. Mr. Jagjit Kooner is the President of the company which is based in Surrey, British Columbia. The Applicant's CVOR certificate # 124-455-422 was issued on November 21, 1996 and the company operated a fleet of 40 commercial vehicles carrying general freight. 22.3% of the Applicant's travel is in Ontario, so the size of the fleet was adjusted to 9 to compensate for this in the calculation of violation rates. Ms. McKenna found that the overall violation rate was 133.6% over the threshold. The rate of accidents was 129% over the threshold, the conviction rate was 226.4% over the threshold, and the inspection failure rate was 50% over the threshold. Ms. McKenna explained that the thresholds are set considerably higher than the Provincial averages, and that accidents are given the greatest weight (double) due to the importance of road safety. She also had concerns due to the Applicant's non payment of fines. At the Ministry's Show Cause meeting on May 3, 2001 with the Applicant, there had been a promise to pay the fines, but as of August 14, 2001 there were still fines outstanding, and some predated her Analysis which was done in March 2001.

In the Analysis, Ms. McKenna reviewed the accidents and referred to the SafetyNet Report which listed all of the deficiencies found in the inspections and showed if the accident and deficiencies were sufficient to have the vehicles taken out of service. According to that report, in 1999 and 2000 the rates of "Out of Service" defects for the Applicant were 52.2% and 57.1% which she testified compared unfavourably with the Provincial averages for the same period of 38% and 35%. The CVOR Record (Exhibit 5, Tab 9) was also produced showing the particulars of the defects found in the inspections, and the convictions. From February 27, 1999 to February 26, 2001 there were 13 accidents and 50 convictions, with 45 of the convictions being considered safety related.

Ms. McKenna testified that on April 24, 2001 a letter was sent by the Deputy Registrar of Motor Vehicles (Exhibit 5, Tab13) to notify the Applicant that an Unsatisfactory safety rating was being assigned to it with a proposed Suspension and a Conditional rating until the beginning of the Suspension. On June 4, 2000 an audit was requested from the Motor Vehicle Branch Inspection and Carrier Safety (British Columbia) (Exhibit 5, Tab 16) and the Audit dated April 23, 2001 was received (Exhibit 5, Tab 17). As a result of this audit, a Show Cause Hearing was recommended in British Columbia to cancel the National Safety Code Safety Certificate of Grand Pacific Transport Inc. Ms. McKenna testified that the Audit revealed some serious problems. The Applicant was not obtaining and reviewing driver abstracts, not receiving accident reports, not keeping records of driver training, drivers were not performing pre-trip inspections, and drivers were not keeping proper daily log books.

On May 3, 2001 a Ministry Show Cause Hearing was held in Ontario with Mr. Beatty, Ms. Mooney, Ms. McKenna and Mr. Parminder Pannu on behalf of the Applicant. Mr. Pannu had produced a written authorization from the Applicant allowing him to appear. Ms. McKenna testified that Mr. Pannu had little information about the company. He advised them that the company was not obtaining driver abstracts and that he was not sure if pre-trip inspections were being done. After the meeting, Mr. Pannu was given a CVOR Update form to fill in and return. When this form was not received, the Applicant was contacted, and the witness was advised that Mr. Pannu no longer worked for the Applicant and that they did not know where he was.

The Registrar of Motor Vehicles issued a Suspension and Seizure Order dated May 10, 2001 which states:

SUSPENSION AND SEIZURE ORDER

WHEREAS a Notice of Suspension & Seizure dated the 24th day of April, 2001 was issued proposing a 30 day suspension of the CVOR certificate issued to Grand Pacific Transport Inc. (124-455-422) and thereafter until all fines were paid and suspension and seizure of plate portions of permits and number plates;

AND WHEREAS provided in the notice, you had the opportunity to make submissions at a meeting with Deputy Registrar on the 3rd day of May, 2001 to show cause why the suspension and seizure order should not be issued;

AND WHEREAS I have considered your submissions, your safety record, your history of and current unpaid fines, I remain concerned for highway safety.

NOW THEREFORE IT IS ORDERED that pursuant to Section 47 & 47.1 of the Highway Traffic Act that as of 15th day of May, 2001, CVOR certificate # 124-455-422 and the plate portion of permits for all commercial motor vehicles and trailers issued to Grand Pacific Transport Inc. be suspended for 30 days and thereafter until all fines are paid and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits, and the number plates be seized.

This suspension and seizure will be effective the 21st day of May, 2001 at 9:00 a.m. Eastern Standard Time to 20th day of June at 8:59 a.m. and thereafter until all fines are paid.

DATED at St. Catharines this 10th day of May, 2001.

LAW:

- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

- 22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

Maintenance requirements under the HTA are found in Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); and Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The [Tribunal] may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the [Tribunal] shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the [Tribunal] with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the [Tribunal] shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute."

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal

record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Tribunal heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitating himself. The Tribunal found that “possibly the applicant will in the future, be a person of honesty and integrity”, and the Tribunal expressed a willingness to “encourage that objective”. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty."

APPLICATION LAW TO FACTS:

The evidence of Ms. McKenna is found to be credible, clear and internally consistent. Relevant information was gathered from reliable sources, and assessed without favour or bias. The same sources of information, and methods of evaluation are used by the Ministry of Transportation in reviewing the safety record of every other commercial carrier in the Province of Ontario.

The Applicant did not dispute the accuracy of the information in the Show Cause Hearing. It is noteworthy that although notified of this hearing, the Applicant failed to appear or to have any representative attend on the Applicant's behalf to dispute the evidence of the Registrar of Motor Vehicles. In the violations involving safety inspections, a significant number of the deficiencies related to the condition of brakes and tires which poses an obvious and immediate safety concern, and serious questions about vehicle inspection and maintenance procedures. Although given sufficient time and reason to do so, the Applicant has not put forward a plan to deal with issues of maintenance, inspection or driver screening and education.

As set out in the *Brenner* decision, the Tribunal is to determine whether the decision of the regulation is reasonable. The Tribunal finds that the decision of the Registrar in this case was not in error, but was reasonable and appropriate. The past conduct of the Applicant shown by the safety record provides ample evidence to support the decision of the Registrar of Motor Vehicles to issue a suspension and seizure order for 30 days and until all fines are paid. The Tribunal finds no reason to interfere with the sanction imposed in the order issued by the Registrar.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.(2) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the decision of Registrar of Motor Vehicles to issue a suspension and seizure order for 30 days and until all fines are paid.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair,
Presiding

Alan Holbrook, Member

Clarke Wallace, Member

RELEASED: August 22, 2001

PROFIT AUTO SALES LTD., PROVINCIAL USED CAR SALES LTD.
AND BRIJ LAL BADHAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PROFIT AUTO SALES LTD., PROVINCIAL USED CAR SALES LTD.
AND BRIJ LAL BADHAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: May 14, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PROFIT AUTO SALES LTD., PROVINCIAL USED CAR SALES LTD.
AND BRIJ LAL BADHAN

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 20, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, November 14, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 20, 2001

BALDASSARRE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ANTONIO BALDASSARRE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 28, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANTONIO BALDASSARRE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 29 and 30, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Tuesday, December 11, 2001 and to continue December 12, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23, 2001

TAMARA KOUKOVA O/A T&V AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
TAMARA KOUKOVA O/A T&V AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TAMARA KOUKOVA O/A T&V AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 5-6, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Tuesday, November 27, 2001 and to continue November 28, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 7, 2001

GERALD BOLTON O/A TRANSTARIO TOURS

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
GERALD BOLTON O/A TRANSTARIO TOURS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 11, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GERALD BOLTON O/A TRANSTARIO TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Gerald Bolton o/a Transtario Tours, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 30, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

GERALD BOLTON O/A TRANSTARIO TOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Gerald Bolton o/a Transtario Tours (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 1988922/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since September 11, 1983 and has been registered as a travel wholesaler (registration number 1988948/W) since September 18, 1984. The Registrant has a fiscal year end of December 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.

3. By letter dated November 22, 2000, TICO requested that the Registrant file its financial statements for its fiscal year ending December 31, 2000 by March 31, 2001.
4. On April 10, 2001, TICO sent a second request for the Registrant's financial statements for its December 31, 2000 year-end, which gave the Registrant a deadline of April 30, 2001.
5. By letter dated May 1, 2001, the Registrar, *Travel Industry Act* informed the Registrant that if it did not provide its financial statements by May 16, 2001, the Registrar would initiate administrative action including a proposal to revoke registration.
6. By June 11, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.

COMPLIANCE HISTORY – PREVIOUS PROPOSAL (FORM 1 FILING)

7. Section 47 of the Regulation states that within forty-five days after the end of the Registrant's fiscal year and fiscal half-year the Registrant shall make payments to the Ontario Travel Industry Compensation Fund and said payment shall be accompanied by a completed return, in the form ("Form 1") provided by the Travel Industry Council of Ontario ("TICO") indicating the sales of the Registrant for the reporting period and the amount owing to TICO.
8. By letter dated February 26, 2001, TICO advised the Registrant that it had failed to file its Form 1 for its fiscal year year-ended December 31, 2000, and to make the required payment to TICO and submit the required filing by March 12, 2001.
9. A final request was sent to the Registrant on March 12, 2001 providing the Registrant with a March 26, 2001 deadline to submit the required payment and filing, failing which the Registrant was advised that a proposal to revoke its registration would be issued.
10. By April 6, 2001, the Registrant had failed to file its Form 1 with the required payment. On that date, the Registrar issued the Proposal to Revoke the Registrant's Registration.
11. On May 5, 2001, the Registrant filed its Form 1 and paid TICO \$28.75 based on estimated sales of \$100,000.00.

12. On May 7, 2001, the Registrar withdrew his Proposal dated April 6, 2001 and cautioned the Registrant that a subsequent proposal may not be withdrawn even if there is compliance after the proposal is initiated.

EVENTS AFTER THE ISSUANCE OF THE PROPOSAL

13. On August 20, 2001, the Registrant filed financial statements for its fiscal year-ended December 31, 2000. The statements were accompanied by a Notice to Reader and did not include a Review Engagement Report. TICO's review of these financial statements showed that the Registrant had a working capital of \$2,598.00.
14. Given the Registrant's reported working capital position, TICO required a Statement of Personal Net Worth of Mr. Gerald Bolton, the Registrant's sole proprietor. On August 22, 2001, the Registrant submitted a Statement of Mr. Bolton's Net Worth, which was noted to be \$240,612.00. The Statement noted that Mr. Bolton's Net Worth could be subject to contingent liabilities due to the bankruptcy of Transtario Bus Lines Inc., a company solely owned by Mr. Bolton. These liabilities are not known at this time.
15. The Registrant's Form 1 filings and corresponding payment to the Compensation Fund for the period ended June 30, 2001, which was due by August 15, 2001, remains outstanding.
16. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 11, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall establish a properly designated "Travel Industry Act Trust Account" and provide proof thereof to the Registrar by September 15, 2001. Thereafter, the Registrant shall comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time and as explained in the Travel Industry Council of Ontario Trust Accounting Guidelines, a copy of which is attached as Appendix "A";

- (b) The Registrant shall submit a monthly trust account reconciliation to the Registrar beginning with the month of September 2001 for so long as the Registrar shall so require. Each reconciliation shall be submitted no later than the last day of the month which immediately follows the month to which the reconciliation refers;
- (c) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2001, no later than March 31, 2002;
- (d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2002, no later than March 31, 2003;
- (e) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant.
- (f) The Registrant shall complete its Form 1 filing for its fiscal half year ended June 30, 2001 and make all applicable payments to TICO by September 4, 2001;
- (g) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2001 and make all applicable payments to TICO by February 15, 2002, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
- (h) The Registrant shall complete its Form 1 filing for its fiscal half year ending June 30, 2002 and make all applicable payments to TICO by August 15, 2002, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
- (i) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2002 and make all applicable payments to TICO by February 15, 2003, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time; and

- (j) The Registrant shall complete its Form 1 filing for its fiscal half year ending June 30, 2003 and make all applicable payments to TICO by August 15, 2003, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (j) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of August, 2001

Mr. Gerald Bolton
Gerald Bolton o/a Transtario Tours
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

KALSATOS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ALEXIOS KALSATOS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 12, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ALEXIOS KALSATOS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 14, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Thursday, November 1, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 7, 2001

VALUE VACATIONS LTD.

PREHEARING

VALUE VACATIONS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL:

TERENCE A. WARDROP Q.C., Vice-Chair

APPEARANCES:

ADAM ALTMID, Counsel for Applicant, Value Vacations Ltd.,
Applicant

TREVOR BRANION, Counsel for Registrar, *Travel Industry Act*
Respondent

DATE OF

PREHEARING: August 8, 2001

Toronto

ORDER

BACKGROUND:

Pursuant to Sections 6(1) and 7 of the *Travel Industry Act*, Revised Statutes of Ontario, 1990, Chapter T.19, (the "Act"), a Notice of Proposal dated June 21, 2001, (the "Proposal") was issued by the Registrar under the Act (the "Registrar") to revoke the registration of Value Vacations Ltd. (the "Applicant") as a travel agent and by order temporarily suspended the said registration effective the date upon which the Proposal was issued (the "Suspension Order").

The Applicant by a Notice of Appeal dated June 22, 2001 (the "Appeal"), and filed at the offices of the Licence Appeal Tribunal (the "Tribunal") on June 28, 2001, requires a hearing by the Tribunal in respect of the Proposal and the Suspension Order pursuant to Section 6(2) of the Act.

The Proposal and the Appeal was set down for a hearing before the Tribunal on July 12, 2001, and, at that time and at the request of the Applicant, the hearing was adjourned by the Tribunal for the purpose of affording the Applicant an opportunity to engage and instruct counsel to represent the Applicant. At the said hearing on July 12, 2001 the Tribunal heard evidence from three witnesses and continued the Suspension Order pending a prehearing conference (the "Prehearing Conference") before the Tribunal for the purpose of identifying and/or simplifying the issues contained within the Proposal and the Appeal.

The Tribunal issued an Interim Order released July 27, 2001 (the "Interim Order"), respecting the adjournment, the continuation of the Suspension Order, the evidence presented at the said hearing of July 12, 2001 and the need for the Prehearing Conference in order to refine the issues raised in the Proposal and the Appeal.

Participation in the Prehearing Conference was set down for a conference on August 8, 2001, in accordance with the Rules of Practice of the Tribunal. At the Prehearing Conference, both the Registrar and the Applicant were represented by counsel and the principal of the Applicant, Charles A. Pinnock, was also present and participated.

DECISION:

It became apparent at the Prehearing Conference that the issues involved in the Proposal and the Appeal were more simple and straight forward than noted in the chronological factual particulars alleged in the Proposal since such were repetitious and resulted from numerous alleged breaches by the Applicant on separate occasions respecting the same issue or issues. In order for the Registrar to comply with the heavy duty imposed upon him to regulate the travel industry, it became obvious to his officials that the Applicant was continually and repeatedly called upon to comply with the Act and the regulations promulgated thereunder and to rectify its alleged non-compliance.

The Registrar sets out some sixty-two items in Part D of the Proposal in which specific "particulars" of non-compliance by the Applicant of statutory or regulatory requirements are alleged. Section 3 of Part D of the Proposal places all enumerated items of non-compliance into the following eight categories;

- late filing of financial statements,
- failing to maintain working capital,
- misuse of credit cards,
- issuing NSF cheques,
- failing to meet its financial responsibilities to wholesalers,
- misrepresentation,
- failing to notify the Travel Industry Council of Ontario ("TICO") of changes in its financial institutions, and

- deficient advertising.

To these categories listed in the said Section 3, there are two additional categories into which the enumerated items are placed, being;

- failure to maintain proper records, and

- failure to deal with customers' complaints.

Each of these ten categories of non-compliance is therefore an issue to be dealt with at the hearing and the sixty-two enumerated items can be grouped into the categorized issues as follows:

1. Late filing of financial statements;

Items #9 to #12

Item #25

Items #27(c) to #28

Item #32

Items #35 to #37

Item #47

2. Failing to maintain working capital;

Item #12

Items #15 to #16

Items #23 to #24

Items #26 to #27(a)

Items #28 to #29

Items #37 to #43

Items #47 to #50

Items #53 to #54

Item #60

3. Misuse of credit cards;

Items #13 to #14

Item #15

Items #17 to #19

Items #21 to #22

Item #40

Items #55 to #58

4. Issuing NSF cheques;

Item #16

Items #20 to #21

Item #44

Item #46

Item #62

5. Failing to meet its financial responsibilities to wholesalers;

Item #14

Item #21

Items #30 to #31

Item #47

6. Misrepresentation;

Item #23

Items #33 to #34

Item #51

Item #59

Item #61

Item #64

7. Failing to notify TICO of changes in its financial institutions;

Item #23

Item #44

Item #61

8. Deficient advertising;

Items #4 to #8

Items #51 to #52

9. Failure to maintain proper records;

Item #15

Item #18

Item #20

Item #27(b)

Item #45

Items #49 to #50

Item #60

10. Failure to deal with customers' complaints.

Item #63

Item #65

Upon the direction of the Tribunal at the Prehearing Conference, each of the enumerated items was discussed, some in more detail than others, and this exchange or discovery process between counsel seemed to clarify the issues contained in the Proposal and Appeal to the extent that the documentation was admitted as factual between the Parties but not the contents of the documentation. In this connection, Counsel for the Applicant required more detailed

particulars of many of the alleged enumerated items of non-compliance contained within the ten categories of issues.

It was also clear at the Prehearing Conference that these categories or issues were subordinate to the main issue of the Applicant's ability or fitness to comply with the regulatory requirements of the Act as determined by the Registrar and to do business with other registrants and wholesalers. As stated in the Interim Order, it is and was not sufficient for the Applicant to attempt to explain away the enumerated items, but rather to ensure that such did not occur in the first place. It is apparent to the Registrar that the sheer number of enumerated items makes his duty under the Act difficult to administer.

Another issue may emerge from the facts and circumstances of this matter, as the evidence which was presented at the Prehearing Conference involves the "last-minute" segment of the travel industry market. Insofar as Mr. Pinnock, the principal of the Applicant, deals in this "discount" portion of the market, it is apparent that more customer complaints will be generated and more difficulties will arise from "last-minute" decisions in the efforts by both planners and customers, not to mention carriers and wholesalers, to fill the last places or seats. This, in turn, makes this "bargain-hunter" market more difficult to regulate, and conversely, more difficult to comply with regulatory requirements by those who would choose to deal principally in this particular, yet important, segment of the travel industry market.

The foregoing Decision is without prejudice to the stated intention of Counsel for the the Registrar to issue a further notice of proposal supplemental to the Proposal which has the effect to bring the hearing to a current state having regard to the efficiency of having the Tribunal deal with all current factual matters involved with the issues between the Parties, and the concomitant right of the Applicant to file an amended notice of appeal, all within the appropriate time limits and constraints of the Tribunal's Rules of Practice.

ORDER:

The Tribunal therefore makes the following Order respecting the hearing to be heard before the Tribunal:

1. The Parties to the hearing are the Applicant and the Registrar;
2. The hearing shall take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, during the week commencing on Monday, September 4, 2001, or at such other expeditious time as ordered by the Registrar of the Tribunal having regard to the estimated duration of the hearing to be four days and the reasonable availability of Counsel and the witnesses which each intend to call upon to give evidence at the hearing;

3. The Parties shall fully comply with Rules 6.3 and 6.4 of the Tribunal's Rules of Practice;

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

RELEASED: August 22, 2001

SMITH

DONALD T. SMITH

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ELMER MERKLEY,
 Presiding member

APPEARANCES: BRIGITTE HAMMOND,

 Representative for the Registrar of Motor Vehicles

 DONALD T. SMITH, Applicant
 unrepresented

DATE OF HEARING: July 30, 2001

DECISION RELEASED: August 2, 2001

Written

REASONS FOR DECISION

A written hearing was held on July 30, 2001, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Donald T. Smith (the "Applicant")
Motor Vehicle:	1996 LVA GMC, plate # ACKA650 (the "vehicle")
Date of Appeal:	July 5, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 30, 2001 and proceeded as a written hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal reviewed the evidence provided in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

July 3, 2001

Reason for Appeal - Exception Hardship

As I live in a small village with no public transportation or taxi services, I need transportation to seek employment and to be able to get to a place of employment when employment is found.

My daughter uses the vehicle to travel to her place of employment and to transport other members of the family around. Also my brother uses the vehicle to transport his children to and from doctor appointments, and their mother's residence.

As I also pay child support for my daughters. I need to be able to get to and from anyplace that I can get employment.

Thank you.

Donald T. Smith

The Applicant did not provide the Tribunal and the Respondent with any reply after receiving the Respondent's submissions and supporting evidence.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Donald T. Smith;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 23, 2002.

The Registrar submitted that the criteria to establish exceptional hardship is cumulative and therefore the Applicant must meet all the requirements of the Regulation before his appeal can be considered and that Mr. Smith has failed to meet the conditions set out for demonstrating exceptional hardship, as prescribed in the *Highway Traffic Act* Regulations 632/98.

The Applicant relied on the submission that he was experiencing hardship as the impounded vehicle was his only way of getting around his rural residence. The onus is on the Applicant to establish this ground. Section 22 of Regulation 574 of R.R.O. 1990, as amended by Ontario Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. In order for the Applicant's claims to be considered, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle in order to adequately mitigate any potential loss.

The Registrar submitted that in the "*Owner's Position in Appeal*", no mention is made by the Applicant of what options or alternatives have been considered by him and inquired into and that the Applicant has failed to demonstrate that he has even considered any option or alternative to the impounded vehicle. For example, the Applicant offered no evidence as to whether the Applicant has considered transportation by taxi, renting a vehicle, public transportation or sharing a ride, and whether the costs of these other alternatives were reasonable. The Registrar submitted that the Applicant did not meet the criteria set out in Section 22(3)(a) and (4), Regulation 574, R.R.O. 1990, as amended by Ontario Regulation 632/98; specifically, he failed to demonstrate that no alternative to the impounded motor vehicle is available to adequately mitigate any potential loss.

As to the Owner's Position dated July 3, 2001, the Registrar submitted that there are reasonable alternatives to the impounded vehicle and presented a certified copy of vehicle registration sealed July 10, 2001 of Donald T. Smith for a vehicle VIN # 1G1LV11W5KY139755. This is for a vehicle other than the one impounded. While the Registrar recognized that this vehicle is not currently plated, the Registrar submitted that there was no evidence from the Applicant that this vehicle could not be easily plated and used as an alternative.

Further, the Registrar submitted that Applicant had not demonstrated that the loss was immediate, significant and lasting as prescribed by Section 22(3)(b). The Applicant stated that he cannot look for work without his vehicle. The Registrar responded that while the Applicant stated that he was seeking employment, there was no evidence that there exists a possible employment opportunity that is jeopardized by the impoundment of his vehicle or that the Applicant required the vehicle to look for work. The Registrar also submitted that any hardship that may be associated with employment (or potential employment) loss is not corroborated by supporting evidence in the Owner's Position in Appeal.

As to the Applicant's statement that he is paying child support for his daughters, the Registrar submitted that there is no evidence that the impoundment of the vehicle affects this.

The Applicant submitted that his hardship includes the inability "*to transport other members of the family around..to and from doctor's appointments*". The Registrar responded that there is no evidence that Mr. Smith or anyone ordinarily transported by the impounded vehicle has any current health concerns that may be potentially jeopardized by the loss of the vehicle under Section 22(1)(a) of Regulation 632/98 and that the Applicant has not provided evidence or details of any health problem. If an emergency possibly arose, the Registrar submitted that emergency personnel could be called.

As to the Owner's Position, dated July 10, 2001, the Registrar submitted that for the Applicant's claims to be considered under Section 22(2)(a), (b), and (c), he must demonstrate that all of section (22)(3) has been met, and section 22(4) of the Regulation provides that the Applicant must demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Registrar submitted that the Applicant has not met these requirements.

Further, the Registrar submitted that any suggested loss, economic or otherwise, by the suspended driver cannot be considered as hardship by the Tribunal pursuant to Reg. 632/98, 22(3)(d)(i)(ii). In this case, the Applicant is the suspended driver and the Regulation states that the loss must be upon a person other than the driver of the motor vehicle and not a result of the driver's loss.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

For the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must demonstrate that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Tribunal may consider loss of employment opportunity only if no alternative to the impounded vehicle is available (see subsection 22(3)(a) of that Regulation). In this case, the Owner's Position of Appeal fails to provide supporting evidence of any specific hardship associated with employment loss or potential employment loss under Section 22(c).

While the Owner's Position makes reference to the Applicant's daughter and his brother using the vehicle from time to time, there is no evidence before the Tribunal to establish that the impoundment results in types of hardships that are immediate, significant and lasting.

The Applicant has not presented the Tribunal with evidence that would demonstrate that every reasonable option has been considered and inquired into as required under section 22(4) of the Regulation. The evidence indicates that the Applicant is currently paying child support for his daughters; however, there is no evidence that the impoundment results in a financial loss that is immediate, significant and lasting.

The Tribunal recognizes that the Applicant, his daughter, and his brother have been greatly inconvenienced by the loss of his vehicle, however, no evidence was provided that would support a finding of exceptional hardship.

The Tribunal finds that the Applicant has failed to meet the requirements of Section 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: August 2, 2001

ST. JAMES DAY CARE SERVICES INC.

PREHEARING

ST. JAMES DAY CARE SERVICES INC.

APPEAL FROM A NOTICE OF INTENTION DATED JUNE 25, 2001
AND A NOTICE OF DIRECTION DATED JULY 19, 2001 OF THE
DIRECTOR UNDER THE *DAY NURSERIES ACT* RESPECTING
ST. JAMES DAY CARE SERVICES INC. LOCATED AT 1200
LAWRENCE AVENUE WEST, TORONTO, ONTARIO, UNDER
SECTION 15 OF THE *DAY NURSERIES ACT*

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES:

V. WILLIAM ANDREOU, Counsel for Applicant

KATHARINE E. RENISON, Counsel for the Director under the
Day Nurseries Act, Respondent

DATE OF

PRE-HEARING: August 17, 2001

Toronto

ORDER

WHEREAS, St. James Day Care Services Inc., (the "Applicant") has requested a hearing before the Licence Appeal Tribunal to appeal the Notice of Intention dated June 25, 2001 and the Notice of Direction of the Director dated July 19, 2001, (the "Director") under the *Day Nurseries Act*, respecting St. James Day Care Services Inc., located at 1200 Lawrence Avenue West, in the City of Toronto, Ontario, under Section 15 of the *Day Nurseries Act*.

AND WHEREAS, a pre-hearing was conducted by the Tribunal on August 17, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, as set forth in the Tribunal's Notice of Pre-Hearing Conference dated July 31, 2001.

The Tribunal makes the following Orders respecting the hearing:

1. On consent of the Respondent and the Applicant, the Applicant's appeal of the Notice of Intention of the Director dated June 25, 2001, and the Notice of Direction of the Director dated July 19, 2001 will be heard together by this Tribunal.
2. The hearing of this matter will require ten days to heard at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, commencing at 9:30 a.m. on Monday, September 17, 2001 and if necessary, to continue September 18-21, 2001 and to further continue Tuesday, October 9, 2001 and to continue October 10-12, 2001 and to continue Monday, October 15, 2001.
3. The Applicant and the Director will comply with the disclosure requirement set out in the Tribunal's Rules of Practice.
 - (1) On or before 4:30 p.m. on August 28, 2001, the Applicant and the Director each will provide one copy to the other party and 4 copies to the Tribunal of any document that the parties wish to rely on at the hearing, and their witness lists.
 - (2) On or before 4:30 p.m. on September 7, 2001, the Applicant and the Director each will provide one copy to the other party and 4 copies to the Tribunal of their submissions and any further documents to be used in the hearing by both parties.

It was noted that the Tribunal's Rules of Practice requires full disclosure 10 days prior to the hearing of all documents on which a party wishes to rely as evidence at the hearing.

3. The Respondent will call approximately 30 witnesses, including Ministry employees and officials, and parents. The Respondents witnesses will provide evidence in relation to the items detailed in the Notice of Intention, as observed from each of their particular roles.
4. The Applicant will call approximately 15 witnesses, including Mr. and Mrs. Pellegrini, employees, and parents. The Applicant's witnesses will give evidence that they were in compliance with the requirements of the Director, however pressure from the news media had influenced the Director in her dealing with the Applicant.

5. There was no resolution of the issues between the parties, which are set out in the Notice of Intention of the Director dated June 25, 2001 and the Notice of Direction of the Director dated July 19, 2001.

LICENCE APPEAL TRIBUNAL

Stuart Cork,
Presiding Member

Released: August 22, 2001

LATOURE

PAUL LATOUR

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

PAUL LATOUR, Applicant
unrepresented

DATE OF HEARING: August 2, 2001

DECISION RELEASED: August 7, 2001

By Teleconference

REASONS FOR DECISION

A hearing was held on August 2, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Paul Latour (the "Applicant")
Motor Vehicle:	1985 Chevrolet Pickup, plate no. HX6100 (the "vehicle")
Date of Appeal:	July 10, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 2, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Mr. Latour is owner of the vehicle which was impounded.
He was not aware that the person which was driving his vehicle had had his licence suspended.
Mr. Latour is 79 years of age and requires his vehicle in order to drive to the doctor's and to drive to the grocery store. Also his wife Mrs. Doris Latour (75) has lived inside the house for 8 months due to rhumatic legs and is incapable of walking without a cane. Therefore Transportation is always very important vigil in case of Emergencies.

Acknowledged by husband
Paul Latour

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a 79-year-old gentleman who lives alone with his 75-year-old wife who has been house-ridden for the past 8 months. Mrs. Latour suffers from diabetes and seizures. The Applicant is currently on blood thinning medication as well as having shingles on one leg and is limited to walking no more than 50 feet without resting. They have no children, but only 1 niece who resides 2 miles on the outskirts of town, who helps them in any way she can. The Applicant sold his business 20 years ago and he and his wife are now on a fixed income.

To pass the time and to earn some extra income, the Applicant repairs appliances like fridges and washing machines. Jerry Pawaluk, the driver of the impounded vehicle, has worked 2 days a week for the Applicant for the past 8 months. Mr. Pawaluk helps load and unload the appliances for the Applicant. He also, on occasion, drives the truck for the Applicant.

On the day the vehicle was impounded, Mr. Pawaluk and the Applicant were on their way to town. Mr. Pawaluk was driving the vehicle. OPP signalled for Mr. Pawaluk to pull the vehicle over to the side of the road, which he did. The Applicant did not know why the police stopped them. The police spoke with Mr. Pawaluk for 2 hours as the Applicant sat in his truck. The police finally informed the Applicant that the vehicle was being impounded for 45 days because Mr. Pawaluk was a suspended driver.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit 3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that Jerry Pawaluk was driving the vehicle at the time it was detained;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 23, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal – Exceptional Hardship

The Applicant has requested an appeal on the grounds of “exceptional hardship” under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardships as described by section 22(2). In order for his claim to be considered under section 22(2), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Applicant is a retired gentleman and occupies his time in repairing broken appliances. Therefore, the only loss would be the cost of the repaired appliances since the Applicant and his wife receive a monthly pension.

With regard to an alternative to the impounded vehicle, the Applicant’s niece assists in whatever capacity she can. The Applicant has received gracious offers from friends and neighbours to help as well, but the Applicant does not want to be obligated to them. The Applicant has taken taxis to or from the grocery store, which is about a ¼ mile away. There is no public transit in this community. Although inconvenient, there are alternatives to the impounded vehicle.

The Applicant’s niece brings the Applicant’s wife to her doctor’s appointments as well as pick up her medication. This community has a hospital and is 911 accessible. Therefore, there is no threat of health or safety to the Applicant or his wife.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as required under section 50.2 of the Act.

The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation.

The Tribunal accordingly finds the Applicant has not established that he has or will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

Appeal – Due Diligence

The second issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Mr. Pawaluk's driver's licence at the time in respect of which the order was made was not then under suspension.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

The Applicant testified that he is the owner of the vehicle that has been impounded and at the time of impoundment Mr. Pawaluk was driving the vehicle and the Applicant was a passenger.

The Applicant lives in a small, close-knit community wherein everyone knows and helps each other. Information flows freely among this community. Mr. Pawaluk lives 6 streets away from the Applicant. At no time did the Applicant hear or suspect that Mr. Pawaluk was in any trouble with the law or had lost his driver's licence.

Due to the relative facts of this unique appeal, one must look at what would constitute what "reasonable" steps would be taken to avoid impoundment in this instance:

1. Mr. Pawaluk showed the Applicant his driver's licence last Christmas. According to Mr. Pawaluk's driver's abstract, his suspension did not appear on his driver's abstract until January 23, 2001 for an offence incurred December 23, 2001.
2. The Applicant assumed Mr. Pawaluk had a valid driver's licence since he owned and drove his own vehicle.
3. Mr. Pawaluk was employed for the Applicant twice a week for the past 8 months. Calculated on a full-time basis, Mr. Pawaluk worked for the Applicant for 2 months and only drove the truck on occasion.
4. After the vehicle was impounded, Mr. Pawaluk told the Applicant that he did not go to court for a driving offence that occurred earlier in the year, and advised the Applicant, that he did not know he was suspended.

5. Mr. Pawaluk was well known to the Applicant, but at no point in time did the Applicant see or hear of any "red flags" to query Mr. Pawaluk further into the status of his driver's licence.

The Tribunal is of the opinion that under these circumstances, the Applicant exercised adequate due diligence required by section 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: August 7, 2001

WILSON

CLARENCE WILSON

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF HEARING: August 3, 2001

DECISION RELEASED: August 7, 2001 Peterborough

REASONS FOR DECISION

A hearing was held on August 3, 2001, at Peterborough, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Clarence Wilson (the "Applicant")
Motor Vehicle:	1991 Chevrolet Cavalier, plate no. 555 ZPY (the "vehicle")
Date of Appeal:	July 12, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on August 3, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant not being present at the time prescribed for the hearing, the Tribunal allowed a 30-minute grace period.

Having verified that the address on the courier slip accurately matched the Applicant's stated address as per the Notice of Appeal; and as the Applicant failed to appear within the allotted grace period; and as the Respondent was present and ready to proceed, the Hearing continued in absentia.

The Respondent provided the Tribunal with original certified copies of the documents on file.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Vehicle was taken by my son without permission.
He is now serving 18 mts.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Greg Wilson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 27, 2010.

At the hearing the Respondent emphasized the fact that the onus is on the Applicant to prove the grounds for the appeal. The Registrar contends that the evidence introduced by the Applicant in the Notice of Appeal is insufficient to corroborate that the vehicle was stolen.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the

vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds that the vehicle was stolen at the time of impoundment, in accordance with section 50.2(3)(a) of the Act. The onus is on the Applicant to establish the merits of the grounds for the appeal.

In order to decide whether the vehicle was stolen at the time of impoundment, the Tribunal must consider the meaning of the word “stolen”. As the *Highway Traffic Act* does not define the word “stolen”, the Tribunal looks to Black’s Law Dictionary for reference as to what is commonly accepted by the judiciary as constituting stolen.

According to Black’s Law Dictionary, “stolen” is defined as follows: “Acquired or possessed, as a result of some wrongful or dishonest act or taking, whereby a person wilfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.”

The Respondent pointed out the Applicant’s statement in the Notice of Appeal does not proffer adequate information to answer the questions raised by the definition. The Tribunal concurs. The Applicant remarks: “...*Vehicle was taken by my son without permission...*”. There is no indication of intent, did the Applicant’s son “intend to deprive” the Applicant of the use of the vehicle “permanently”, or did he simply take the vehicle for his convenience with the intent to return the vehicle after use.

The Tribunal finds that the evidence presented is, therefore, insufficient to support the ground of appeal that the vehicle was stolen at the time of the impoundment, as described by section 50.2(3)(a) of the Act. Accordingly, the Applicant’s ground of appeal based on the vehicle being stolen is dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 7, 2001

FOX

AARON FRANK FOX

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the “Act”), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

AARON FRANK FOX, Applicant
unrepresented

DATE OF HEARING: August 2, 2001

DECISION RELEASED: August 8, 2001

Toronto

REASONS FOR DECISION

A hearing was held on August 2, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Aaron Frank Fox (the "Applicant")
Motor Vehicle:	1990 Ford COF, plate no. FOXXXX (the "vehicle")
Date of Appeal:	July 17, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 2, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- 1) On the day in question I had oral surgery and was sleeping when truck was driven. Was advised by Officer on phone as to situation. (see receipt)
- 2) As to brother's suspension I have asked him numerous times as to his licence, never informed he was suspended.
- 3) I have been on WSIB for approximately 4 years and I am at present attending retraining in another city (Brampton). As I live in Rural Norval (farming area). There is no public transportation. This truck is the only vehicle I own and my only means of transportation. If I can't attend school I will be dropped from WSIB who currently provided my only source of income. Due to my shoulder injury I can't find work without this training.

The following is a summary of the Applicant's affirmed testimony.

The Applicant is a 50-year-old gentleman who is currently enrolled in an 11-month upgrading/retraining program due to a work-related injury, which occurred 3 years ago while employed as a landscaper for his brother-in-law in Toronto. His only current source of income is from the WSIB to attend the upgrading/retraining course.

The Applicant commenced this upgrading/retraining program in March 2001 between the hours of 1:00 p.m. to 4:00 p.m. each day. Once this program is completed, he will attend Humber College for an additional 2 years to obtain a diploma in a specialized computer program. The school in which the Applicant attends is approximately 19 kilometres from his home. His usual routine in getting to school is walking approximately 1 ½ kilometres on a rural road to Highway 7 where he either hitchhikes or is fortunate enough to catch a GO bus passing by. He then travels to Highway 10 and Queen Street where he takes the Brampton public

transit system for another 30 minutes until he reached Kennedy Road and Clarence. On his return home, he tries to secure a ride from a classmate to the furthest point possible.

Frank Fox, the Applicant's brother and driver at the time the vehicle was impounded, has resided with the Applicant for the past 3 years. As stated in Exhibit 2, on the day the vehicle was impounded, the Applicant had oral surgery earlier in the day. He was given pain medication as well as antibiotics. In his testimony, he spent the remaining part of the day sleeping.

As stated in Exhibit 2, the Applicant queried his brother on the status of his driver's licence on a number of occasions. The Applicant was led to believe that his brother had won the "failing to remain" conviction and that his driver's licence was in good status. The Applicant was unaware of the fact that his brother still had a suspended licence. In his testimony, the Applicant advised the Tribunal that he had only viewed his brother's driver's licence approximately 2 years ago.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit 3):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Frank A. Fox;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of "Fail to Remain at Accident" under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 26, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal – Due Diligence

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the Applicant's brother's driver's licence at the time in respect of which the order was made was not then under suspension as required by section 50.2(3)(c) of the Act.

The Applicant has conceded that he is the owner of the vehicle that has been impounded. At the time of the impoundment, the vehicle was being driven by Mr. Frank Adolf Fox whose driver's licence was then under suspension due to a conviction under the *Criminal Code of Canada* for failing to remain at a scene of an accident.

The evidence before the Tribunal, in the Applicant's own testimony, was that the Applicant viewed his brother's driver's licence about 2 years ago. The Applicant was aware that his brother had a court appearance respecting his driving. Nonetheless, at no point did he make inquiries with the Ministry of Transportation concerning his brother's driver's licence to take reasonable measures to avoid impoundment and/or to determine whether or not his brother's driver's licence was in good standing since the Applicant's brother did, on occasion, drive the impounded vehicle.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal – Exceptional Hardship

The Applicant has also requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardships as described by section 22(2). In order for his claims to be considered under section 22(2), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

With regard to section 22(3):

(a) "...no alternative to the impounded motor vehicle is available..."

The Applicant testified that he walks, travels by GO bus and with the Brampton public transit system to get to school. He also secures rides from classmates after school, when possible, to the further point closest to his home. He did not look into renting a vehicle as he is on a fixed income and other family members do not own a vehicle. Taxis are also available, but the cost is an issue. In his testimony, the Applicant did acknowledge that he receives mileage benefits from the WSIB.

(b) "...the loss will be immediate, significant and lasting..."

The Applicant has managed to carry on his day-to-day routine and attend school during the course of this impoundment. He has missed only a few days of schooling due to this impoundment. The Applicant has been unable to do any grocery shopping, but testified that his brother picks up a few things on his way home from work.

(c) "...impact of the loss will be upon a person ordinarily transported by the motor vehicle..."

There is no evidence before the Tribunal that there is an impact of loss on anyone but the Applicant. The Applicant testified that his brother's employer each day picks his brother up and drops him off after work.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as required under section 50.2 of the Act.

The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting.

There is a provision in Section 55.1(21) of the *Highway Traffic Act* to pursue compensation from the suspended driver, Frank Fox:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

In the Applicant's testimony, Frank Fox will be paying for the release of the impounded vehicle and related charges.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation.

The Tribunal accordingly finds the Applicant has not established that he has or will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: August 8, 2001

MURDOCH GROUP INC.

MURDOCH GROUP INC.

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

MURDOCH GROUP INC., Applicant

ANDY CHARBONNEAU, Agent for Applicant

DATE OF HEARING: August 8, 2001

DECISION RELEASED: August 13, 2001

Toronto
By teleconference

REASONS FOR DECISION

A hearing by teleconference was held on August 8, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Murdoch Group Inc. (the "Applicant")
Motor Vehicle:	2001 Pontiac Grand Am, plate # AEWV 357 (the "vehicle")
Date of Appeal:	July 19, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3)(c) of the Act.

This matter came before this Tribunal on August 8, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Car was rented at Liz-Belair. Plante as the authorized driver. Mr. John Henson was not to drive the vehicle. He only signed the rental agreement because his credit card was used for payment.

We don't feel this vehicle should be impounded, since we did take the necessary pre-cautions as owners of the vehicle, to insure that Mr. Henson was not to drive the vehicle.

We require a telephone conference - due to location distance.

"Andy Charbonneau"

Mr. Charbonneau's opening statement offered little more than was submitted in his Appeal request. He considered his instruction to Henson, the second party to the rental agreement, that he was not to drive the car and only his credit card was to be used. The contract for the rental of the car was not submitted to the Tribunal by the Applicant and was therefore not available for examination by the Tribunal. Mr. Charbonneau was asked if he had any further evidence or statements he wished to make and answered in the negative.

When questioned about the contract being separate from the rental bill, it was explained that this was an industry practice to protect the privacy of their clients. Driver's licence information is not recorded on any document but is entered in the company's database.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. John P. Henson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until Nov.14, 2001.

The Respondent had nothing to add to the submissions entered under Exhibit #2.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(c) of the Act on the basis that his instruction to Henson was that he was not to drive the rented car offered by the Applicant. No evidence was submitted by the Applicant as to why he issued these orders. The second part of the rental contract is separate from the billing instrument and was not submitted by the Applicant to the Tribunal for examination.

In a discussion after closing remarks, the Respondent outlined three methods by which any person can validate a persons driver's licence at little or no cost 24 hours a day. Surprisingly, the Applicant was aware of this service, but he stated that it was not widely used in the industry but had been discussed at Association meetings without any conclusions as to its use industry wide.

The onus on the Applicant is to show that he exercised due diligence to determine that the driver's licence was not under suspension at the time of the impoundment. The Tribunal finds that the Applicant failed to provide the Tribunal with evidence to support the test of "due diligence" as required by Section 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford, Presiding Member

RELEASED: August 13, 2001

O'NEIL

BRIAN BERNARD O'NEIL

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

BRIAN BERNARD O'NEIL, Applicant
unrepresented

DATE OF HEARING: August 7, 2001

DECISION RELEASED: August 15, 2001

Toronto
By teleconference

REASONS FOR DECISION

A hearing by teleconference was held on August 7, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Brian Bernard O'Neil (the "Applicant")
Motor Vehicle:	1991 Pontiac 6000 LE, plate no. ZMC 475 (the "vehicle")
Date of Appeal:	July 23, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 7, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Mr. Anderson assured me he was a legally licenced driver.
I live in Hamilton and work in Mississauga. Without a car, I cannot get to work as there are no buses. Taxi is not economically viable. I do mediations (insurance) that require me to be in downtown Toronto for 2 or 3 days per month. I am a contract employee and therefore request a telephone conference as I am paid by the hour and cannot afford to lose time from work.

The Applicant's testimony expanded little on his written submission in respect to his friend's qualifications to drive. It appeared he had simply taken his friend's word that his licence was valid and gave the issue no further consideration.

While some thought was given to alternative means of transportation they were soon dismissed by the Applicant as unworkable or too costly. He did not support these conclusions with any facts or figures. The general tone of his statement was of resignation and despair.

The Respondent asked why Anderson was elected to drive and why police stopped the car. To the first question the Applicant replied that Anderson had less to drink than he had and so more able to drive. To the second question he replied that they had to swerve violently to avoid a head on collision with a van. A police officer pulled them over and it was determined that Anderson's licence was under suspension until 2005. The vehicle was impounded and Anderson taken to jail where he still resides pending trial.

The Respondent offered a number of options that the Applicant might consider until his vehicle is recovered, none of which were received by the Applicant with any interest. According to evidence given by the Respondent, "Go Transit" and buses could serve him albeit with some inconvenience. He is currently using his sister's car and while she has asked for it back by August 14, 2001, her position might change given the circumstances.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Edward Anderson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 18, 2005.

The evidence from the Respondent was revealed during their examination of the Applicant. The Respondent's closing statement reviewed the Applicant's own evidence to support the Registrar's position that the Order to Impound be confirmed by the Tribunal.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(c) of the Act on the basis that the Applicant exercised due diligence to confirm the validity of Edward Anderson's licence. No evidence was given to support his claim. In fact, beyond a statement that he asked whether or not his licence was valid, nothing else was pursued even though conditions warranted a closer appraisal of Anderson's claim.

In conclusion, the Tribunal finds that the Applicant has failed to provide any evidence to the Tribunal that would satisfy the test of "due diligence" as required by section 50.2(3)(c) of the Act.

The Applicant has also appealed under section 50.2(3)(d) alleging that the impoundment would result in the loss of his job as he needs his car for his work. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

In order for the Applicant's claim to be considered under section 22 (b) and (c) the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation requires demonstration that every reasonable option has been explored, including an alternative vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate any reasonable option to the impounded vehicle has been explored and inquired into as required under section 22(4) of the Regulation. In fact, the evidence offered indicates that no option has been considered once his sister's car is no longer available to the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford, Presiding Member

RELEASED: August 15, 2001

KRYGER

JANET KRYGER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ELMER MERKLEY,
 Presiding member

APPEARANCES: KYLE M. BIEL,
 Representative for the Registrar of Motor Vehicles

JANET KRYGER, Applicant
unrepresented

DATE OF HEARING: August 20, 2001

DECISION RELEASED: August 21, 2001 Written

REASONS FOR DECISION

A written hearing was held on August 20, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Janet Kryger (the “Applicant”)
Motor Vehicle:	2001 GMC Sierra, plate no. 4710HC (the “vehicle”)
Date of Appeal:	July 26, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 20, 2001 and proceeded as written hearing.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal reviewed the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To whom it may concern:

In regards to the appeal, I am requesting a written hearing with the consent from the Ministry and the Tribunal because the loss of vehicle will cause hardship. My husband Paul Wilson, owner of Ken-Tash & Son Construction needs this vehicle for work and has drivers available. The vehicle is registered commercial and is needed at different job sites. At this time Ken-Tash & Son Construction have a contract with the City of Kawartha Lakes. With this vehicle loss, our contract is at stake and we will suffer financially. In closing I am requesting an appeal in writing, as we have a contract and we need this vehicle back to work as soon as possible.

The Applicant did not provide the Tribunal and the Respondent with any reply after receiving the Respondent's submissions and supporting evidence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Paul B. Wilson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 11, 2002.

The Registrar submits that the criteria to establish exceptional hardship is cumulative and therefore the Applicant must meet all the requirements of the Regulation before her appeal can be considered. Ms. Kryger has failed to meet the conditions set out for demonstrating exceptional hardship, as prescribed in the *Highway Traffic Act*, Section 22(3) of Regulation 574, R.R.O., as amended by Regulation 632/98.

The Applicant has presented no evidence that she, or anyone else for that matter, is normally transported by the impounded motor vehicle. She only states that her husband, Paul Wilson, the suspended driver, needs this vehicle for work at different job sites.

The Applicant relies on the submission that the impounded vehicle is needed for her husband's work purposes. The onus is on the Applicant to establish this ground. Section 22 of Regulation 574, R.R.O. 1190, as amended by Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. In order for the Applicant's claims to be considered, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle in order to adequately mitigate any potential loss.

In the "*Owner's Position in Appeal*", the Registrar submits that the Applicant has failed to provide any evidence that other options or alternatives have been considered and inquired into to replace the impounded vehicle. The Applicant does not indicate whether she has inquired into renting a truck or whether Ken-Tash & Son Construction has other vehicles that may be utilized.

The Applicant, in her appeal, has claimed that she will be suffering a financial loss as a result of the impoundment of her vehicle. The Applicant has not demonstrated that the alleged financial loss will be immediate, significant and lasting as prescribed by Section 22(3)(b) of the Regulation. She states that "*With this vehicle loss, our contract is at stake and we will suffer financially*". The Registrar submits that this is speculation and that no hard evidence was brought forward to sustain it. The Applicant has not detailed any lost business or business opportunities. There is no evidence of missed work, layoffs or contracts not completed or terminated. There is no evidence of the Applicant's current monthly income and expenses compared with the amount necessary to perhaps rent a vehicle. The Applicant has not provided any information or insight into her financial status. Therefore the Applicant has failed to demonstrate any financial or economic loss under subsection 22(2)(b).

The Applicant has failed to mention in her appeal if there is any loss of employment, employment opportunity or loss of education or training to any person including herself.

The Registrar submits that no evidence exists that would indicate whether the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle.

As to the Owner's Position, the Registrar submits that for the Applicant's claims to be considered under Section 22(2)(a), (b) and (c), she must demonstrate that all of Section 22(3) has been met, and Section 22(4) of the Regulation provides that the Applicant must demonstrate that every reasonable option has been considered for an alternative to the impounded vehicle. The Applicant has not met these requirements.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

For the Applicant's claims to be considered under Section 22(2)(a), (b), and (c), she must demonstrate that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

While the Owner's Position makes reference to the Applicant's husband needing this vehicle for work and has available drivers, the Applicant has not presented the Tribunal with evidence that would demonstrate that every reasonable option has been considered and inquired into as required under Section 22(4) of the Regulation. Without supporting evidence, the Tribunal cannot conclude that the contract with the City of Kawartha Lakes is in jeopardy and the impact of the loss will be immediate, significant and lasting.

The Tribunal recognizes that Ken-Tash & Son Construction is greatly inconvenienced by the loss of the vehicle, however, no evidence is provided that would support a finding of exceptional hardship.

The Tribunal finds that the Applicant has failed to meet the requirements of Section 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: August 21, 2001

JHAND

PREHEARING

JARNAIL SINGH JHAND

IN THE MATTER OF an application by Jarnail Singh Jhand dated July 26, 2001 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Notice of Refusal to Issue an Operating Licence dated May 30, 2001 and the Notice of Refusal to Issue a Commercial Vehicle Operator's Registration Certificate dated May 30, 2001 issued by the Registrar of Motor Vehicles;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of an application of Jarnail Singh Jhand for a Commercial Vehicle Operator's Registration Certificate;

TRIBUNAL: ALAN HOLBROOK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
JAMES F. LEE, Agent for the Applicant

DATE OF
PRE-HEARING: August 24, 2001 Toronto

ORDER

A Pre-hearing conference between the parties was held on August 24, 2001 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated August 15, 2001.

The Tribunal makes the following Orders respecting the hearing:

1. The parties to the hearing are Jarnail Singh Jhand and the Registrar of Motor Vehicles.
2. The hearing date has been set for 9:30 a.m. on Wednesday, September 26, 2001, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
3. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
4. On or before September 16, 2001, both parties will file with the Tribunal their submissions and documents to be used at the hearing. Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure at least 10 days prior to the hearing. Mr. Lee asked only for an index for documents already received from the Ministry Of Transportation and any further documents the Respondent wishes to file.
5. Both parties agreed that Jarnail Singh Jhand and Charan Singh are brothers and reside at the same address.
6. The Registrar of Motor Vehicles will call one witness John Miller, Carrier Safety Rating Administrator for the Ministry of Transportation, to testify regarding a previous sanction imposed on Charan Singh by the Registrar of Motor Vehicles and this application by the Applicant, Jarnail Singh Jhand . Mr. Miller will also testify to statements made to him by Charon Singh after his Show Cause Hearing in St. Catherine's, Ontario
7. The Applicant will call two witnesses, the Applicant, Jarnail Singh Jhand and his brother Charan Singh.
8. The Applicant informed the Tribunal and the Registrar of Motor Vehicles that the Applicant does not intend to rely on any documentary evidence at the hearing before this Tribunal.

9. Mr. Moore, Representative for the Registrar of Motor Vehicles, expressed a desire for an interpreter at the hearing. Mr. James Lee representative for the Applicant assured the Tribunal that it was unnecessary that it would delay the proceedings and that it would result in additional costs to the Applicant. The Applicant was not in attendance at the prehearing and the need for an Interpreter will be dealt with by the Tribunal panel at the hearing of this matter, if required.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: August 29, 2001

MARSHALL

WENDY S. MARSHALL

Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

WENDY S. MARSHALL, Applicant
Represented by JAMES MARSHALL.

DATE OF HEARING: August 17, 2001

DECISION RELEASED: August 22, 2001

Toronto
By teleconference

REASONS FOR DECISION

A hearing by teleconference was held on August 17, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Wendy S. Marshall (the "Applicant")
Motor Vehicle:	1999 Chevrolet Cavalier Z24, plate no. ADXJ032 (the "vehicle")
Date of Appeal:	July 27, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on August 17, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- The vehicle was stolen when impounded.
 - Police occurrence # 620490.
 - I am in Parry Sound on Holidays (705) 746-8716.
 - I left my vehicle with a licenced driver in order to ensure my daughter got her medication daily (in Belleville, Ont) She lives in Trenton, Not with me.
 - Driver was Brianna Graham - 26 years old - licenced.
 - This impoundment is unfair - causes severe hardship.
 - Please release my vehicle.
 - There have been temporary argt's made but I must have my vehicle returned. I need it Monday July 30th.
-

- My daughter goes to Oshawa weekly for a doctors care. (Trenton-Oshawa)
- She has to get medication from Belleville Ont daily. This medication is not available in Trenton.
- Doctor Esben has been her doctor for eight months now.
- First step medical clinic in Oshawa.
- Occurrence # 620940
- Vehicle was taken July 24th & impounded because the thief's licence was suspended.

Please contact me @ 705-746-8716 For a telephone hearing at the earliest convenience.
Thank you.

c.c. Kim Grosskurth

Mr. Marshall was affirmed and gave the following testimony on behalf of his wife, Wendy Marshall. Mr. Marshall testified that he and his wife had given the vehicle to Ms. Brianna Graham. They checked Ms. Grahams' driver's licence which she showed them and Mr. Marshall believed that it was valid. The vehicle was left with Ms. Graham in order that there would be transportation available to take Miss Marshall to Belleville and to Oshawa for her medical appointments. According to Mr. Marshall, the keys were stolen from Miss Graham by Jason Butler. Mr. Butler was stopped by police.

Mr. Butler admitted to having taken the vehicle without permission. Mr. Butler was arrested and the vehicle was impounded. Mr. Marshall believes that the impoundment is unjust and wanted the vehicle released. Mr. Marshall had nothing further to add and was excused.

Miss Brianna Graham was affirmed and gave the following testimony. She stated that the Marshalls had given her the car to take their daughter for medical appointments. Ms. Graham stated that on the evening of the impoundment, she went to bed leaving the keys and her purse on the kitchen table. Mr. Butler, who is also residing in the same home as Ms. Graham and Ms. Marshall removed the keys and took the vehicle without her permission. Testimony from Ms. Graham indicated that she called the police after she was called that the vehicle was going to be impounded. She reported the vehicle stolen to the Q.W.P.S. The evidence presented indicated that the Q.W.P.S. after their investigations, laid a charge of Take Auto Without Permission against the driver, Mr. Jason Butler. No charge of theft was ever laid.

Ms. Graham had nothing further to add was excused.

Mr. Jason Butler was affirmed and gave the following testimony. He stated that he stole the vehicle from Ms. Graham. He stated that he believed that he could do his errands and return the vehicle without anyone being the wiser. However, he was stopped by police and upon checking, the Police arrested him. He stated that he asked the police for a break and that the vehicle was not his and that he had borrowed it and perhaps Ms. Graham could come and pick it up. He believed that the vehicle was not going to be impounded however the QWPS after becoming more familiar with the motor vehicle impoundment program, issued the impoundment notice to the registrar and impounded the vehicle. Mr. Butler does not understand why he was not charged with theft of the vehicle. A sworn statement was submitted by Mr. Marshall in which Mr. Butler states " I removed the subject vehicle from the care and control of Ms. Brianna Graham". The affidavit does not indicated that the vehicle was stolen as the intent was to return the vehicle after it had been used without the knowledge of Ms. Graham to whom the vehicle had been entrusted.

Mr. Butler had no further information to give and was excused.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Jason Leslie Butler;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 10, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

There are two issues to be considered in this appeal and are dealt with hereunder.

First, should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle that is the subject to the order was stolen at the time in respect of which the order was made as per section 50.2(3)(a)?

(1) Stolen Vehicle:

The evidence before the Tribunal establishes that the driver of the subject vehicle, Mr. Jason Butler was in fact driving while under suspension for a criminal code conviction, impaired ability. The Tribunal accepts this as fact. The Tribunal also accepts the evidence as presented by the Quinte West Police Services. The evidence indicates that the vehicle which is the subject of the impound was in fact taken without permission by Mr. Jason Butler. However, there is no evidence before this Tribunal that Mr. Butler who used the vehicle without permission had the intent of permanently depriving the owner, Wendy Marshall of her vehicle. In fact, Mr. Butler testified that he had every intention after he finished using the vehicle, to "return it and put the keys back before any knew that I had taken it." This is sufficient evidence to confirm to this Tribunal that the impounded vehicle was indeed not stolen. Further, care and control was left with Ms. Brianna Graham and in fact the keys to the impounded vehicle were left out on a table which afforded anyone easy access to them showing a lack of concern. Mr. Butler who also resides at the same residence as both Ms. Graham and Ms. Marshall, seized the opportunity and removed the keys, but there is no evidence to support the allegation that the car was stolen.

While the Applicant has made statements to the Police to the effect that the vehicle was stolen, the Police after investigation, failed to lay a charge of stolen. After weighing the evidence presented, the Tribunal - therefore can find no evidence that the vehicle was in fact stolen as per Section 50.2.3(a).

(2) Exceptional Hardship:

Should the Tribunal set aside the Registrar's order to impound the vehicle as the basis that the order will result in exceptional hardship as per Section 55.2(3)(d)?

Mr. Marshall indicated to the Tribunal that he was abandoning this ground of appeal as it was his contention that the exceptional hardship suffered was only for the first two weeks of the impoundment period and that there was no longer exceptional hardship being suffered.

The Applicant has failed to meet the criteria as described in Section 22(4) of Regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: August 22, 2001

GILLARD

DEBRA L. GILLARD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: WILLIAM WARBURTON,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

DEBRA L. GILLARD, Applicant
Unrepresented

DATE OF HEARING: August 15, 2001

DECISION RELEASED: August 24, 2001 Toronto

REASONS FOR DECISION

A hearing was held on August 15, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Debra L. Gillard (the "Applicant")
Motor Vehicle:	1986 Pontiac Bonneville, plate # ALBF 841 (the "vehicle")
Date of Appeal:	July 30, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 15, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My common law husband took the car without my knowledge. He was stopped for driving under suspension and fail to comply with probation order. I am a single mother on family benefits and I need my car to look for employment. Also I do not and will not have the \$800.00 or \$900.00 the towing company tells me it will cost to pick it up after 45 days. I just bought the car in July 2001, I paid \$2000.00. This would be half the cost of the car.

The Applicant has been married common law to Daniel Campbell for fifteen years. Their young daughter, Heather, will be entering the third grade in September. Throughout their married life the Applicant has been the principal breadwinner. However, due to some health problems, she retired early from her job with the Toronto Public School Board in February, 2001. She received a retirement benefits package from the Board. The money that she received in her benefits package was used to pay debts, expenses and to purchase a car. The Applicant is not eligible to receive Employment Insurance benefits until February, 2002.

Daniel Campbell is a recovering drug abuser and alcoholic. He has been "clean and sober" for approximately the previous twelve months. Also, approximately twelve months ago, Mr. Campbell secured full-time employment. Previously, he had been without a steady job for ten years. In early May, 2001, he went on a medical leave of absence due to a severely infected finger. He has received no income during his leave of absence. He has filed a pending application for Employment Insurance sick benefits.

On June 18, 2001, Mr. Campbell was convicted of leaving the scene of an accident. He was sentenced to ninety days in jail to be served on weekends. His driver's licence was suspended until June 18, 2002.

On July 6, 2001, the Applicant purchased a 1986 Pontiac Bonneville for \$2,000. The purchase severely depleted her savings. She used the car when shopping for groceries, going to the laundromat, going to her appointments with a chiropractor. Also, she drove her husband to his medical appointments and on Monday mornings she drove him to their home from the Corrections Centre. In the fall she was planning to utilize the car to transport her daughter to school and to facilitate the Applicant's search for a new job.

On July 25, 2001, the Applicant drove her husband to St. Joseph's Medical Centre where he underwent day surgery on his finger. Later, while returning to their home from the Medical Centre, the Applicant and her husband had an argument about money. They had spent their last few available dollars to purchase gasoline for the car. Subsequently, they "did not have [money for] a bus ticket." Upon arriving at home, Mr. Campbell said that he was feeling shaky and that he wanted to go to an Alcoholics Anonymous meeting. He asked the Applicant to drive him to the meeting. The Applicant was feeling angry with her husband and she had a headache. Therefore, she refused to drive him to the A.A. meeting. She subsequently fell asleep. When she awoke she realized that her husband had left the house. Initially, she assumed that a friend had driven her husband to be A.A. meeting. Mr. Campbell was stopped by the police while driving homeward from the meeting. The car was subsequently impounded.

As a result of his actions Mr. Campbell is presently incarcerated on a full-time basis.

On July 30, 2001, the Applicant applied for social assistance. She presently receives \$957 per month in social assistance. Her rent is \$800 per month. She also receives approximately \$100 per month from the Child Tax Credit.

The Applicant's most acute concern about the impoundment is that she cannot afford to pay the impoundment fees. Therefore, she will be forced to forfeit the car and lose her investment of \$2,000.

Although the Applicant is entitled under the Act to recover costs arising from the impoundment from the suspended driver, Mr. Campbell has no current income and no apparent recoverable assets. Furthermore, as a matter of principle, the Applicant is reluctant to press any claim against him. She does not wish to make his situation any more aggravated.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Daniel Campbell;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of failure to remain at the scene of an accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was placed under suspension until June 18, 2002.

Questioned by the Respondent's representative, the Applicant stated that she does not believe that the health or safety of any member of her family is being jeopardized by the impoundment.

Also, as noted above, the Applicant outlined the nature of her vehicle utilization and her intended future utilization. She stipulated that prior to the purchase of the vehicle on July 6, 2001, she had relied upon public transportation and walking to meet her requirements. In particular, she stated several times that she needed the vehicle to transport her daughter to school. However, she said that during the previous school year she walked with her daughter to school. She also mentioned that her chiropractor is located in Richmond Hill and that it is particularly inconvenient and time consuming to travel there by public transit.

The Registrar's representative asserted that the impoundment only necessitated that the Applicant resume the lifestyle that she had pursued prior to the purchase of the vehicle. She submitted that the Applicant had not established that there is no alternative to the impounded vehicle available. Furthermore, she asserted that since the Applicant had owned the vehicle for only nineteen days prior to the impoundment, any losses arising from the impoundment cannot be regarded as immediate, significant and lasting.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds that the impoundment of her vehicle will result in exceptional hardship.

Under Section 22 of Regulation 574 of R.R.O. 1990, as amended by Ontario Regulation 632/98, the owner must establish that no alternative to the impounded vehicle is available as a prerequisite condition for a finding of exceptional hardship under subsections (1) or (3).

Since the Applicant's responsibilities and transportation requirements have not significantly changed since the period prior to the purchase of the vehicle, the Tribunal must conclude that public transportation and walking do constitute somewhat less convenient alternatives to the impounded vehicle.

Furthermore, the Applicant has also failed to establish any of the other conditions required for a finding of exceptional hardship. In addition to establishing that no alternative to the impounded vehicle is available, the Applicant must establish that the impoundment will result in:

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety...of a community in whose service the motor vehicle is ordinarily used; or
- (c) financial loss of employment or education that will be immediate, significant and lasting.

Regarding (c) above, the Applicant expressed considerable anxiety over her inability to pay the impoundment fees and the possible forfeiture of her car, and said that the possible forfeiture would represent a loss of the \$2,000 required to purchase the vehicle. The Applicant is not currently employed. However, financial loss may not be considered because there is an alternative to the impounded vehicle, as set out above.

Section 22.3(b) of Regulation 574, does permit the Tribunal to consider financial loss, but the losses contemplated in subsection 3(b) are losses incurred as a result of the loss of use of the impounded vehicle predicated on the assumption that no alternative to the impounded vehicle is available. Therefore, the impoundment fees are excluded from consideration as a loss under section 22.3. Similarly, the purchase price of \$2,000 is also excluded from consideration.

Regarding (a) above, the Applicant stipulated that she does not contend that the impoundment has placed the health or safety of any member of her family at risk.

Regarding (b) above, public health and safety is not at issue in this case.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

William Warburton, Presiding Member

RELEASED: August 24, 2001

LEFLER

DAVID LEFLER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

DAVID LEFLER, Applicant
unrepresented

DATE OF HEARING: August 17, 2001

DECISION RELEASED: August 22, 2001 Owen Sound

REASONS FOR DECISION

A hearing was held on August 17, 2001, at Owen Sound, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	David Lefler (the "Applicant")
Motor Vehicle:	1988 Dodge N15, plate no. 5921JH (the "vehicle")
Date of Appeal:	July 27, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 17, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

At this time the Tribunal ordered the exclusion of witnesses, and the Applicant's witness left the room.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My nephew told me time and time again that he had his licence so I didn't think to check it out cause I trust him. He is willing to state that. I need my truck for I live away from town some three miles and that's the only transportation I have to get my food and to the bank. My nephew will come with me to the hearing.

.....
To whom it may concern

I George Ryder did not tell my uncle about my fine and that I was okay to drive. Since he was my uncle he trusted me. He needs his truck to get around for he lives few miles from town and he has to buy his food and pay his bills. Sometimes he has to go out a fix Modle T Fords for his friends and he gets paid for this so its extra income for him for he is on a pension. He has no phone so he uses my number in case of emergency. I would appreciate if you gave him his truck back and I will pay for any cost.

George Ryder

P.S. He cant get his mail everyday so if you could send anything to me and I will get it to him.

George Ryder 6699 Falconer Dr. # 54
Mississauga ONT.
L5N-2E3

At the hearing the Applicant re-iterated his comments in the Notice of Appeal testifying that he assumed the driver of the vehicle at the time of the impoundment, had a valid driver's licence as he was "driving around". The Applicant did not ask to see the licence.

In cross-examination, the Applicant admitted that he did not ask to see Mr. Ryder's drivers licence.

The Applicant testified that he needed the truck to periodically allow him to "...fix antique cars..." in order to supplement his pension income.

The Applicant admitted to owning another vehicle, registered July 27, but stated that the vehicle was in Brampton for bodywork. Mechanically there is nothing wrong with the vehicle.

As for losses, the Applicant claims that no extra long lasting expenses have been incurred due to the impoundment of the vehicle.

The Applicant confirmed that he is inconvenienced by the inability to use the vehicle; nonetheless he manages to get about with the assistance of a neighbour.

The Applicant's health has not suffered as a result of the loss of the vehicle.

Mr. George Alexander Ryder, the driver of the vehicle at the time of impoundment, appeared as a witness on behalf of the Applicant. Mr. Ryder admitted to being guilty of deceiving the Applicant, by showing him a "phoney license". Mr. Ryder further remarked that the Applicant should not be made to "suffer" as a result of someone else's dishonesty.

The Applicant, in closing, repeated his desire to have the vehicle returned.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. George A. Ryder;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 23, 2001.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing, the Respondent asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment, on the grounds that “due diligence” requires an Applicant to do more than assume the driver has a valid driver's license.

As for hardship the Respondent maintained that the Applicant's testimony amounted to inconvenience but did not constitute hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the due diligence and exceptional hardship grounds of appeal as provided in subsection 50.2(3)(c) and 50.2(3) and (d) of the Act, respectively.

The Tribunal will address the matter of due diligence first. Section 50.2 (3) (c) is clear in the requirement:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

The Respondent argues that “assumption” does not constitute due diligence. The Tribunal concurs. Due diligence requires that “all reasonable efforts” be made.

The 6th edition of Blacks Law Dictionary, defines “due diligence” as follows: “Due diligence, such a measure of prudence, activity, assiduity as is properly to be expected from and ordinarily exercised by a reasonable and prudent man under the circumstances, not measured by any absolute standard but depending on the relative facts of the case.”

Whether the Applicant was shown a “phoney licence” or “assumed” Mr Ryder had a valid licence, the fact remains that the Applicant made insufficient effort, to ensure that the individual to whom he loaned the vehicle was a licenced driver.

The Tribunal finds that the Applicant did not satisfy the criteria of Section 50.2(3)(c).

With respect to undue hardship as per subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant owns another vehicle, but has chosen to have bodywork done on the vehicle at this time. Further, the Applicant has been getting about with the assistance of his neighbour.

As the Applicant has alternate methods of transportation available, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant stated that he incurred no incidental or any other out of pocket expenses, as a result of the impoundment.

Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

The Applicant having an alternative vehicle and the loss due to the impoundment not being immediate, significant or lasting, it is not necessary to review further criteria set out in the Regulation.

The individual affected by the impoundment, has an alternative method of transportation, and has incurred no significant or permanent loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 22, 2001

PAOLO

MARY ALICE PAOLO

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

MARY ALICE PAOLO, Applicant
unrepresented

DATE OF HEARING: August 20, 2001

DECISION RELEASED: August 23, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on August 20, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mary Alice Paolo (the "Applicant")
Motor Vehicle:	1996 Chevrolet Monte Carlo(MLS) plate # MAP57 (the "vehicle")
Date of Appeal:	August 1, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on August 20, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To whom it may concern:

July 27/01

On Friday July 20th around 5:30 a.m. my friends and me left for Bobcaygeon for a couple of days. My mother (Mrs. Mary Lou Paolo) took my cats that day before, July 19th, till I returned. We returned on Sunday July 22, approx. 10:30 a.m. I seen that my car was gone, I thought that my mother had come and got it because there other vehicle is in the shop for repairs. When I got inside my home, I noticed that I didn't have any messages as I picked up the phone to call my mother. I asked my mother to bring back my cats and if she had my car. She said that she didn't, then I told her I would call herback. I went to my bedroom to check if my spare set was under my mattress. As I was doing this Mr. A. Braster called me from the Thorold Detention Centre. I asked him about my car, if he had taken it, he said yes and then said haven't the police called me yet, I said no because I just had gotten home. I was extremely upset and started yelling at him, so he then hung up on me. Right then I phoned the police station to find out about my car. It took them about 5-8 min. to find where my car was, by now I'm going insane. The girl on the phone from the police station told me that my car was impounded in Oakville. The police station sent over Constable Pardoe, badge # 9652, Ext. 2200 905/688-4111 to make a report that my car was taken.

Mr. Braster lives with me only as a border/friend. I have known him for sometime and am aware that he is an alcoholic, I have been trying to help himout. He does not pay any rent, some food, and comes and goes as he pleases. When Mr. Braster gets out of jail he will no longer reside with me.

Thank you
Mary Alice Paolo

To whom it may concern

July 27/01

I Mary Lou Paolo picked up my daughter's Mary Alice Paolo cat on Thursday, July 19/01. She was going away for a couple of days with friends. On her return she called asked if I had her car I said "no". She called me later to day Mr. Braster had take it without her knowledge, he called to tell her he was in jail. She called the police they told her it had been impounded.

July 27/01
Mary Lou Paolo

The Applicant confirmed the information provided in the Notice of Appeal and added that she was unaware of Mr. Braster's lifetime licence suspension and neither did she know about the record of licence suspensions. The Applicant acknowledged that Braster would periodically take her car on errands and in response she had developed the habit of hiding her spare keys. The Applicant testified she had completed and provided to the police a charge of "taking without consent" against Mr. Braster and could not understand why there was no record of her charge. She also added that she did not think he was intending to permanently deprive her of the vehicle but was only intending to go to the liquor store and then return the vehicle.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Anthonius A. Braster;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 9, 2008.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

To be successful in this appeal, the Applicant must establish that the motor vehicle was stolen as set out in section 50.2(3)(a) of the *Highway Traffic Act*.

The Applicant has provided this Tribunal with no evidence to indicate that there was any "intent to deprive the owner of the benefit of ownership (or possession) permanently." The evidence clearly established that while the driver may have been using the vehicle without consent, the driver was a resident within the Applicant's home and, as confirmed by the Applicant, had been known to use the vehicle for short periods of time before returning it. The Applicant's testimony describing Mr. Braster's presumed intentions on the day the vehicle was impounded, supported the conclusion that it was the driver's intention to return the vehicle and that he was only prevented from doing so by the impoundment. The evidence does not support the Applicant's argument that the vehicle was stolen at the time of its impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: August 23, 2001

MAXEY

MICHAEL MURL MAXEY

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NEIL J. MACPHEE, Q.C.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

MICHAEL MURL MAXEY, Applicant
CHRISTINA SWEET, Counsel for Applicant

DATE OF HEARING: August 21, 2001

DECISION RELEASED: August 29, 2001

Windsor

REASONS FOR DECISION

A hearing was held on August 21, 2001, at Windsor, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Michael Murl Maxey (the "Applicant")
Motor Vehicle:	1995 Chevrolet 1500 Series, plate no. XF8 699 (the "vehicle")
Date of Appeal:	August 1, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3) of the Act.

This matter came before this Tribunal on August 21, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. Originals of documents from the Ministry of Transportation on file were submitted by the Registrar and the Appellant submitted a receipt dated May 11, 2001 issued by the Ontario Court of Justice to Ryan M. Maxey.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

1. I allowed my brother, Ryan Maxey, to operate my motor vehicle and honestly believed that he had a valid driver's licence to do so;
2. Although I know that he had a conviction for exceeding the breathalyser, I was advised by him that when he attended the court house to seek an extension for payment of his fine that he was advised by a Clerk that he did not have suspension;
3. I understood furthermore that he received a driver's licence in the mail from the Ministry of Transportation and Communication, that he contacted the Ministry to inquiry in terms of the validity of the licence which he had received, and was assured that they would not have sent him a licence if he didn't have authority to drive;
4. I further know that he received validation stickers which were affixed to his motor vehicle and it is my understanding that he would not be able to obtain validation stickers if in fact he had a suspended licence;
5. In view of the foregoing I had no reason to believe that he was driving while suspended;
6. Furthermore, I would not have allowed him to operate my motor vehicle if I know that he was suspended or had any reason to believe that he was suspended;
7. I reside in Leamington, Ontario which is approximately 45 miles from my place of employment in Windsor, Ontario and require this motor vehicle, which is my only motor vehicle, to travel to and from work and for all other necessary transportation purposes.

The driver, Ryan Marc Maxey testified as follows:

1. He admitted that his driver's licence had been suspended as set forth in Exhibit #5 until January 24, 2004 for the offence of driving with more than 80 mgs. of alcohol in his blood.
2. He attended at the Ontario Court of Justice on May 11, 2001 to make a payment on his fine as evidenced by Exhibit #6 and was told by a clerk that his licence was no longer suspended.
3. Subsequently, his mother telephoned the Ministry of Transportation and was told that his driver's licence was no longer suspended.
4. A valid driver's licence was sent to him in the mail after its 90 day suspension in March, 2000. He believed that someone had made a mistake and that he had "gotten lucky".
5. On the occasion of the impoundment, the police officer who pulled him over because his daughter was not secured properly in the car, conducted a search of his driving record and determined that his driver's licence was under suspension. The police officer took possession of the driver's licence.
6. He believed that through some mistake his driver's licence had been reinstated.

The Applicant/Owner Michael Murl Maxey testified as follows:

1. He knew his brother's driver's licence had been suspended in October, 2000.
2. His brother showed him the valid driver's licence issued to him in spite of the suspension.
3. His brother told him that a clerk at the Ontario Court of Justice told him that his driver's licence was not under suspension.
4. His mother told him that she had telephoned the Ministry of Transportation and was told that his brother's driver's licence was not under suspension.
5. He lent his truck to his brother only on the one occasion, the day of the impoundment.
6. He would not have done so if he had known that his driver's licence was suspended.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ryan Marc Maxey;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS of Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 24, 2004.

No witnesses were called for the Respondent who relied on Exhibits 3, 4 and 5 to establish the offence and the reason for the impoundment.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish that he had exercised due diligence in determining that his brother the driver had a valid driver's licence. The inquiries that were made and the information known to the Applicant are set out above. As pointed out by counsel for the Applicant, the definition of "due diligence" as contained in Black's Law Dictionary states that the standard is what a "reasonable person" would do.

After assessing the evidence presented, the Tribunal finds that the Applicant has established that he did in fact exercise due diligence in reaching the conclusion that his brother had a valid driver's licence.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Neil J. MacPhee, Q.C.,
Presiding Member

RELEASED: August 29, 2001

LENNON

WINSTON O. LENNON

**Appeal under Section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"),
from the Order of the Registrar of Motor Vehicles
pursuant to Section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: DINO BOTTERO,
Presiding member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

WINSTON O. LENNON, Applicant
Unrepresented

EVON BELL,
Owner of Evon Auto Repair
On behalf of Applicant

DATE OF HEARING: August 22, 2001

DECISION RELEASED: August 27, 2001 Toronto

REASONS FOR DECISION

A hearing was held on August 22, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under Section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under Section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Winston O. Lennon (the "Applicant")
Motor Vehicle:	1985 Chevrolet CCL, plate no. 623 RWK (the "vehicle")
Date of Appeal:	August 1, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in Section 50.2(3) of the Act.

This matter came before this Tribunal on August 22, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal indicated that the ground of appeal was that the vehicle was stolen, but the owner did not submit any written documentation with his notice of appeal form setting out any details supporting the owner's position.

Winston O. Lennon was sworn in and gave evidence. He indicated that his 1985 Caprice vehicle was not working and required immediate repair. A tow truck brought his car to the Evon Auto Repair shop.

Mr. Lennon had dealings with Evon Auto Repair for, at least, the past 25 years; where he had his vehicles variously repaired. He indicated that, a couple of days after his car was towed in, he was advised that his car had been impounded.

Police Constable Jason Wrong had contacted him and told him what had happened. Mr. Lennon indicated that he did not know the person who took his car. He also advised that Police Constable Wrong would want a video statement regarding the potential theft of his car; if he chose to go that route.

On August 8, 2001, Mr. Lennon appealed the Order of Impoundment on the grounds that the car was stolen; requesting that the Order of the Registrar of Motor Vehicles be appealed and set aside.

Mr. Lennon testified that he was quite upset that his car had been driven without his knowledge and he did not know the person who had taken his car. The keys had been with his car when it was towed to the Evon Auto Repair shop; which he considered normal given that the keys would be required to start the car and unlock the wheels.

He had assumed that, if the car were to be driven, it would strictly be driven in the context of potential road testing. He indicated that he had no idea who Stuart L. Miller, the driver of his car, was or his relationship with the garage. Mr. Lennon's relationship was with Mr. Bell, owner of Evon Auto Repair. Mr. Miller was driving Mr. Lennon's car at the time he was charged with impaired driving (July 15, 2001). His licence had been previously suspended and cancelled and was unrenewable.

Evon Bell, owner of the Evon Auto Repair shop, provided evidence as a witness for Mr. Lennon. He was sworn in and testified that Mr. Miller was not an employee of his; however, he had used space at his shop to repair various vehicles.

On the date that the vehicle was impounded, July 15, 2001, Mr. Bell had asked Mr. Miller to attend to some minor transmission leaks to Mr. Lennon's car and to contact Mr. Lennon that his car was ready. He indicated that he never gave permission to Mr. Miller to drive the car. He simply advised him to call Mr. Lennon which, apparently, he never did.

Mr. Bell indicated that he did not know that Mr. Miller did not have a valid driver's licence and he testified that Mr. Miller had often driven cars in and out of the lot in the course of his own specific repairs. His evidence was that he had not given specific permission to Mr. Miller to drive the car. He solely asked that Mr. Miller attend to some minor repairs on the vehicle and to call Mr. Lennon that his car was ready.

Under cross-examination by Kyle M. Biel, representative for the Registrar of Motor Vehicles, Mr. Lennon indicated that, when his vehicle was being towed away for repair, he did not specifically ask that the vehicle not be driven. He acknowledged that no charge of theft had been made against Mr. Miller given that Police Constable Wrong had never got back to him in a timely fashion to take a video statement.

Under cross-examination, Mr. Bell indicated that he had spoken to Police Constable Wrong, and the officer had advised him that theft charges would not be appropriate since Mr. Miller had access to the vehicle and it could not be proven that he took the car without consent.

In his closing statements, Mr. Lennon felt strongly that the person who took his car without his consent should be the one to pay the penalties and costs for the impoundment. He asked that the vehicle be released immediately given that he operated a small business and that his business was suffering as a result of the lack of the vehicle.

Mr. Biel's closing statement centred on the reason of appeal being based upon the car having been stolen. He presented the case that Mr. Miller had implied consent to use the vehicle in the course of its repair, the keys were readily available for the car, and there was no evidence that he was not going to return the vehicle; which is a major test to determine whether or not the vehicle was stolen.

A review of Mr. Miller's driving records indicates that he was previously convicted for impaired driving on at least four occasions. His status is unlicencable.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner or if different names registered as vehicle owner and as plate owner, then indicate which one the Applicant is.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Stuart L. Miller.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle.
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving while licence suspended under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 18, 2003.
5. Notice of Appeal Form received at the Tribunal August 1, 2001; filed by the Applicant.

Items 1, 2, and 4 were couriered to the Applicant on August 14, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and Section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to Subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to Subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under Subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this Section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this Section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this Section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in Section 50.2 of the Act, with Subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under Section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By Subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the Section is defined in Subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in Subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in Subsection 50.2(3):

(3) The only grounds on which an owner may appeal under Subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of Subsection 50.2(3)(a).

With respect to an appeal under Subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The Applicant had filed his appeal under Section 50.2(3)(a) of the Highway Traffic Act. Section 50.2(3)(a) states that an order to impound a vehicle may be set aside if the “motor vehicle that is subject to the Order was stolen at the time in respect of which the Order was made.”

In this particular instance, Mr. Lennon's vehicle was taken by Mr. Miller, who used space at the Evon Auto Repair shop. Mr. Miller repaired cars at the Evon Auto Repair shop where he utilized some of the space and was well known to the owner. Mr. Bell, owner of the auto repair shop, asked Mr. Miller to make some minor repairs to the vehicle and to call Mr. Lennon. He would not have normally been shocked or surprised to see the vehicle gone from the lot, on a temporary basis, since repairs would have been recently undertaken. It has not been established that his intent was to steal the vehicle and not return it permanently.

The onus is on the Applicant to prove the case that his vehicle was stolen. Whilst he indicated that the vehicle was driven on the day of its impoundment without his specific consent, Mr. Lennon had, in fact, consented to have the vehicle repaired at a shop where he had dealings for many years and a test drive of the vehicle is a reasonable possibility. It was not proven that Mr. Miller took Mr. Lennon's vehicle without any intent of returning it.

It is noted that Mr. Miller, driver of the vehicle, was not charged with theft.

The Tribunal finds that the evidence presented is insufficient to support the grounds of appeal that the vehicle was stolen at the time of impoundment as described by Section 50.2(3)(a) of the Highway Traffic Act.

Accordingly, the Applicant's ground of appeal based on the vehicle being stolen is dismissed.

This case describes an unfortunate situation where a man, in good faith, left a car for repair at an auto shop. It was subsequently driven on a short or temporary basis by a driver whose licence was under suspension and who, in fact, was unlicencable. The Tribunal would wish to draw the Applicant's attention to Section 51.1(21) of the Highway Traffic Act which states that:

"The owner of a motor vehicle that is subject to an order to impound under this Section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order."

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under Section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Dino Bottero, Presiding Member

RELEASED: August 27, 2001

FOSTER

JULIE A. FOSTER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

JULIE A. FOSTER, Applicant
unrepresented

DATE OF HEARING: August 20, 2001

DECISION RELEASED: August 23, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on August 20, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Julie A. Foster (the "Applicant")
Motor Vehicle:	1996 Chrysler Intrepid, plate no. 999 RJF (the "vehicle")
Date of Appeal:	August 2, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 20, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I was doing a friend a favour by driving him from Hamilton to Thunder Bay. I was extremely exhausted he offered to drive.

I'm separated and need my car for work. I reside in Hamilton and work in Burlington. I also have a pregnant daughter who relies on my car. I had assumed that my friends licence was reinstated. My car is now in Sault Ste Marie which is quite an inconvenient drive for me to attend a hearing. I'm also under a doctors care for depression and this situation is putting more stress on me.

I require my car before the 45 day limit.

The Applicant confirmed she had allowed her friend to help out with driving the long distance to Thunder Bay and that she was unaware his licence was suspended nor that he had never been licenced.

The Applicant confirmed she lives in Hamilton and works in Burlington but has been off on stress leave since about a week before the impoundment incident. She is separated from her husband. Her pregnant daughter, who has a young child, used the car to take her child to the babysitter but she did not use it on a daily basis. In the meantime, her son had been helping out by taking the child to the babysitter.

The Applicant confirmed she was not certain when she would be returning to work. She has an upcoming doctor's appointment and may be advised she could return to work by August 27, 2001.

The Applicant acknowledged she had made no inquiries about car pool participation because she worked flex hours. She acknowledged she had not looked into GO bus schedules even though the Aldershot station would be near her place of employment and she could take a taxi the balance of the distance. The Applicant confirmed she had rented a vehicle during the impoundment and that she felt it as a financial loss.

The Applicant also confirmed there had been no loss of employment, no loss of education and that she had no knowledge of any missed doctor's appointment by her daughter due to the impoundment.

The Applicant said that she had no hope of being able to obtain compensation from the driver of her vehicle for the impacts caused by the impoundment.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Christopher Gregorchuk;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 4, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Regulation 632/98 provides specific criteria the Tribunal is to take into consideration in determining if the Applicant has suffered exceptional hardship as a result of the impoundment of her vehicle. Under section 22(1) of the Regulation, the Tribunal may consider the health or safety of any person ordinarily transported in the vehicle. Under section 22(2)(3) financial or economic loss or loss of employment is not to be considered unless there is alternative to the impounded vehicle.

As to the Applicant's appeal to have the impounded vehicle returned on the basis that the loss of the vehicle will result in exceptional hardship, the evidence that was presented confirmed (i) that as the Applicant was on medical leave from her place of employment from just prior to the time the vehicle was impounded there had been no loss of employment; (ii) that alternative arrangements had been made for family and personal transportation needs; (iii) that no medical appointments had been missed; and (iv) that public transit options were also available in the event the Applicant returned to work before the end of the impoundment period.

Accordingly, the Applicant has not established exceptional hardship as required under the Regulation 632/98 and section 50.2 of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: August 23, 2001

THOMSEN

KIM THOMSEN/CITY PAWNBROKERS LIMITED

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JEAN-MARC LEFEBVRE, Q.C.,
Vice-Chair Presiding

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

KIM THOMSEN/ CITY PAWNBROKERS LIMITED,
Applicant unrepresented

DATE OF HEARING: August 22, 2001

DECISION RELEASED: August 28, 2001 Ottawa

REASONS FOR DECISION

A hearing was held on August 22, 2001, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal shown on the Notice of Appeal are as follows:

Owner:	Kim Thomsen (the "Applicant")
Motor Vehicle:	2001 GMC Jimmy 4x4, plate no. 440 YJR (the "vehicle")
Date of Appeal:	August 2, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 22, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Tribunal made its ruling on the preliminary issue which follows.

A request was made for a ruling as to whether Applicant is the "owner" as defined under subsection 50.2 (11) and if not, the Applicant requested permission of the Tribunal to amend the Notice of Appeal to indicate the correct name of the vehicle/plate owner as shown on the actual plate and registration documents, namely: City Pawnbrokers Limited. The agent representing the Registrar of Motor Vehicles consented to this request. Accordingly, the Tribunal granted the request and ordered that the style of cause of this matter be amended to show the name of the applicant to read Kim Thomsen/City Pawnbrokers Limited and ordered that the notice of appeal be also deemed to include the name City Pawnbrokers Limited with Kim Thomson being its authorized agent for the purpose of this hearing.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- only form of transportation
- I live 45 minutes out of town and I work in town
- have three children to provide for who also have volunteer work and activities
- husband was charged not convicted
- vehicle was taken off private property where husband was charged
- we also volunteer our time to helping with childrens programs
- vehicle is also used for business is also registered under the business
- there are no public transportation in the country

The only witness presented by the Applicant was Kim Thomsen. She was very credible and her evidence was forthright. She stated that she had taken over her husband's pawn brokerage business approximately five (5) years earlier and that she was the sole director, officer and shareholder thereof; previously her husband had been a shareholder thereof with other shareholders and the business had been reorganized so that she was the only one having any interest therein.

She stated that the police had advised her that her husband was not to be involved in the business as there were concerns due to his "record" and that, as such, he was simply not involved. Instead, he stays at home with the children but he is not very proficient at that task and she has to get back home early in the afternoons to take care of her children, aged 6, 10 and 12. Her husband does not work and he has been under suspension from driving any motor vehicle for various previous *Criminal Code of Canada* offences and he is currently under a lifetime suspension for "dangerous driving".

She is the sole provider for the household. She lives out in the country at or near Sarsfield Ontario, a small hamlet with one country store, 45 minutes from her place of business where there is no public transit and there are no taxis. She maintains that she has no family or friends in the area upon whom she can depend.

She has rented a vehicle since the date of impoundment at a cost of \$500.00 per week, making the payments by "maxing out" her credit card and she states that she cannot afford to pay off the card. She claims that she has no source of income to continue the payments other than her drawings of \$3000.00 monthly as a salary from the business and she maintains that her expenses: groceries, mortgage, insurance, and payments on her credit cards eat up all of her income. Her business has revenues averaging \$8,000 to \$10,000 per month and her overhead averages \$4,000 to \$5,000 per month.

She owes personal back taxes and the business owes some arrears in payroll deductions for both herself and two other employees of the business. The business has an inventory of approximately \$65,000; however, these assets are not liquid i.e. these are pawned items which she must keep at least 30 days for customer purposes and retain a further 30 days for other legal purposes, or as she says for "police" purposes, before she can dispose of them. She did not allude to any outstanding business loans but she did state that she was concerned that her inability to pay the replacement car rental costs could put her out of business. She did not produce any personal or business financial statements to corroborate her financial situation.

She made much of the fact that a vehicle is needed for her to transport her children to extracurricular activities to Orleans, Ontario, where she provides volunteer services while her children are involved in the activities, as a method of reducing the cost to her for her children's activities, i.e. she provides 33 hours of volunteer service per month to set off part of the children's registration fees. She would have to stop these activities, if she has no vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of City Pawnbrokers Limited as owner and as plate owner,

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Arno H. Thomsen and the vehicle owner is City Pawnbrokers Ltd. (sic.);
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Dangerous Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

The Registrar of Motor Vehicles did not present any witnesses and the documents produced by the Registrar were not contested by Kim Thomsen, agent on behalf of the Applicant. The representative for the Registrar of Motor Vehicles agreed to permit the Applicant to produce a copy of registration documents to establish the correct name of the vehicle/plate owner. This was done.

Upon cross-examination, the Applicant stated that the impounded vehicle was a 2001 vehicle purchased a few days before the impoundment and that the business had made a conscious decision to purchase a newer vehicle. Although it was not "brand new", this was suggested as an indication that the business felt it had the ability to purchase such a vehicle. The Applicant's response was to the effect that a replacement vehicle was needed and that the one selected suited the purpose. The Applicant did not really explain how such a decision was made, if the business was in such dire straits. The Tribunal is not persuaded that the business would fold as a result of continuing the \$500 per week rental for a replacement vehicle for the relatively short number of days remaining until the impoundment lapses.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue whether the loss of the vehicle will result in exceptional hardship the evidence established that the Applicant was, in fact, able to secure an alternative vehicle. While there is no doubt that the Applicant personally and the business are suffering financially, immediately and significantly, it is the view of this Tribunal that the ultimate effect upon them will not be lasting. The Tribunal holds that the business will survive despite the extra burden of the weekly rental for the alternative vehicle payments.

The Applicant has therefore not discharged the onus of establishing that the conditions contemplated by all 6 subclauses of section 22(3) have been met.

The Tribunal finds that the hardship being faced is not “exceptional” hardship as contemplated under section 50.2 of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre, Q.C., Vice-Chair

RELEASED: August 28, 2001

RAFUSE

MICHELE RAFUSE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NORMAN MEALING,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

MICHELE RAFUSE, Applicant
unrepresented

DATE OF HEARING: August 23, 2001

DECISION RELEASED: August 29, 2001

Toronto
By teleconference

REASONS FOR DECISION

A hearing by teleconference was held on August 23, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Michele Rafuse (the “Applicant”)
Motor Vehicle:	1993 Plymouth Acclaim, plate no. AKFJ 593 (the “vehicle”)
Date of Appeal:	August 3, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 23, 2001 and proceeded as an oral hearing. The Applicant participated via teleconference.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am a married mother with a 21/2 yr old daughter. On July 23/01 my husband was at our newly rented home - cleaning, preparing and painting the house so that we could move in. I am almost 9 months pregnant with our second child. I had driven the car to the new house to pick up my husband so that he could come home for supper. It was extremely hot this day. We arrived home after running a few errands and prepared dinner. Around 9pm my husband wanted to go back to the house to continue on with repairs - he asked that I drive him back. I was very pregnant, exhausted, trying to settle our 21/2 yr old - in the middle of a bath. So I asked my husband to just drive the car back to the house as I was very tired. He did so reluctantly but was wanting to finish repairs ASAP. He drove carefully, within the speed limit and followed all the rules. When he arrived to our new neighbour hood (much to be desired a reputation for "questionnaire activity" at all times of the day) - a police officer stopped him. Not because he was observed driving erratically or broke the law - only because of the neighbourhood and the type of car we drive is high on the "theft list". Continued impoundment of the car will I feel result in exceptional hardship for me. I have just gone on maternity leave I am the only person in the household with an income - and how that is much more limited. I am expecting the birth of my 2nd child any day now. My due date is Aug 2/01 with no way to the hospital if I have no car or no way to bring my child home. To me the loss of the car will obviously affect me and my children while it was not my licence that was under suspension. I do accept responsibility for my part and am regretful of my decision to ask my husband to drive. I wish I wasn't tired, pregnant and giving my 21/2 yr old daughter a bath - those are the facts. I cannot change them. I respectfully ask for your mercy and understanding in this matter and would like this to be resolved as soon as possible.

Thank you
Michele Rafuse

The Applicant repeated the circumstances surrounding the impoundment of her vehicle, and the basis for her appeal. She advised the Tribunal that she had recently given birth [August 13th], and that her baby was delivered via caesarian section which resulted in complications requiring a longer than expected stay in hospital. She also pointed out that the circumstances of her baby's birth meant she was under doctor's orders to avoid over-exerting herself through lifting, walking, etc. for a period of six weeks. She also made the point that the circumstances of her baby's birth meant that there were more frequent visits to their doctor. In response to questioning, she indicated that she initially relied on walking immediately following the impoundment, that a friend had transported her to and from the hospital, and that her family had been staying with her for the past three days. She also acknowledged the availability of public transit. She discounted the use of taxis as too expensive given her present income, i.e. maternity leave benefits.

The Applicant also acknowledged that she had encouraged her husband to drive her car on the night it was impounded, and that she was aware that his driver's licence was under suspension at that time.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by William Christopher Gordon;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 3, 2002.

The Respondent questioned the Applicant with respect to the availability of alternative transportation, in particular, transit, taxis, friends, and families. She also questioned the Applicant as to whether or not she had contacted social services to help out, specifically in relation to the trips to and from doctors' appointments. In reply to this line of questioning, the Applicant indicated that she had spoken to a social worker while in hospital but had not pursued this possibility further. The issue of financial hardship was raised, and the Applicant pointed out that the most significant financial issue was the fee payable to retrieve her car from the impound.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Exceptional hardship requires that the Tribunal consider whether or not the impoundment will result in a threat to the health or safety of any person ordinarily transported by the motor vehicle, and while the circumstances of the birth of the Applicant's baby were such that visits to the doctor are more frequent, the availability of alternative transportation, including emergency services, if required, suggest that the health and safety of the Applicant and her baby are not at risk due to the loss of her motor vehicle.

Exceptional hardship also requires that the owner demonstrate that no alternative to the impounded motor vehicle is available. Under questioning, the Applicant acknowledged that she had been able to manage thus far with the help of friends and family, and that public transit was available, although she considered it inconvenient.

In addition, exceptional hardship requires that the owner demonstrate that the loss associated with the vehicle will be immediate, significant, and lasting. Under questioning the Applicant confirmed that most significant issue facing her was the cost of retrieving her vehicle from the impound. She also confirmed that her own employment circumstances had not changed in that she continues to receive maternity benefits.

On the evidence before it, the Tribunal finds that the Applicant has not established that the impoundment of the vehicle has resulted in exceptional hardship, as required under section 50.2(3)(d) of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: August 29, 2001

TASSIE

PAMELA T. TASSIE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

PAMELA T. TASSIE, Applicant
unrepresented

DATE OF HEARING: August 24, 2001

DECISION RELEASED: August 29, 2001 Owen Sound

REASONS FOR DECISION

A hearing was held on August 24, 2001, at Owen Sound, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Pamela T. Tassie (the “Applicant”)
Motor Vehicle:	1993 Ford Taurus Wagon, plate no. 319 XXJ (the “vehicle”)
Date of Appeal:	August 7, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 24, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Prior to the commencement of the Hearing the Respondent requested an exclusion of witnesses and provided the Tribunal with original certified copies of the documents on file.

There were no other preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

July 31, 2001

Licence Appeal Tribunal
1 St. Clair Avenue West, Suite 1200
Toronto, Ontario
M4V 1K6
Telephone: 416-314-4260
Fax: 416-314-4270
or 426-314-6307

To whom it may concern,

Re Impound order No. 1504524

I Pamela Tassie am the registered owner of the vehicle as well as the plate owner.

The car in question was lent to a Mr. Edward Conway as he had appointment's to attend to in Owen Sound and his vehicle was in need of repair. Unfortunately he did not take enough precautions in order to make sure the vehicle was only driven by him. He is a licenced driver.

The loss of the vehicle is an exceptional hardship to me as I am currently applying for a disability pension and there would be no way I could afford the \$1200.00 fee to release the car. The car was a gift in the first place from my brother in-law as he didn't like to see his nieces riding around in unsafe vehicles.

I am currently in treatment at the South Grey Mental Team in Markdale Ontario because of a sexual assault. I have attached a letter of proof from my counsellor stating that I am receiving help from them. I have had to cancel my appointments due to no transportation. The only way would be to hire a taxi which I cannot afford as it is \$30.00 round trip. It is approximately 10 miles to town I am unable to lease or replace this vehicle because of my lack of income. I receive \$830.00 per month from social services of which \$500.00 goes out from rent.

I live in rural Ontario and I would be unable to continue my every day needs without the vehicle.

They are as follows;
To seek mental health counselling

To attend doctor appointments with my family physician for myself & children
To pick up my Prescriptions from the Pharmacy
To pay my rent I have to go to Dundalk Ontario to my landlord's farm approximately 25 miles one way
To pay bills i.e. phone, utilities, etc.
To get Groceries
To take my daughter's to numerous functions i.e. birthday parties, sleep overs, shopping for school supplies
Emergency Hospital visits
Court attendance re the sexual assault case

In order to get the most reasonable prices for things like school supplies requires a trip to Owen Sound Ontario which costs \$50.00 one way or \$100.00 round trip by taxi. I see no logical reason as to why myself & my children should be put in this position as these expenses would have to come out of what little I have left for food.

I have been suffering from fibromyalgia for 9 years which sometimes is unbearable to control which requires hospital visit for a shot of pain medication.

I am also looking for another place to live as where I am I can no longer afford to stay as well I am renting month to month as the place is for sale. The heating costs alone last winter were \$1600.00 for propane. Therefore I need a vehicle to access the newspapers and viewing potential of new rental property before the beginning of the school year.

Should you require any more documentation please contact me at home phone 519-986-4230.

In closing I would like to add that there is no possibility of the unlicensed driver accessing the car again as he will be under incarceration for the next 2 years. He is my ex boyfriend & the biological father of my two girls.

The vehicle registration is unavailable due to the fact it is in the glove box of the car in the impound yard.

Yours truly,

Pamela Tassie

At the Hearing the Applicant reiterated the statements made in the Notice of Appeal, that the vehicle is essential in order to enable the Applicant, not only to carry on the basic necessities of life such as grocery shopping and shopping for her children going back to school supplies, but more importantly to maintain weekly visits to her psychiatrist and physiotherapist.

The Applicant needs to see a psychiatrist once or twice a week as she is recovering from past incidents of rape and assault. As for the physiotherapist, the Applicant must go once a week to obtain relief from fibromyalgia.

The Applicant has been getting around with the assistance of her friend but because she does not want to impose, she has been forced to devise a series of priorities. According to the Applicant her friend "...*has his own life* ..." therefore she has determined that only Court related trips have preference.

In cross-examination, the Applicant asserted the fact that she has missed several medical appointments due to the impoundment, and that this has affected her health adversely.

Further, the Applicant clarified that if she fills the gas tank of her own vehicle, she will make sure that it lasts for as long as she needs, doing so, is less expensive than giving someone \$15.00 each time they drive her. Similarly buying gas is still less expensive than taking a cab into town, which is a \$30.00 round trip. Expenses are significant as the Applicant is the recipient of \$830.00 a month Disability Assistance.

Mr. Edward J. Conway was called as a witness by the Applicant.

Mr. Conway confirmed that he drives the Applicant around as he feels responsible for her losing the vehicle. Nonetheless, Mr. Conway remarked that he has his own life and feels restricted by the responsibility of being required to drive the Applicant to her appointments.

In closing, the Applicant requested the return of her vehicle and a reduction in the cost of impoundment as she is not able to afford the \$1,200.00.

The Applicant also raised the issue of physical safety, as she testified that the previous night someone had attempted to break into her home. The Applicant feels more secure having a vehicle, in that she feels she would be able to escape an intruder by driving away.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gary W. Bruner;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 11, 2003.

The Respondent offered no viva voce evidence at the hearing but relied on information previously submitted to the Tribunal.

In closing, the Respondent argued that the Applicant has not proven the exceptional hardship ground for appeal. The Respondent suggests that the Applicant may avail herself of an alternate vehicle but has chosen not to do so. Further, as long as the Applicant has an alternate means of transportation, her health is not at risk, thus the health and safety grounds may not be considered.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship grounds of appeal as provided in subsection and 50.2 (d) of the Act, respectively.

Section 22 of Regulation 574, R.R.O. 1990 as amended by Ontario Regulation 632/98 is very specific, in that it provides the Tribunal with criteria the Applicant must demonstrate to determine that exceptional hardship will result from the impoundment.

Section 22.1 (a) of the Regulation allows consideration in circumstances which could pose “a threat to the health or safety of any person ordinarily transported by the motor vehicle”. Nonetheless, in order for the Tribunal to apply Section 22(1)(a), it is necessary that no alternative to the impounded vehicle is available. Under section 22(4) of the Regulation, to show that no alternative is available, the Applicant must show that every reasonable option has been considered.

Also, subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant does not own another vehicle. She has on occasion been getting about with the assistance of her neighbour. That neighbour has indicated that he is only able to do this when he is available. According to the Respondent, this would preclude the Tribunal from considering Section 22(1)(a). The Respondent further contends that the Applicant missed appointments by “choice”, as she could have continued to rely on Mr. Conway's assistance.

The Tribunal does not concur with the Respondent. The Tribunal accepts that there are limits to the Applicant's reliance on Mr. Conway driving her around. Given the fact that the Applicant has been required to attend Court proceedings sometimes twice a week, the Tribunal understands the Applicant's need to prioritize her requests for assistance from Mr. Conway. The Applicant is under the medical care of her psychiatrist and physiotherapist. The Applicant's psychiatrist has stated in writing that the Applicant needs her vehicle to attend at the psychiatrist's office. As for the issue of security, the Tribunal also recognizes the Applicant's need to have the ability to escape from danger, particularly in the light of her past experience of having been raped and assaulted. The Tribunal accepts the Applicant's statement that the lack of access to her vehicle at home, creates significant anxiety, particularly when there has been an attempt to break into her home. In the unique circumstance in the Applicant's case, the Tribunal finds that there is no alternative to the impounded vehicle and its loss is a threat to her health and safety as set out in subsection 22(1)(a) of Regulation 632/98 which requires that there be "a threat to the health or safety of any person ordinarily transported by the motor vehicle."

The person ordinarily transported by the vehicle is the Applicant, and the Tribunal finds that there is enough evidence to substantiate a decision of exceptional hardship. The Applicant has missed several appointments both to her psychiatrist and physiotherapist. Given the past incidents in the Applicant's life, the Tribunal has no doubt that therapy is essential and if missed further mental and emotional anguish could result.

After assessing the evidence presented, the Tribunal finds that the Applicant has established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 29, 2001

BOTELHO

MARIA BOTELHO

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

MARIA BOTELHO, Applicant
unrepresented

DATE OF HEARING: August 27, 2001

DECISION RELEASED: August 29, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on August 27, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Maria Botelho (the “Applicant”)
Motor Vehicle:	1997 Pontiac Grand Prix, plate no. AJTB 604 (the “vehicle”)
Date of Appeal:	August 2, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver’s licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 27, 2001 and proceeded as an oral hearing. The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

July 21/01

Licence Appeal Tribunal

I am the mother of Eusebio Botelho who was driving my vehicle at the time of this incident. I had been aware of my son's prior suspension. However, it was my son's understanding and myself that he was reinstated January 2001. It was a shock to myself & my son to learn that he had a further suspension when the car was impounded.

As a result of this impoundment it is causing great hardship for myself and my 43 yr. Son who has Polio. I am a senior in poor health. My son with Polio has difficulty walking. We both need my vehicle for every day life needs.

When I purchased my vehicle I was refunded the taxes paid on the vehicle because it was used to transport my disabled son.

Enclosed is a copy of my son's disability sticker. I am sure you can also access your records which show the refund of taxes that were refunded.

I am pleading with your office to please release my vehicle for the above mentioned reasons.

Thank you very much for your consideration in this matter.

Yours truly
Maria Botelho

The Applicant was accompanied by her son, Manuel Botelho who explained that his mother, Maria Botelho, understood English but did not speak it and therefore he would provide the translation.

Through Mr. Botelho, the Applicant confirmed her knowledge of her son Eusebio Botelho as having been the driver of her vehicle when it was impounded and that she was aware of his licence suspensions. The Applicant also confirmed she had been informed by Eusebio, that he understood his suspension period had ended in January 2001 and that she had believed this to be the fact. The Applicant advised the Tribunal that had she known her son's licence was still suspended she would not have allowed him use of her vehicle.

The Applicant further confirmed that she required her vehicle for every day needs as she was a senior on disability pension and also used the car to transport her son Manuel, who had polio, to medical appointments and therapy sessions. The Applicant also confirmed that she had received a tax rebate from the Provincial Government as her vehicle was essential to transporting a handicapped person. The Applicant referred to the Provincial Parking Permit which a copy of which was entered as Exhibit 3.

Through translation, Mrs. Botelho confirmed her immediate need to have the vehicle released as it was causing her exceptional hardship.

The Applicant's son, Mr. Manuel Botelho, gave evidence as a witness in support of the Applicant's appeal and provided the following testimony.

Mr. Botelho described the Applicant's belief that the driver's licence was not suspended by explaining there was a question about when the suspension was to end or to have ended. The witness explained that Eusebio Botelho had entered into legal proceedings to clarify that question based on the view that the Crown had dropped the charges relating to the suspension period ending January 7, 2002. The witness then referred to several pages of documentation with a top-of-page date of June 12, 1997 and which described the charges and proceedings results.

Mr. Botelho stated that the Applicant's understanding of this documentation and asking the driver whether his licence had been reinstated was her means of exercising due diligence.

Mr. Botelho said that the need to have the vehicle returned was based on the fact that he had received a doctor's advice to do as little walking as possible and that he needed to attend therapy sessions four to five times a week. He confirmed that he was dependent upon his mother to transport him to all his outside appointments and it was essential for her to have her vehicle returned.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Eusebio Botelho;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 7, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Regulation 632/98 provides specific criteria the Tribunal is to take into consideration in determining if the Applicant has exercised due diligence and/or suffered exceptional hardship as a result of the impoundment of her vehicle. Under section 22(1) of the Regulation, the Tribunal may consider the health or safety of any person ordinarily transported in the vehicle.

As to the first issue of due diligence, the Applicant acknowledged she had been aware of her son's licence suspension and that she had only asked him if he had a valid driver's licence. She acknowledged she had not asked to see the licence. The Applicant confirmed that she relied on his word and accepted the driver's statement that he had received a letter in November of 2000 which advised him his licence had been reinstated.

While the Tribunal sympathizes with the Applicant and the language difficulties the Applicant faced in understanding the licence suspension process, the Tribunal relies on the definition of 'due diligence' as being the exercise of "a measure of prudence, activity, ... as is properly to be expected from, and ordinarily exercised ... under the particular circumstances" where knowledge existed of prior licence suspensions.

As to whether any question exists about the January 2002 licence reinstatement date versus the Applicant's view of the January 2001 date, the Tribunal relies upon the evidence which is on the record.

Regarding the second issue of exceptional hardship or whether conditions of "severity...hardness of fate or circumstance...suffering, extreme privation" were being endured by the Applicant and those who were reliant upon her access to the impounded vehicle, there was no evidence that the Applicant or any member of her family had been unable to meet their medical or personal commitments.

There was no evidence to show that the absence of the impounded vehicle had posed a threat to the health or continued well being of the Applicant or any family member within her care.

In addition, the evidence provided by the witness established that an alternative means for transportation had been provided by a relative of the family and while it was described as an old and well-used vehicle, there was no evidence that this was not a viable vehicle. The witness also confirmed that one breakdown had occurred, a repair had been done and this loaned vehicle was still serving as a means of transportation. An alternative to the impounded vehicle being available to the Applicant, the loss of the impounded vehicle is not exceptional hardship as prescribed by Regulation 574, R.R.O. 1990 as amended by Regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: August 29, 2001

BARAKAT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROGER NICOLAS BARAKAT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 16, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ROGER NICOLAS BARAKAT

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Roger Nicolas Barakat, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 29, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Roger Nicolas Barakat
25 Trailwood Dr.
Mississauga, ON L4Y 3K9

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Roger Nicolas Barakat (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full disclosure on all future applications.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them the circumstances of his pending charges.
- 6) The Applicant agrees that his explanation of the circumstances of his convictions, are substantially as set out in the disclosure provided to the Registrar.
- 7) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 8) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 9) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.

- 10) The Applicant agrees that as soon as a disposition is made regarding his pending charge of "Possn for the Purpose", he will inform the Registrar of the result forthwith.

Roger Nicolas Barakat (initials)

- 11) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
- 12) The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
- 13) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 14) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 15) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 16) The Applicant will provide a copy of this order to his employer forthwith.
- 17) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 18) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 19) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2001.

(Signature) Roger Nicolas Barakat

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

ADLS - 690 - NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: July 31, 2001

Toronto

DECISION

A hearing was held on July 31, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 1, 2001

ADLS - 690 - NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: BRIGITTE HAMMOND,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: July 31, 2001

DECISION
RELEASED: August 1, 2001

Toronto

REASONS FOR DECISION

A hearing was held on July 31, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 1, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 10, 2001, and was received by the Tribunal on July 10, 2001, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

This matter was before the Tribunal as the Applicant's Driver's Licence was suspended "01/01/19" as per Notice of Appeal (Exhibit # 1)

Applicant's Agent, from CLASP Community Services, stated that he was appearing on behalf of the Applicant for the sole purpose of requesting an "...*adjournment without a date*".

The grounds for adjournment as expounded by Applicant's Agent are that he was only made aware of this file on the prior Friday. Applicant's Agent feels that more time is required to enable the Applicant to obtain proper medical evidence from his physician to respond to the expert report from Physician # 1.

Applicant's Agent acknowledged that evidence tendered by the Applicant relates to injuries sustained at work, which occurred prior to the date of suspension. Applicant's Agent pointed out that since the Applicant had been unable to visit his physician prior to consulting with Legal Aid, time was now required to advise the Applicant to obtain further medical reports, showing the link between his injuries and his breathing difficulties.

The Respondent objected to the adjournment, as two Constables from the Ontario Police Services were available to testify. The Respondent noted that it would be not only inconvenient but also costly to re-call the two Constables as witnesses.

The Tribunal noted that the Applicant's Notice of Appeal on file, dated "*Jul. 10, 2001*", states that counsel has been sought.

The Tribunal further observed that page two of the Notice of Appeal was prepared by the Applicant's physician for "*4 years 4 months*", Physician # 2, and is dated "*July 6, 2001*". Physician # 2 states under the heading "Details and Diagnosis of patient's present condition"; that the Applicant "*...has very severe problem with his back ... has shortness of breath...*".

The Applicant had the assistance of Physician # 2 when the Applicant's appeal was filed and was aware that the Applicant's medical condition was the issue to be determined in this hearing. The Respondent provided the Applicant with the Respondent's documents within the disclosure time provided in the Tribunal's Rules of Practice. The Applicant's request for an adjournment was made with no prior notice and only at the opening of the hearing. The basis of the Applicant's request was to obtain more evidence. The Respondent was prepared to proceed with the hearing, had two police officers in attendance to give evidence, and objected that the request for an adjournment was unreasonable.

The Tribunal found that an adjournment was not warranted, denied the Applicant's request and asked the Applicant's counsel to proceed.

Once the decision to proceed was rendered, Agent for Applicant advised the Tribunal that he withdrew from the case. At the same time, the Interpreter present to assist the Applicant also stated that he was from CLASP and was also withdrawing as Interpreter.

After Agent for Applicant, the Interpreter and the Applicant had a moment to discuss the Tribunal's ruling on the adjournment, they informed the Tribunal that the Applicant was abandoning the Appeal.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

DECISION:

Upon the application by the Applicant to appeal the suspension order dated June 19, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA"), the onus being on the Applicant to establish the merit of his appeal and the Applicant having withdrawn his appeal before this Tribunal;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 10, 2001

ADLS - 744 -RESP

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August 28, 2001

Windsor

DECISION

A hearing was held on August 28, 2001, at Windsor, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 29, 2001

ADLS - 744 -RESP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August 28, 2001

DECISION
RELEASED: August 29, 2001

Windsor

REASONS FOR DECISION

A hearing was held on August 28, 2001, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 29, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 8, 2001, and was received by the Tribunal on August 10, 2001, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

A thirty-minute grace period was afforded to the Respondent to allow for the attendance of two witnesses, who had conveyed the message that they would be delayed.

The Applicant stated that his lawyer would not be attending and consented to proceeding without the assistance of counsel. He did, however, sign a note authorizing the Tribunal to send the decision to his counsel.

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal Form - received August 8, 2001.

- b) Exhibit # 2 Notice to Registrar – dated June 23, 2001.
- c) Exhibit # 3 Medical Report from Leamington District Memorial Hospital - dated June 24, 2001.

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions – received August 22, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "01/06/24" as per Notice of Appeal (Exhibit # 1).

Physician # 1, the Applicant's physician for "20 years", prepared Page 2 of Notice of Appeal. Physician # 1 reports the Applicant's diagnosis as "... asthma ... recurrent panic disorder with obsessive compulsive disorder..." (Exhibit # 1).

In a typewritten letter under the letterhead of Four Oaks Family Care, Physician # 1 confirms that the Applicant was taken to "Leamington District Memorial Hospital ...breathless ...required a inhalation treatment of Ventolin and Atroven ...Prior to this event ...last seen December 28, 2000 for treatment of upper respiratory tract infection ...past significant medical history of asthma and obsessive compulsive disorder with panic attacks and this combination may have made it difficult for him to comply with the police instruction with regards to the breath analyser." (Exhibit # 1)

The Leamington District Memorial Hospital Emergency Department Clinical Assessment Record indicates, "...Slight ...wheezing heard ...Ventolin ...Atroven..." (Exhibit # 3)

The Respondent provided the following Documents: (Exhibit # 4)

1. Notice to the Registrar
2. Driving Record of the Applicant
3. Vehicle Record

The Applicant's driver's record according to the Ministry of Transportation, since 1988 shows several infractions. (Exhibit # 4)

At the hearing the Applicant testified he did not "...have the ability to blow...". The Applicant stated that he tried to blow "...as long and as hard..." as he could, but was not able to provide "...enough air...".

The Applicant attested that he was given two attempts to provide a breath sample, but denied the opportunity to provide a third sample.

Under cross-examination, the Applicant declared that he requested medical assistance due to the cuts and bruises that he had suffered not because he was feeling any respiratory distress.

The Applicant confirmed that he has lived with asthma all his life and that in his youth he did undergo some pulmonary function tests, but none recently. He suffers from shortness of breath particularly as a result of exertion or panic, which may require the use of an inhaler but does not carry an inhaler with him.

At the time of the breathalyzer session the Applicant stated that he was not feeling any particular breathing discomfort, wheezing was normal under the circumstances, as he was in an excited emotional state.

After being taken to hospital, the Applicant did not complain to the medical staff of any breathing discomfort. There were no immediate visits, by the Applicant, to the family physician regarding concerns about breathing difficulties.

The Respondent called Police Officer # 1 as a witness. Police Officer # 1 testified that he is an OPP Sergeant with the Essex Detachment and has been a Police Officer for “ 15 years”.

Police Officer # 1 related the circumstances leading up to the breathalyzer session. Throughout incident, Applicant was uncooperative, verbally abusive and defiant.

Although a qualified breathalyzer technician himself, Police Officer # 1 called upon a fellow officer to perform the test on the Applicant. While writing his notes Police Officer # 1 observed that the Applicant simply gave a “puff” but failed to seal the mouthpiece with his lips. The Applicant appeared to know the procedure and voluntarily offered a second “puff” when the machine did not register after the first attempt.

Police Officer # 1 testified that the Applicant was taken to hospital due to cuts and bruises sustained during the scuffle with the officers, not because of any apparent breathing difficulties.

At no time did Police Officer # 1 observe the Applicant suffering from severe breathing distress, nor did the Applicant indicate to him that he was unwell or required medical assistance for anything other than the bruises.

The Respondent also called Police Officer # 2 as a witness. Police Officer # 2 was able to testify as to the incidents that led to the breathalyzer session. She was called in to assist Police Officer # 1 in subduing the Applicant. Police Officer # 2 asserted that she observed the Applicant being unruly but at no time did she observe that the Applicant was having any difficulty breathing. Police Officer # 2 was present at the hospital when the Applicant was administered Ventolin by the physician, but according to Police Officer # 2 , the Applicant was merely “...wheezing...”.

Police Officer # 3, the attending breathalyzer technician, with the Ontario Provincial Police, Essex Detachment, was also called to testify on behalf of the Respondent.

Police Officer # 3 informed the Tribunal that after explaining the procedure, he gave the Applicant two opportunities to provide a breath sample. Each time the Applicant “...puffed his cheeks but the effort would not even blow out a children’s candle.”

Police Officer # 3 affirmed that both attempts were insufficient to cause the “R ...refuse” display to disappear from the machine. Police Officer # 3 explained that airflow of 15 centimeters would eliminate the display. In Police Officer # 3’s experience elderly people, people with severe asthma, even individuals with one lung are able to provide enough air to turn off the refusal display.

Police Officer # 3 stated that a third attempt was requested of the Applicant but he explicitly stated he would not be providing one. After being told that he would be charged, the Applicant did ask Police Officer # 3, for another opportunity. Police Officer # 3 felt there would be no purpose in allowing the Applicant to try again as, the Applicant has previously been disorderly, abusive, and when asked to provide a breath sample simply “tooted twice”, the third time the Applicant verbally expressed his refusal to cooperate.

At no time did Police Officer # 3, observe the Applicant being afflicted with shortness of breath or wheezing.

In closing, Applicant made a brief statement reiterating the fact that he had been given two opportunities to provide a breath sample, asked for a third but was refused.

Alluding to Physician # 1's report the Respondent accepts that the Applicant may be asthmatic, however disputes the fact that this was reason for the Applicant's inability to provide a breath sample. The Respondent argued that evidence indicates that the Applicant had been uncooperative from the beginning and had no intention to provide a breath sample.

The Respondent emphasized that the Applicant's physician has not seen a need for regular pulmonary function tests, that the Applicant has no need to carry an inhaler, that neither of the officers noted the Applicant having any trouble breathing, and that he was not taken to emergency due to respiratory distress but rather due to cuts and bruises.

APPLICATION OF THE LAW TO FACTS:

At issue is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand. If so, how does the medical condition of the Applicant relate to Section 50.1(2)(b) of the *Highway Traffic Act*. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Applicant provided the Tribunal with a letter outlining his physician's opinion “...past significant medical history of asthma and obsessive compulsive disorder with panic attacks and this combination may have made it difficult for him to comply with the police instruction with regards to the breath analyser.” (Exhibit # 1)

The Tribunal does not dispute Physician # 1's diagnosis or his judgment as to the Applicant's overall ability to provide a breath sample. The Tribunal also recognizes that the Applicant was in need of Ventolin upon his arrival at emergency. Nonetheless, the Tribunal concurs with the Respondent's position that the Applicant's behaviour throughout the event demonstrates an unwillingness to co-operate. The Applicant's vive voce evidence is crucial in substantiating the Tribunal's decision. By his own admission, the Applicant established that he was not suffering any particular breathing discomfort, and that he requested medical treatment for the cuts and bruises not because of any respiratory problems.

The Applicant's testimony is corroborated by the three officers, who were present during the incident and testified at the hearing. Neither officer observed the Applicant being afflicted with breathing difficulties. In fact, the officers testified, and the Applicant acknowledged, that he was " shouting ...yelling..." while in custody.

The Applicant did not seek further medical assistance and only visited his physician on July 29, for the purpose of having Form 2 of the Notice of Appeal prepared. The Tribunal finds this fact quite significant in that it clearly demonstrates that the Applicant did not view his condition as serious enough to warrant immediate attention.

The Applicant has not presented any evidence that Physician # 1 has ordered pulmonary function tests or prescribed any medication to alleviate the Applicant's breathing difficulties. Again, the Tribunal has no justification to conclude that the Applicant's condition is severe enough to prevent him from providing a breath sample, as it would appear his condition is not severe enough to necessitate further medical intervention.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1(2)(b), in that he was not able to demonstrate that he suffers from a medical condition, which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated June 24, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 30, 2001

MED - 694 - SEIZURE

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: August 9, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

This 24 year old female has been diagnosed with idiopathic epilepsy. Seizures began at age 5. After investigation in hospital, she was started on anticonvulsive medication. During adolescence and into puberty she had several episodes requiring adjustment of her medication. She was seizure free from 1985-1990. In 1990 she stopped her medication - hoping that she had outgrown her disorder - as did happen with other members of her family. Unfortunately, she had recurrence of seizures, and medication was restarted. She remained seizure free until May 2001. Her neurologist had been reducing her drug dosage because she was doing well with negative EKG and CT Scan.

On May 21, 2001 she had a seizure. Contributing factors for this episode were fatigue and the omission of several doses of her medication. This episode led to her visit to the Grand River Hospital in Kitchener where the attending Doctor submitted the required report to the Ministry of Transportation resulting in this licence suspension.

The Applicant submitted medical reports as requested. Her neurologist Physician # 1 reports of September 2000 and March 2001 indicate her condition as stable - that her neurological and general medical examination is negative and that recent EKG and CT scan were normal. Drug blood levels in 1994 and in 1997 were within therapeutic levels. The Drug blood level of May 2000 was considerably lower than therapeutic range while she was seizure free. As a result Physician # 1 suggested the lowering of her drug dosage.

After her seizure of May 21, 2001 she saw Physician # 2, a neurologist in Toronto - because Physician # 1 was not available. He supports the diagnosis and suggests a daily maintenance dose of anticonvulsive medication and felt she was unlikely to have any seizures in the near future. She returned to Physician # 1, - her regular neurologist, on July 18, 2001 who reports a negative EKG of June 21, 2001 and states that he sees no reason why she cannot resume normal activities including driving a motor vehicle.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Canadian Medical Association's Guide to "Determining Medical Fitness to Drive" is used by the Ministry of Transportation to interpret whether a driver suffers from any disability likely to interfere with the ability to drive a motor vehicle safely.

The Ministry's Medical Advisory report of July 23, 2001 applies to section 5.4.1. of this guide to recommend this licence suspension until the Applicant is seizure free for 6 months.

Section 5.4.1. *Single, unprovoked seizure before a diagnosis*

Private drivers: These patients should not drive for *at least 3 months* and until a complete neurologic examination including electroencephalography (EEG) and computer tomography (CT) has been carried out to determine the cause.

5.4.2. *After a diagnosis of epilepsy*

Drive if:

- 12 months seizure-free on medication and
- physician has insight into patient compliance
- physician caution against fatigue, alcohol.

This 12 months period may be reduced to 6 months on the recommendation of a neurologist.

It would appear that section 5.4.1 is not applicable to this case because her diagnosis of epilepsy was established years ago. A more relevant section of the guide is 5.4.5.

Section 5.4.5. *Withdrawal of seizure medication or medication change*

After seizures recur: When seizures recur after a physician has ordered a discontinuation or a change in anti-epileptic medication, patients can resume driving provided they take the medication according to the physician's instructions and have been *seizure free for 6 months*. This period may be reduced on the recommendation of a neurologist.

The Applicant fulfils all these conditions in that she had a long standing history of epilepsy and was seizure free for the past 10 years. The seizure of May 21, 2001 occurred because of gradually diminished dosage and accidentally missing several doses of her medication. She has since resume a therapeutic level of anticonvulsive medication under the guidance of her neurologist.

She finally realizes that she has this disease for life and will not be one of the lucky ones who may discontinue medication in adulthood. Her neurologist states that the likelihood of a seizure in the near future is remote and that she may resume driving a motor vehicle- implying that the CMA guideline regarding the 6 month waiting period may be shortened.

The test provided by section 14 of Regulation 340/94 is that the holder of a driver's licence must not suffer from a disability likely to significantly interfere with her ability to drive a motor vehicle of the applicable class safely.

This Tribunal has determined that nothing further can be gained in diagnosis compliance or treatment of this Applicant by withholding her driver's licence reinstatement for 6 months and that she does not suffer from any disability likely to significantly interfere with her ability to driver a motor vehicle safely.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 22, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: August 15, 2001

MED - 710- ALCL

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: August 23, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant's driver's licence was suspended by the Ministry of Transportation as a result of an unsolicited medical report from Physician # 1, neurologist dated January 6, 2001 detailing the assessment of this patient following a single first time seizure which occurred on December 25, 2000.

He was first taken to the emergency department of the Credit Valley Hospital - Mississauga where he was stabilized and sent home. Physician # 1's examination was neurologically negative and his seizure was diagnosed as alcohol related. A follow-up report dated February 22, 2001 reveals negative C.T. and E.E.G. tests. He was advised to abstain from alcohol.

The Applicant has a history of considerable alcohol consumption over many years and has had several failed attempts to stop in 1991 and 1992. He is now attending his family doctor. Physician # 2 to monitor his abstinence and states that he has not had any alcohol since the seizure of December 25, 2000. Blood tests in June 2001 are normal for alcohol related biochemical markers (M.C.V. & G.G.T). He attends "Alcoholics Anonymous" regularly.

His last visit with Physician # 1 was August 14, 2001 but this report has not been received by the Ministry.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or

(c) a CVOR certificate,

on the grounds of,

(d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;

(f) conviction of the holder for an offence referred to in subsection 210(1) or (2);

(f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

(g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant's driver's licence was suspended on the basis of the *Highway Traffic Act*. Section 47(1)(g) - the sufficient reason being non compliance with Regulation 340/94. Section 14 "A holder of a driver's licence must not be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely".

For reinstatement, the generally accepted guideline is set out by the Canadian Medical Association "Determining Medical Fitness to Drive" - the relevant section under paragraph 3. Alcohol is:

3.3 Recommended driving restrictions after the assessment

Patients with a diagnosis of alcohol dependence, including those with alcohol withdrawal induced seizures, should not be allowed to drive any type of motor vehicle. These patients **must** complete a recognized rehabilitation program for substance dependence and remain alcohol free and seizure free for **12 months** before recommencing driving.

The National Safety Code for Motor Carriers has a similar provision as per paragraph 6.3.5.

6.3.5. Alcohol and Seizures

An individual whose seizures are clearly precipitated by alcohol should not drive any motor vehicle until at least a 12 month seizure-free period while also abstinent from alcohol.

The Applicant has made excellent progress over the past six months. His neurologist has cleared him of any pathological reason for the seizure. Laboratory and other tests are negative and he is attending a compliance program. However, there is no compelling reason to deviate from the accepted medical guidelines in this case.

Because alcoholism, especially associated with a serious neurological complication (viz: seizure) is an insidious and difficult process to control or conquer - it is felt that a minimum period of 12 months freedom from seizure is necessary to assure ongoing abstinence and good health in order to be able to drive a motor vehicle safely.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 25, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: August 30, 2001

MED - 704 - Downgrade

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: August 13, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant, a 52 year old 18 wheeler truck driver, had his driver's licence downgraded from "A-Z" to "G" following receipt of a cyclical medical report, dated March 8, 2001, from his family physician Physician # 1. Physician # 1 reported that the Applicant had suffered a myocardial infarction and congestive heart failure in May 1998.

A Medical Waiver Certificate, dated April 30, 2001 was subsequently received from Physician # 2, a cardiologist. Physician # 2 reported the Applicant's echocardiogram showed a Grade 2-3 left ventricle with the proximal third of the interventricular septum moving paradoxically, for some unexplained reason. Physician # 2 recommended that he maintain his present licence, stop smoking, take cholesterol lowering medications and an angiotension blocker.

Physician # 2 re-examined the Applicant on April 19, 2001 and performed an ECG Stress test. There were no ECG changes, but below average exercise tolerance with absence of angina or ischemic changes. The stress test was stopped after 4 minutes because of shortness of breath.

Physician # 2 concluded the Applicant has significant risk factors for further trouble and wants him to return for an echo and 24 hour Holter. If nothing unusual was found, he would probably support the request to maintain his driving licence.

On June 27, 2001 the Ministry informed the Applicant that his driver's licence was downgraded to a "G".

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

THE LAW

Regulation 340/94 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F drivers licence are that the applicant or holder,
- (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.

- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
 - (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.

The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

.....

APPLICATION OF THE LAW TO FACTS:

The Applicant's present status is that of a Class "G" licence after being downgraded by the Registrar on June 27, 2001, following receipt of clinical information in a Medical Waiver from Physician # 2, a cardiologist. Notwithstanding the cardiologist's recommendation that the Applicant retain his licence, the Medical Review Committee recommended downgrading the licence from "A-Z" to "G".

The Minister could have suspended the licence under Section 340/94(a) which states "An Applicant for or a holder of a driver's licence must not,

(a) suffer from any-----or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle safely."

Instead of downgrading the Applicant's driver's licence under section 32(12)(b)(i) which states:

32 No person shall drive a motor vehicle unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.

(b) in the case of a person who holds a driver's licence

(i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of examinations,

The Applicant had a Myocardial Infarction followed by an episode of Congestive Heart Failure in the summer of 1998. After his recovery period, he returned to highway truck driving for over two years before he received the notice of downgrading in June, 2001, a week after he had taken on a new driving job. His present job is strictly driving with no lifting. His heart attack occurred following an attempt to lift 250 lbs.

The Applicant has had a clear driving record, since he obtained his first licence in 1969.

Physician # 2 indicated in his letter of April 19, 2001, that he had some concerns about the Applicant's significant risk factors. Although he has no angina and no evidence of ischemic changes in his heart, some of his coronary arteries are occluded and partially occluded. Physician # 2 mentioned that he wanted the Applicant to return for another echo and 24 hour Holter and if there was nothing unusual he would probably support the request to maintain his driver's licence. It is unfortunate an update on the Applicant's cardiac status was not available to the Tribunal for this Appeal. Lacking that update, Physician # 2's April 19, 2001 letter stands, stating Physician # 2's concerns about the Applicant's significant risk factors.

Further, the Applicant is still smoking 3 packages of cigarettes per week, apparently not able to take anti-cholesterol medication, has a grade 2-3 left ventricle and severe coronary atherosclerosis.

On the evidence now before the Tribunal and the lack of a re-assessment by a cardiologist, the Tribunal finds that the Minister's decision to downgrade the Applicant's licence is appropriate.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 29, 2001 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Minister be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: August 17, 2001

SHARP

GLEN AND GINETTE SHARP

MOTION TO CONSIDER AN APPLICATION FOR
EXTENSION OF TIME

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES: GLEN AND GINETTE SHARP, representing themselves,
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program

DATE OF
HEARING: July 10 2001 *via teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

This is an application to the Licence Appeal Tribunal under Section 7 of the Licence Appeal Tribunal Act 1999 to extend the time for Glen And Ginette Sharp (the "Applicants") to file an appeal from a Decision Letter of the Ontario New Home Warranty Program (the "Program") dated January 17, 2001. The Decision Letter was sent pursuant to section 16(2) of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, chapter O.31 (the "Act").

At issue was the type of sash or side windows installed in the bay window placements. The Applicants took the position that the windows were not of the type contracted for and claimed they had a claim for breach of warranty under the Act against the builder and therefore a claim for compensation. The Applicants were informed by a field representative of the Respondent by letter of 10 January 2001 that the window installations did not constitute a warranted item under the Act. After being informed that the matter would be pursued further, the representative issued the formal Decision Letter of January 17, 2001 referred to above which is the basis of the present appeal. The letter was received by the Applicants on January 19, 2001.

The Applicants had, pursuant to the Act, 15 days from the receipt of the Decision Letter to deliver their Notice of Appeal. The Notice of Appeal was filed late on February 19, 2001.

The hearing of this matter proceeded on consent by teleconference. The Tribunal received material filed on behalf of the Applicants. On behalf of the Program, the Tribunal received the Affidavit of Filomena Cece and Paul Picard.

ISSUES:

The Tribunal must first ensure that the service requirements set forth in the Act have been met.

If the service requirements have been met and a Notice of Appeal was not filed by the Applicant within the 15 days prescribed by section 16(2) of the Act, the Tribunal must then decide whether this is this an appropriate case for leave to extend the time pursuant to the discretion granted to the Tribunal by section 7 of the Licence Appeal Tribunal Act, 1999.

Whether or not a case is one in which the Tribunal's discretion to grant an extension of time is dependant upon the Applicant satisfying the following four point test:

1. That there was an intention on the part of the Applicant's to exercise their right of appeal within the allotted time.
2. That the reason this right was not exercised on time was such that the Applicants should be excused from not doing so and allowed to do so later if they did so as soon as the true situation was apprehended.
3. That there is no overriding prejudice to the Respondent in allowing the late filing of the appeal.
4. That there is a substantial point in issue, and the Applicant has some reasonable chance of success.

EVIDENCE:

The Tribunal finds from the material filed that the service requirements have been met.

On the first part of the test there was evidence that the Applicant telephoned the Program within the 15 days allotted for the filing of the appeal. This communication was acknowledged and the first part of the test conceded.

The Applicant, Mr. Sharp, offered as a reason for not actually filing on time after his phone call to the Program, his ill health and the need to gather material to present his appeal. No illness was claimed by Mrs. Sharp. It was not asserted that the illness was incapacitating or in any way prevented the filing of the appeal on time.

It was conceded that there was no overriding prejudice to the respondent due to the late filing.

On the fourth part of the test, the Applicants submitted that they have a substantial point to be argued on appeal in that it is demonstrable that they can fit their claim as required under section 14(1)(b) of the Act.

That section reads:

14 Where:

“an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations”

It is the position of the Applicants that the vendor wrongfully substituted two side sash windows. One as part of the living room bay window and another on a bedroom bay window. The Applicants claim that both bay windows sets should have had “operational” or opening side windows on both sides of both bay window installations instead of on only one side as they received.

It is the position of the Program that for the Applicants to have a valid claim they have to fit their situation within Part VI of Regulation 892 of the Act which deals with Warranties and in particular sections 18 and 19 dealing with substitutions.

Section 18 reads:

“Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

Section 19 reads:

“Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.”

The Tribunal takes as a reasonable assumption that sash windows forming the sides of a bay window installation that open and shut are a superior installation to ones that do not. Accordingly, in order to determine whether the vendor has not lived up to the warranty obligations imposed upon him by the Act it is necessary to examine what was agreed to under the Agreement of Purchase and Sale. The executed copy of the Agreement provided states on page 13 of Schedule B:

“Vinyl clad casement windows, vinyl clad sliders in basement only and some fixed picture windows, according to plans. All windows double sealed thermal, with screens where applicable”

There is no reference in the Agreement, either in the body or attachments, as to whether the windows in question open and shut or not. As stated, the bay windows installed according to the plan have one side window that opens and shuts and one that does not.

Paragraph 3 of the Agreement states:

“The vendor agrees that on or before the closing date, it will have constructed and completed the unit in a good and workmanlike manner upon the real property in substantial conformity with the vendor’s draft plan and those specifications set out in schedule “B” hereto, which have been shown to and approved by the purchaser. The purchaser acknowledges and agrees that in the course of construction and completion of the unit, the vendor may make minor variations to the said plan or may substitute other materials than those specified in the said specifications and the purchaser agrees to accept any such variations or substitutions, so long as they are of equal or better quality and do not diminish the value of the real property or substantially alter the size or appearance of the unit.

Under the schedules section of the Agreement, paragraph 32 reads:

“This agreement, schedules “A” ‘B’ ‘C’ and “D” attached hereto and the plans and specifications referred to in this agreement are for all purposes part of this agreement whether contained in the body of the agreement or not and together constitute the entire agreement between the purchaser and the vendor. There is no representation, warranty, collateral agreement or condition which affects this agreement other than as expressed herein.”

The Applicants takes the position that they are entitled to windows described in documents which do not form part of the agreement of purchase and sale and to those they state were installed in a model home. As well, they refer to various conversations with representatives of the builder.

There were conciliation inspections arranged after the initial inspection of Paul Picard the field representative of the Respondent. As stated above the Applicants were informed that their claim regarding the window installations did not fit within the criteria set forth in the Act.

THE LAW:

Section 7 of the Licence Appeal Tribunal Act states:

7. Despite any limitations of time fixed by or under any Act for the giving of notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or of any other Act, if the Tribunal is satisfied that there are reasonable grounds for the applying for the extension and for granting relief , it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

The conditions under which extensions are granted has been outlined above as have the relevant sections of the Act and Regulations.

Turning to the case law, the Tribunal was first asked to look at the matter of *Nicolini* released by this Tribunal on February 20, 2001. As in the present matter, the Tribunal was dealing with leave to extend the time for filing an appeal and had to consider point 4, whether there was a substantial issue to go to appeal and whether the Applicant had a reasonable chance of success. In *Nicolini* the Tribunal was asked to find that there was a cause of action against the

builder for breach of warranty for items that could not be found within a reading of the Agreement of Purchase and Sale. In that case the Tribunal was asked to find that a door from the garage to the outside should have been insulated. The Tribunal stated:

“The garage door is purely an issue within the sphere of the Agreement of Purchase and Sale. There is nothing in the wording which convinces the Tribunal that it would be a reasonable interpretation to hold that there should be an insulated door from an uninsulated garage to the outside. This again is a matter for other legal remedies.”

Another case referred to the matter of *Pajor* released by this Tribunal on July 16, 1998. In *Pajor* the relevant issue for present purposes was whether a furnace installed in the home which differed from the installation in the builder’s model home could give rise to a cause of action when there no reference to the difference in the Agreement of Purchase and Sale. The furnace actually in the home did not have a heat recovery ventilator; the model home did. On the issue of a cause of action arising from a representation not reduced into the wording of the Agreement of Purchase and Sale, the Tribunal stated:

“This is not a case of substitution. The item was not referred in any fashion in the Agreement of Purchase and Sale. The Agreement is in writing and is the basis of the deal to purchase the house. The Applicants now understand the importance of having everything clarified and put into writing. The Tribunal cannot rely upon a verbal representation.”

Finally on this point, the Tribunal was referred to the matter of *Saporita* released by this Tribunal on July 28, 1999 in which the Applicant asserted that the non inclusion of French doors in the completed home gave rise to a cause of action which allowed for a claim under the Act. It was stated that there had been verbal representations to the effect that French doors were to be installed but such representations had not been reduced into the Agreement of Purchase and Sale. The Tribunal found as in the present case that the Agreement specifically excluded all representations not set out in the Agreement. As a result, the reliance upon such representations was denied.

DECISION AND ORDER:

The foundation of the Applicants’ submissions appears to be that the installation of at least one opening sash window not called for in the Agreement of Purchase and Sale should of itself constitute evidence of the builder’s intention to include a higher standard in the Agreement and thereby give rise to an actionable warranty; if not duplicated in all of the window installations. The Applicants also rely on the fact that there are two opening sashes in the model home and rely on representations not contained in the Agreement of Purchase and Sale.

The Respondent argued that the installation of at least one opening sash is at best an upgrade or modification contemplated by the Agreement of Purchase and Sale and the Regulations and not evidence of some standard collateral to the contract. In any event, as the installations insisted upon by the Applicants are not included in the Agreement of Purchase and Sale, they cannot be relied upon to form the basis of a cause of action. In line with the case law, it is the position of the Respondent that for representations to be relied upon, they must form part of the written Agreement.

The Tribunal accepts the position of the Respondent and finds that the Applicants would not have a reasonable chance of success should the matter proceed to appeal. The Applicant therefore fails to satisfy the fourth requirement needed in order that the Tribunal exercise its discretion to extend the period of time required to file the Notice of Appeal.

The Tribunal therefore orders that the Applicants' motion for an extension of time to file their appeal is denied.

LICENCE APPEAL TRIBUNAL

William McIntosh,
Vice-Chair

RELEASED: August 10, 2001

JACOBS

JOHN ROBERT JACOBS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair, Presiding
RICHARD C. DELANEY, Member

APPEARANCES: MALCOLM BENNETT, Counsel, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: June 22, 2001 London

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act", respectively) issued a Notice of Proposal dated February 1, 2001. With that Notice of Proposal was a Final Notice dated February 1, 2001. The Registrar in his Notice of Proposal states that the past conduct of John Robert Jacobs (the "Applicant") is inconsistent with the Act and therefore the Registrar refused to register the Applicant as a motor vehicle salesperson. In his statement of Particulars, the Registrar stated that the Applicant and his motor vehicle dealership had their registrations revoked in August, 1998; that the revocations were stayed pending a Divisional Court decision; that the Divisional Court dismissed the appeal in November, 2000 but granted continuation of the stay for a further 60 days; that the registrations were revoked on January 23, 2001; that the Applicant has been convicted of two counts of fraud on June 4, 1999; and that the convictions related to the Applicant's conduct while registered under the Act.

The Applicant filed his Notice of Appeal with the Tribunal on February 14, 2001. In it the Applicant disclosed his prior conduct and stated that he wishes to register as a motor vehicle salesperson, that he has reformed and that he was prepared to be registered under terms and conditions.

The hearing before this Tribunal was conducted on June 22, 2001 at London, Ontario with all parties in attendance. The Presiding Chair brought to the attention of Counsel for the Applicant and Counsel for the Registrar that the Tribunal's Vice-Chair, Richard C. Delaney, had been a member some years ago of the law firm which now forms part of the law firm belonging to Counsel for the Applicant. Both Mr. Delaney and Mr. Bennett stated they had not known each other at that time nor was there any prior knowledge of the matter that is now the proceeding before this Tribunal. The Presiding Chair asked both Counsel if there was any objections to Mr. Delaney sitting as a Vice-Chair in this hearing. Neither Counsel had any objections. Accordingly, Mr. Delaney continued as a Vice-Chair in these proceedings.

ISSUES:

Did the Registrar, *Motor Vehicle Dealers Act*, act reasonably in finding that the Applicant, due to his past conduct, should be refused to be registered as a motor vehicle salesperson?

EVIDENCE:

Opening Statement:

Counsel for the Registrar:

Counsel stated that this application comes under section 8 of the Act. The Applicant had been previously registered and then had his registration revoked. In the case of Hassan v Ontario (Registrar of Motor Vehicles)(2001) O.J. No. 421, the Ontario Court of Appeal stated that the Registrar cannot refuse to process the application but he can reject it if he feels the criteria in section 8 has not been met. Counsel stated that the onus is on the Applicant to establish new evidence or a substantial change in circumstances.

Counsel stated that the Applicant has been convicted of odometer misrepresentations. This is industry related and based on his past conduct he is not entitled to be registered.

Counsel for the Applicant:

Counsel stated that the Applicant was out of business for 3 and one half months in 1998 until a stay was granted by the Divisional Court in December, 1998. The Applicant has criminal convictions on 2 of the 6 counts and received a twelve month suspended sentence plus community service. His convictions were published in the local newspapers.

Counsel stated that one has to look at the factual basis for the convictions. In one instance it was the doing of the salesperson. The Applicant never had any dealings with the wronged customer, but the Applicant is responsible for the actions of his employee. In the other case, the odometer was not working properly and the true odometer readings was not known. It was a matter of the need for full and complete disclosure. At the time of this occurrence in 1997, there was still a practice among motor vehicle dealers to put TMU on the invoice and have the customer initial it. In this case, the customer of the Applicant did not put initials beside the TMU.

Counsel stated that the Applicant has not reoffended since 1997 and has changed his business practices as evidenced by the Divisional Court decision.

Counsel stated that revocation is the ultimate penalty. In this case it would be appropriate to consider terms and conditions. Mr. Jacobs wishes to be a salesperson at Goodwheel Motors which is a motor vehicle dealership owned by Mrs. Jacobs. The business of Jacob Sales and Servicing now is a garage business which mainly fixes vehicles to be sold by Goodwheel Motors. Their son, Craig Jacobs, has been helping his mother, but he will be attending school in September.

Counsel stated that there has been a significant change in circumstances in how the Applicant conducts himself and his business practices. The Applicant is seeking a licence as a salesperson.

Testimony of Laura Gordon:

Ms. Gordon is the director of compliance at the Ontario Motor Vehicle Industry Council ("OMVIC") since April, 1997. Prior to that time, she had worked in the Ministry of Consumer and Commercial Relations as an investigator and inspector. OMVIC was created in January, 1997.

Ms. Gordon stated that the purposes of the *Ontario Motor Vehicle Dealers Act* are: for registration; inspection; investigation; and complaint/mediation. The criteria for registration is found in section 5 of the Act.

Ms. Gordon testified that under the Notice of Proposal dated February 1, 2001 the Registrar refused to register Mr. Jacobs as a motor vehicle salesperson due to his conviction of two counts of fraud and the prior revocation of his registration which was upheld by the Divisional Court. On January 17, 2001 OMVIC received the application for registration of Mr. Jacobs. There is no issue as to disclosure.

Bev Jacobs, the wife of Mr. Jacobs, is the owner of KW Goodwheel Motors, which is the dealership where Mr. Jacobs wishes to work as a registered salesperson.

Ms. Gordon reviewed the charges and then ultimately the two convictions of Mr. Jacobs for odometer tampering. These occurred while he was registered under the Act and relate to industry specific misconduct. The Ontario Court of Appeal in March, 2000 dismissed his appeal from the convictions.

Ms. Gordon stated that consumers rely on odometer readings as to the value of the vehicle and safety issues. It is a serious breach of trust to misrepresent the odometer readings. Under Regulation 801, section 19 there are rules governing the changing of odometers. Under Regulation 801 section 16(2)(o) dealerships are required to list the distance travelled on the bills of sale.

Ms. Gordon stated that Mr. Jacobs was only out of business for 3 ½ months in the Fall of 1998 and she said that there are suspicions that he was selling cars in October, 1998. In any event, she did not think that length of time or even 6 months was sufficient time for a revocation.

Under cross-examination, she agreed that Bev Jacobs was granted registration as a motor vehicle dealer in 1999. She agreed that Mrs. Jacobs is bound by the Act and its regulations and if the Registrar had concerns about the conduct of Mrs. Jacobs, the Registrar could take action against her. Ms. Gordon agreed that there are a number of motor vehicle dealership run by women. She agreed that from the date of the Commercial Registration Appeal Tribunal ("CRAT") order in August, 1998, until the stay was granted in December, 1998 it was in order for Mr. Wagner, the OMVIC investigator, to permit Mr. Jacobs to consign the remaining vehicles to the Goodwheel dealership.

Ms. Gordon stated that the concept of TMU has been an issue of concern with OMVIC. Indeed OMVIC has worked with the Used Car Dealers Association on this matter. There are now certificate courses dealing with TMU and newsletters on the issue.

Ms. Gordon agreed that of the three cars mentioned in the August, 1998 CRAT decision, Mr. Jacobs was only criminally convicted on one of those cars, that being the 1990 Chevrolet. She is not aware of any other criminal charges since 1997.

Under cross-examination, Ms. Gordon stated that she has not personally spoken to Mr. Jacobs about his business practices and she is not aware that anyone else at the Registrar's office has done so. She stated that the decision of the Registrar to refuse to register Mr. Jacobs as a motor vehicle salesperson was based on the two criminal convictions and the appeal which was dismissed. She agreed that the Registrar has the authority to impose terms and conditions.

Ms. Gordon in answer to the questions by the Tribunal stated that Mrs. Jacobs was registered as a dealer and salesperson on January 14, 1999. Ms. Gordon feels that for a conviction of odometer tampering, there needs to be at least a couple of years of revocation of registration. She felt it would be too great a burden on the Registrar's office to have it check on Mr. Jacobs through terms and conditions on his registration.

Upon further cross-examination, Ms. Gordon stated that the Registrar has the authority to inspect premises but there is the issue of the practicality to do so. If there were terms and conditions, Ms. Gordon would like to see them address the issues of taking a certification course, having the invoices sent to the Registrar, having letters of credit, having undertakings by the dealership, having an independent audit of the dealership, having Mr. Jacobs with no direct or indirect interest in the dealership, and having an arms length relationship.

Testimony of John Robert Jacobs:

Mr. Jacobs testified that he is 47 years old and lives in the small town of Wellesley, Ontario with his wife, Beverley Jacobs, and his three grown up children. His youngest child, Craig, is a registered motor vehicle salesperson but will be going back to Georgian College this fall and probably can only work on a part time basis. Mr. Jacobs has been a licensed mechanic since 1975. He purchased Jacob Sales and Service Inc. in 1993. He received financial help for this purchase from his father and father-in-law. Mr. Jacobs is the director of the Wellesley Community Centre, a past president of the Optimist Club, a member of the Church and board of Trade and a volunteer with the Apple Butter Cheese Festival in September of each year. He was a licensed motor vehicle sales person at Jacob Sales and Service Inc.

Mr. Jacobs stated that his dealership had specialized in vans, pickup trucks and one ton trucks. Now it is a garage that fixes the used car to sell at the other company, Goodwheel Motors. In 1996 he had Elaine Gerber as his office staff who was responsible for the bookkeeping and record keeping, and another licensed mechanic and a person who reconditioned the cars. He was making money at the dealership. Then in 1997 he hired Michael Alpy as his first salesperson. He needed someone due to the long hours that he had been working. In February, 1998 he was charged with six counts of odometer tampering. This devastated him. His situation was on the television and in the newspapers. At that time he had over 50 cars at his dealership and he had to wholesale them. The Notice of Proposal from the Registrar was dated February 26, 1998 and the decision by CRAT happened in August, 1998. He did not have any consumers at his CRAT trial though customers did testify at his criminal trial.

Mr. Jacobs stated he did have a complaint from a Mr. Mehta in 1994 and he tried to satisfy that customer. His philosophy was that the customer is right so he went to mediation. Regarding the 1998 problems Mr. Jacobs stated that he gave the customers their money back if they requested he take back the car. Some of the charges related to paperwork issues.

After the CRAT decision in August, 1998 Mr. Jacobs arranged through Mr. Wagner to sell his vehicles or consigned them to Goodwheel Motors. Some of the sales were to other dealers or at auctions.

Prior to these charges, Mr. Jacobs was trying to establish a branch of his dealership in the Kitchener/Waterloo area. After the charges were laid, his bank called in his line of credit, and he had to mortgage his house. Mr. Jacobs estimated that he lost revenue of about two hundred thousand from the revocation of his registration. In June, 1999 Mr. Jacobs was put on probation of one year and required to do fifty hours of community work.

Mr. Jacobs stated that he terminated the employment of Mr. Alpy. He discovered that Mr. Alpy had been misrepresenting himself to the customers. Mr. Alpy was selling accident repair cars but that fact was not on the customer's bill of sale, only on the dealership's copy of the bill of sale.

Regarding his purchase of a 1990 Chev from Parkrow Auto Sales, Mr. Jacobs noticed that the odometer was not working so it was agreed between them to put TMU on the wholesale bill. Mr. Alpy dealt with the customer who bought this car, and Mr. Alpy did not get that customer's initials beside the TMU insertion. The customer thought he was getting a vehicle with a certain amount of mileage. Mr. Jacobs was convicted on this count.

Regarding the purchase of a 1990 Sierra GMC from Parkrow Auto Sales, Mr. Jacobs stated that the wholesale bill has TMU on it. The invoice from Ingersoll Motors to Parkrow has a mileage figure with TMU beside it. Mr. Jacobs did not know about that mileage figure as it was not on his wholesale agreement with Parkrow. That car was sold to a customer with a lower mileage and with no insertion of TMU nor did the customer initial the mileage. Another copy of the retail bill of sale for that vehicle does have TMU beside the mileage, but the customer had not initialed it.

Mr. Jacobs stated that the industry was struggling with what to do with these situations and even Mr. Wagner, an investigator with OMVIC, could not advise him on the use of TMU. Now OMVIC has a code of conduct. That happened in December, 2000. OMVIC is trying to clean up the industry and now dealerships and salespeople must be more careful with their paperwork and have more history on a vehicle.

Mr. Jacobs testified that since that time there has been no other charges against him. The charges and ultimately the convictions have cost him money and drained him emotionally. He has a large mortgage on the Queen Bush Road property, and he owed money to his family and other creditors.

Goodwheel Motors has moved to Wellesley. Mr. Jacobs works on the cars, but he has been advised by OMVIC not to deal with the customers. His wife is a manager, not a salesperson and the youngest son is going back to school. Basically, Jacob Sales and Services fixes up the cars that are then sold through Goodwheel Motors.

Mr. Jacobs stated that he had changed his business practices. He completed a course with the Used Car Dealers Association about two years ago. That course dealt with the Act and its Regulations. He testified that he would take any courses required by OMVIC and that he follows the business practices approved by OMVIC.

Under cross-examination, Mr. Jacobs stated that odometer readings are important and that the motor vehicle industry needs to clean up the odometer problem. Mr. Jacobs stated that Mr. Alpy worked for him probably just over a year. Mr. Alpy was never charged. He agreed that Mr. Mehta had the RCMP involved over a car purchase in 1995 and Mr. Jacobs went through a community justice initiative and bought back the car from Mr. Mehta.

Regarding the current operations, his wife, besides working part time at a grocery store, oversees the operations of Goodwheel Motors. Elaine, his sister acts as the general manager and does the licensing and registration and obtains the histories of the cars. He uses a program to check up on the history of a vehicle. He belongs to the Used Car Dealers Association. Goodwheel Motors gives much more history on the car to the prospective customers. Their used cars are bought from the big, reputable dealers in Milton, Brampton and Kitchener. His son Craig has been doing the buying, and Mr. Jacobs then checks out the car as the mechanic. They agree with the standards of business practices that are espoused by OMVIC.

Testimony of Mr. Pyne:

Mr. Pyne is a chartered accountant who does work for Jacob Sales and Service and for Goodwheel Motors. He prepares the financial statement and the tax summaries. He was aware of the six charges against Mr. Jacobs.

Mr. Pyne stated that for nine months after the charges were laid, the dealership had no customers.

Goodwheel Motors is under the control of Mrs. Jacobs. Jacob Sales and Service does the mechanical work for the dealership.

Mr. Pyne felt that there had been weaknesses in the document process under Jacob Sales and Service and that led to the problems with the bills of sale. Now, both businesses are in Wellesley. Mrs. Jacobs signs the cheques and authorizes the purchase of the used cars. There is a level of review in the paperwork that was not there prior to 1998. There has been a revamping of the accounting system. It is on computer and monthly statements are produced.

Mr. Pyne stated that Mr. Jacobs took out a \$200,000.00 mortgage on his house to provide the business with a line of credit.

Mr. Pyne testified that he goes to the dealership probably once a month. He talks to Mr. Jacobs about business strategies and business priorities. The businesses are in new premises now and the usage of space is more efficient. As well, the office manager, Elaine, is now quite proficient with computers. She has taken on more responsibilities since 1998.

Mr. Pyne felt that the businesses could have a future if Mr. Jacobs were permitted to be a salesperson.

Under cross-examination, Mr. Pyne agreed that Mr. Jacobs oversees the activities of Craig. As well, a number of the documents such as odometer readings, and purchase and sales invoices are not computerized. He has been told by Mr. Jacobs that the company no longer uses TMU in dealing with odometer readings.

Testimony of Robert Harnack:

Mr. Harnack has known Mr. Jacobs for over twenty five years. He has a plumbing business which employs approximately sixteen employees. He considers himself a family friend of Mr. Jacobs. He feels that Mr. Jacobs put his faith in the wrong people, including Mr. Alpy. He thinks Mr. Jacobs has learnt from his mistakes.

Mr. Harnack stated that Mr. Jacobs now deals with more commercial people and deals more with trucks than cars. Mr. Jacobs has gone to some courses, not industry related.

Under cross-examination, Mr. Harnack agreed that it was important to disclose to customers about the mileage of cars, whether the car is accident repair and whether it has liens against it. He knew of the six counts of odometer tampering. He was not aware of the problem with Mr. Mehta.

Testimony of Ross Kelterborn:

Mr. Kelterborn has known Mr. Jacobs for over forty years. He was his teacher in elementary school. Mr. Kelterborn had been on the township Council. In that capacity he had dealings with Mr. Jacobs over environmental concerns with the property where the businesses are currently located. Mr. Jacobs met his obligations on these matters. He feels Mr. Jacobs is a good corporate citizen. He knows of Mr. Jacobs involvement with the Wellesley Community Centre. He feels Mr. Jacobs and his wife have raised an excellent family. Mr. Kelterborn knows of the criminal charges. He gave Mr. Jacobs a letter of reference in regards to the criminal charges. He felt the salesperson contributed to this situation. He would expect Mr. Jacobs to tell the truth.

Closing Statements:

By Counsel for the Registrar:

Counsel stated that you must consider the wording of section 8 of the Act. There must be a material change of circumstances or new or other evidence.

In this case, the Ontario Court of Appeal has held that there are two criminal convictions.

Counsel held that the evidence did not show any new business practices. There is nothing to support the Applicant's assertion that he has changed his business practices.

In this case, section 5 of the Act outlines the fact that it is important to consider the past conduct of the Applicant. The test is outlined in the case of Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesmen) (1983) O.J. No. 1017 which deals with the importance of considering the past conduct of the Applicant, not what are his good intentions for the future.

The case of Baldwin v Ontario (Registrar of Motor Vehicle Dealers and Salesmen) is concerned with the totality of the evidence and its cumulative effect. Counsel stated that there were three vehicles the subject of the previous CRAT decision.

Counsel cited the cases of Siba (c.o.b. Cardinal Agency) (re)(1998) O.C.R.A.T. D. No. 94, Zylawy (c.o.b. A.Z. Distributing) (Re) (1994) O.C.R.A.T.D. No. 101, and Harrison (Re)(1998) O.C.R.A.T.D. No.65 for the proposition that one should accept the convictions on their face. As stated in Registrar v Griese (1993) the Divisional Court stated: "a plea of guilty admits every element of the offence including knowledge".

Counsel stated that this was a case of odometer tampering which is a most serious infraction. There is a regulation dealing with this offence. Accurate disclosure is fundamental to the industry and the trust of the consumers.

Counsel cited Re Herman Motor Sales Inc. et al. And Registrar of Motor Vehicle Dealers 29 O.R. (2d) 431 as to the importance of odometers. The case of Ontario (Registrar of Motor Vehicle Dealers and Salesmen) v. Clermont (1974) O.J. No. 1028 stresses that one instance is sufficient to revoke the registration.

Counsel stated that not enough time has gone by since the convictions. In the case of Hanover Auto Wreckers Ltd.(Re) (1996) O.C.R.A.T.D. No.11. It was held that five years was not sufficient time to be registered after such convictions. The case of Ehsan Shalforoshzadeh LAT decision of March, 2001 held that four years was not sufficient. As stated in Hanover supra the overriding requirement is consumer protection. It should be noted that economic losses are natural consequences that flow from the breach of regulations.

Counsel stated that terms and conditions are completely inappropriate. The wife of the Applicant has a part time job outside of the motor vehicle industry. The office manager, Elaine, is the sister of the Applicant. There is a question of the extent of review of the actions of the Applicant by these parties.

The position of the Registrar is belief based on industry-specific past conduct. There is no arm's length control of this business. There is no faith that there will be meaningful monitoring of the business practices of the Applicant.

Counsel stated that the Tribunal needs to be concerned about the precedent value to the industry of the penalty to tamper with odometers.

By Counsel for the Applicant:

Counsel stated that Mr. Jacobs has done everything possible to satisfy the requirements that he has rehabilitated himself. It is submitted that the threshold under section 8 has been met. Mr. Jacobs has submitted a new application to be a salesperson under a new dealership. Though his wife is working part time in the industry this was approved by the Registrar. One cannot speculate that she will have bad behaviour.

Though Mr. Jacobs has serious industry specific convictions, the witnesses at the criminal court put a new light on the circumstances of the problems. Divisional Court felt Mr. Jacobs had reformed. Mr. Jacobs has taken courses and put into place different systems. Counsel stated that in looking at past conduct, one should look at the totality of the conduct, both good and bad. It is a balancing process. The public interest is important and compliance is important. One can look only at the penalties or look at the ways for reform.

Mr. Jacobs has changed how he conducts his paperwork. He has a new computer system and accounting system. He now has an office manager. He has changed his direction and now does not deal with some dealers. He is concentrating on being a dealership for trucks. Counsel stated that Mr. Jacobs has followed the directions of OMVIC. He has a business mentor, an accountant and double checks his documents. He works in Wellesley which is a small community.

Counsel stated that Mr. Jacobs has been penalized for nine and one half months. From August to December, 1998 and from January to June, 2001. Within that time frame, he has taken steps to change his business practices.

Counsel stated that one has to look at the whole of the time period and look at all of the circumstances. Now, Mr. Jacobs would be less likely to take a risk based on what he knows can happen for non compliance.

LEGISLATION:

The relevant legislation is the *Motor Vehicle Dealers Act*.

Section 5:

- (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

Section 8:

A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Regulation 801

Section 16 (2) Where a used motor vehicle is sold, the sales or purchase order shall show,

.....

- (o) the distance travelled by the vehicle at the time of sale;

.....

- (2) Where a used motor vehicle is purchased or traded in, the sales or purchase order shall show,

.....

- (g) the recorded odometer reading at the time of purchase or trade in.

.....

Section 19(1)

Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust, or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.

ANALYSIS:

This is a case where the Registrar is basically saying that sufficient time has not elapsed since the Applicant suffered revocation of his registration as a dealer and as a salesperson. Though the Registrar, through the capable argument of its Counsel, stated those cases whereby the Tribunal had felt that four years or five years of revocation was not sufficient for rehabilitation under the Act, those cases can be distinguished on their facts. In the Ehsan Shalforoshzadeh case, the Applicant was still a very young man with an extensive Young Offenders record and had not made full disclosure of his past offences. In the Golab (Re) case, the applicant had been convicted on two counts of odometer tampering, had not had his registration previously revoked and had not disclosed the conviction. In the Hanover Auto Wreckers Ltd (Re) case, the Applicant had been convicted on one count of substituting VIN plates in a pattern of behaviour that had continued over three years. He had made full disclosure of the conviction in his application for registration both as a dealer and as a motor vehicle salesperson. The RE Herman Motor Sales Inc. decision dealt with an appeal by the registrant against the revocation of his dealership registration. The Divisional Court held that odometer tampering was an extremely serious matter as it forms the basis for assessment in value of most motor vehicles. This Tribunal agrees with the Divisional Court that the public does use odometer readings to assess the value of motor vehicles. Indeed the Regulation 801 has specific sections, section 16.(2)(o), (3) (g) and section 19 which deal with the need for disclosure of mileage on odometers and any adjustment or alterations to odometers.

The facts are not in controversy in this case. The Applicant had his registration as a dealer and as a motor vehicle salesperson revoked by CRAT in August, 1998. The revocation was stayed by the Divisional Court until its decision in November, 2000 in which the appeal was denied and the revocation came into force again in January, 2001. The Applicant was found guilty of two counts of odometer tampering. Though he appealed, the higher court denied his appeal in March of 2000. Though the Applicant has mentioned that these incidents also involved a dishonest employee and improper paperwork, he has not denied that ultimately he, as the employer and as the motor vehicle dealer, is responsible for these breaches of trust to the car buying public.

The Act is based on protection of the car buying public. It sets out very exacting and specific responsibilities upon a motor vehicle dealer and a motor vehicle salesperson to ensure that

consumers are aware of what they are purchasing. OMVIC has the responsibility of enforcing these measures through its investigation and registration functions. It is appreciated that this is an exacting and difficult task, particularly as OMVIC must work with limited resources and deal with thousands of dealers and many thousands of registrations each year.

It is an extremely important point to note that this Applicant in no way failed to disclose his past. Indeed, it is conceded by the Registrar that their case is not based in any fashion upon failure to disclose. As the Registrar must deal with thousands of renewals of registrations of dealerships and salespersons every year, it is essential that his office be given the correct facts upon which to make their decision.

It is well accepted that since the Divisional Court decision in Brenner that the Tribunal must carefully examine the past conduct of the applicant/registrant. As well, the Tribunal does not have carte blanche to give its own opinion whether or not the applicant/registrant should be registered. Instead, the Tribunal must consider whether or not the Registrar has acted in a reasonable fashion in making his decision on whether the applicant or registrant meets the criteria under section 5 of the Act.

In this case, the Applicant has the burden of meeting the requirements as outlined in section 8 of the Act. Here the previous salesperson registration was revoked by the Tribunal and that revocation was upheld by the Divisional Court. So this Applicant must satisfy the Tribunal, that the application is based upon new or other evidence or that the material circumstances have changed.

The Tribunal is of the opinion that the Applicant has met the test under section 8 of the Act. There is evidence before the Tribunal that the Applicant has changed his business practices. It would have been helpful to have had more documents outlining these changes, but the Tribunal does accept the evidence of the Applicant and his witnesses that he has revised his business practices since the charges were laid against him in February, 1998. His staff are better trained. He uses more computer technology. He has taken a course through the Used Car Dealers Association on the Act and Regulations and the responsibilities of those registered under the Act. He accepts the guidelines of OMVIC as to what are better business practices. He is familiar with articles in the Dealer Standard newsletter of OMVIC and the Front Line newsletter of UCDA which deals with such issues as dealer disclosure to consumers and the prohibition on the use of TMU on retail bills of sale. The Applicant stated clearly in his testimony that he now does not use the term TMU and that he utilizes the various internet services to obtain better histories on the used cars that he purchases.

The Tribunal agrees with Counsel for the Registrar that the fact that the Applicant has experienced economic loss is not a determining factor in this application. Any revocation of registration automatically has associated with it some economic loss. Dealers and salespersons are working within a regulated industry. Failure to abide by the terms and conditions of that industry can result in serious economic consequences.

It is always difficult to determine how long someone should be penalized for past mistakes. It is a matter that needs to be considered on a case by case fashion. The Tribunal does not agree with the statements of Ms. Gordon that there needs to be a certain time period of at least two years before the Registrar can look at applications under section 8 of the Act. The Registrar cannot act unfairly and must consider each application on its merits. The Registrar cannot be viewed as fettering his discretion. The Federal Court, Trial Division, in YHAP v MEI (1989) court # T-2543-89 held that the Minister of Immigration and her officials cannot arbitrarily use a set of criteria which constitute inflexible limitations on her discretion. This issue of fettering of discretion by administrative tribunals and officials has also been found to be improper by the Supreme Court of Canada in such decisions as Telecommunications Workers Union v Canada (Radio television and Telecommunications Commission) [1995] 2.S.C.R. 781 and Pacific National Investments Ltd. v Victoria (City) [2000] 2.S.C.R. 919.

In this case, the Applicant ceased to operate as a dealer or salesperson from August to December, 1998 and from late January, 2001 to the date of this decision. As well, this Applicant's charges and then convictions were well known in his small community. Indeed, his accountant spoke of a serious lack of business for many months after the charges were publicized via newscasts and in newspaper articles.

It is of significant importance that the Applicant is asking for registration only as a motor vehicle salesperson. Such a registration is significantly different from that of a motor vehicle dealer. A salesperson has to be supervised and does not have full authority. There can be more checks and balances to ensure the protection of the car buying public.

The Tribunal feels this is a case that requires terms and conditions. The Tribunal is concerned that the Applicant will be working for a dealership whose owner does not have a great deal of experience in the industry. While the owner is also the wife of the Applicant, that in itself would not be grounds for concern if she had significant experience in the industry. As well, the Tribunal is aware that both businesses, that of the dealership Goodwheel Motors and that of the car repair shop Jacobs Sales and Services, are dependent to a great extent upon the talents and experience of the Applicant. The Tribunal is encouraged that the office manager, though the sister of the Applicant, does have increased responsibilities in the paperwork of the business and obtaining the histories of the used cars being purchased for the business. As well, the accountant for the business has taken a greater role in attending on a monthly basis and reviewing paperwork that is not necessarily within his mandate as the accountant. But there needs to be more supervision on the activities of the Applicant to ensure that he abides by the business practices as espoused by OMVIC.

The Applicant needs to take the certification course offered by OMVIC for those wishing to register as motor vehicle salespersons. The Applicant needs to take this course within a year of being registered unless the course is not offered by OMVIC within that time frame.

In that case, the Applicant must take the course at the earliest time after a year that it is offered by OMVIC. Copies of the retail and wholesale sales invoices need to be sent to the Registrar on a monthly basis or less frequently if so decided by the Registrar for the first year after registration of this Applicant. The Applicant needs to find a mentor who has at least five years experience as a motor vehicle dealer, who is currently working in the industry as a motor vehicle dealer and who has no pending charges before the criminal courts and who is not under investigation by the Registrar. This mentor needs to agree to personally meet with the Applicant at least four times in the next year starting as of the date of this decision at the place of business of the Applicant to review business practices and provide guidance to the Applicant. This mentor is under no obligation to report the content of these discussions to the Registrar. The purpose of these meetings is to provide the Applicant with some guidance by someone with experience in the industry as KW Goodwheel Motors does not have such a person. The Registrar has the authority under the Act and its Regulations to do spot checks of the Applicant and the motor vehicle dealer for which he works, as is necessary.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to register the Applicant as a motor vehicle salesperson subject to the following conditions:

1. The Applicant takes the motor vehicle salesperson certification course offered by OMVIC within a year of the date of this decision or as soon as possible as is offered by OMVIC if that occurs after one year from the date of this decision;
2. All wholesale and retail sales invoices of KW Goodwheel Motors are sent to the Registrar on a monthly basis or more infrequent than that if so decided by the Registrar. This will be done for a year from the date of registration of this Applicant.
3. The Applicant is to find a mentor who is currently a motor vehicle dealer, has at least five years experience as a motor vehicle dealer, has no pending criminal charges or criminal convictions, and is not under investigation by the Registrar. The Applicant is to have this mentor meet with him at least four times in the first year of his registration as a motor vehicle salesperson. The mentor is under no obligation to report the content of these discussions with the Registrar. These discussion are for the purpose of having the Application receive guidance on business practices from someone with experience in the industry.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair,
Presiding

Richard C. Delaney,
Member

RICHMOND PROPERTIES INC.

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a REGISTRATION by
RICHMOND PROPERTIES INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),

TO REFUSE REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

RICHMOND PROPERTIES INC.

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on September 20, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Wednesday, September 19, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 7, 2001

GIBSON

FUNERAL DIRECTOR AND ESTABLISHMENTS ACT
Revised Statutes of Ontario, 1990 Chapter F.36

IN THE MATTER OF a CLAIM by
SHEILA M. GIBSON

AND IN THE MATTER OF the DECISION of
the Complaints Committee of the Board of Funeral Services,
dated May 14, 2001, made pursuant to section 14(2)(c) of the
Funeral Directors and Establishments Act

TO REFUSE A REFERRAL TO THE DISCIPLINE COMMITTEE

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision, pursuant to section 14(8)

SHEILA M. GIBSON

Applicant

-and-

MICHAEL NEWEDIUK

Respondent

-and-

BOARD OF FUNERAL SERVICES

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on
September 14, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory*
against the Applicant to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th
floor, Toronto at 9:30 a.m., on Monday, December 17, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 6, 2001

JANKOVIC

PREHEARING

TOMKA AND MILAN JANKOVIC

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

TOMKA JANKOVIC, representing herself and on behalf of Milan Jankovic, (the "Applicants")
NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program (the "Respondent")
BETTY TAM, Agent, representing Forever Homes Inc., (the "Added Party")

DATE OF
PREHEARING: September 4, 2001 Toronto

ORDER

FOLLOWING attendances on September 4, 2001 at a prehearing before the Tribunal of Tomka Jankovic, appearing on her own behalf and on behalf of Milan Jankovic, (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Betty Tam, Agent on behalf of Forever Homes Inc. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, October 10, 2001 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on October 11, 2001;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. The only issues to be dealt with at the hearing are items 1, 2, 5, 6, 9, 11, 13 and 16 from the decision letter. Items 3, 4, 7, 8, 10, 12, 14 and 15 have been withdrawn by the Applicants.
3. The Added Party shall have its hardwood installer, if possible the hardwood supplier, inspect the hardwood floor in the Applicants' home and pursuant to such inspection, prepare a report based on the findings respecting the hardwood floor. The Added Party shall provide such report to all other parties in compliance with the disclosure rules contained in the Rules of Practice of this Tribunal.
4. The hearing that is due to commence in this matter on October 10 and 11, 2001 is by consent of all parties adjourned to a later date to be fixed by the Registrar of the Tribunal.

LICENCE APPEAL TRIBUNAL

David J. Hunt, Vice-Chair

RELEASED: September 6, 2001

891990 ONTARIO INC.

891990 ONTARIO INC.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

891990 ONTARIO INC., Applicant
SUKHWANT SINGH THETHI, Agent for Applicant

DATE OF HEARING: September 4, 2001

DECISION RELEASED: September 6, 2001
Toronto
By teleconference

REASONS FOR DECISION

A hearing by teleconference was held on September 4, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	891990 Ontario Inc. (the "Applicant")
Motor Vehicle:	2001 Chrysler Intrepid, plate # AJEF 122, (the "vehicle")
Date of Appeal:	August 2, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 4, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent offered certified true copies of their submissions which without challenge were included in Exhibit # 2.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

ROUTES
CAR & TRUCK RENTALS

Ms. Kim Beintema
Hearing Officer

Dear Ms. Kim

RE: Vehicle Impoundment Appeal of 891990 Ont Inc.
LAT File No: 0739/MVIA/01/173

Thank you for your response of Aug 10 with respect to the above mentioned appeal.

The reason for our appeal is as follows:

We had rented out the said vehicle to a Mr Nicholas Stowe under the company's due diligence guidelines, who in turn lent the said vehicle to his friend or acquaintance, without our knowledge or permission.

Furthermore we would greatly appreciate if you would expedite the release of this vehicle before the 45 day Impoundment period as we are losing money on it with no fault of our own.

A copy of the rental agreement is attached for your perusal.

Thank you for your attention to this matter.

Sincerely

Sukhwant Singh Thethi
Owner/Operator

The Applicant expanded little on the opinion expressed in his written submission filed with his application for Appeal. He did detail their standard practice in respect to the company's "due diligence" guide lines which did not include any direct inquiry to MTO to validate a driver's licence. He again pleaded that he had no control over the renter allowing someone else to driver the car save for his warning at the signing of the rental agreement which prohibits any

other driver operating the rented car. The Respondent provided the Applicant with a validation procedure and suggested his financial loss might best be recovered by the use of Section 55.1 subsection 21 of the Act. It was determined that the credit card used by a third person involved was to provide the necessary approval level required to rent the car. No relationship of the credit card holder to the other parties was provided.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Blagojce Mustakinovski;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 2, 2003.

The Respondent chose not to add any evidence but made reference to the Submission by the MTO entered as exhibit # 2. The Respondent's closing statement reiterated the position of the cause for impoundment as it relates to the Act and again suggested to the Applicant to seek his damages in another value.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time

- (d) in respect of which the order was made was not then under suspension; or
that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The Applicant here appeals on the basis of subsection 50.2(3)(c) of the Act on the grounds that he exercised "due diligence" before he rented the car, and yet beyond a discussion in respect to the renter's statement that his licence was valid, no other proof of validation was pursued by the Applicant. The renter of the car in this case allowed a suspended driver to drive the rented car in spite of the warning given to him by the Applicant that he was the only authorized driver according to the Applicant's testimony. The Act does not provide grounds for appeals based on agreements between owners and drivers respecting a driver having a valid driver's licence. Here, the requirement is that the Applicant demonstrate due diligence in confirming the validity of the driver's licence. The evidence is that the Applicant was content with the renter's assurance that his driver's licence was valid. The Tribunal finds that this degree of effort for validation of the renter's licence does not meet the standards as described in section 50.2(3)(c) as it pertains to due diligence.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: September 6, 2001

POLESZUK

ANNA POLESZUK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

ANNA POLESZUK, Applicant
unrepresented

DATE OF HEARING: August 30, 2001

DECISION RELEASED: September 4, 2001

Toronto
By teleconference

REASONS FOR DECISION

A hearing was held by teleconference on August 30, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Anna Poleszuk (the "Applicant")
Motor Vehicle:	1988 Pontiac Grand Prix, plate no. AKMM 693 (the "vehicle")
Date of Appeal:	August 13, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 30, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I'm mother of Paul Poleszuk.

August 3th, 2001 I went after work to Toronto to my boyfriend. I left the car on parking lot in the basement of an apartment where I live. I left the key at home just in case if something happened. My son was at home. I even didn't think that he can take the car. He had suspended driver licence and never took the car before when I was in Toronto juring the weekend. I don't know what came to his head, why he took the car and drive to West of Mississauga? Saturday morning he called from Brathford, told me what happened. Answer on my question why he took the car was - I don't know - Happened is already done. He's got a new problems and me too. Now I have to walk to work 10 km. I start work at 5:45 A.M. - 6:00 p.m. to be at work at 6:45 a.m. I have to live home 4:45 a.m. I can take two buses and walk 0.5 km to the place where I work. I spend even more time to get to work by the buses. I work so hard every day by six day. Car make me easier and faster be at work and at home after work. Please let me took car back. My six working days make me very tire, but I must work very hard, because I have some debts pay back for the bank after when my ex husband divorce me 4 yers ago. I beg you, please help me my car back soon is possible.

I never have problems before with my car or driver licence. Thank God that he takes care of me when I work to my work in the morning in dark on empty streets. Please, try to understand and help me.

Thank you
very much
Sincerely:
Anna Poleszuk

The Applicant read into her statement her original submission to the Tribunal with some enhancement but no material contribution. The questions asked by the Respondent in respect to alternative transit which might be an option to the Applicant were answered in conflict with the research presented by the Respondent especially the distance to travel and the public services available. Taxis and rental cars were dismissed by the Applicant as too costly as alternatives to her car although no direct contact of these sources by the Applicant was made.

It was also determined that the key to the Applicant's vehicle was available in the event it had to be moved as a result of some emergency in the apartment buildings underground garage during her absence.

The Applicant stated she was also aware of her son's driving record and warned him not to take her vehicle.

There was no other witnesses for the Applicant.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Paul Poleszuk;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 2, 2002.

The Respondent questioned the Applicant's contention that her work was 10 kilometers from her home and that the bus service would cause any exceptional hardship. The Respondent identified other options available to the Applicant such as borrowing a car from friends or relatives and sharing a ride with fellow employees none of which had been fully explored by the Applicant.

Neither the Applicant nor the Respondent offered any new evidence and only restated their original positions in their closing remarks.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the

Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(d) of the Act on the basis that the impoundment of her vehicle will and has resulted in a severe hardship insofar as her ability to get to her place of employment. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment. The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

In order for the Applicant's claim to be considered under section 22(b) and (c), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation requires demonstration that every reasonable option has been explored, including an alternative vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate any reasonable option to the impounded vehicle has been explored and inquired into as required under section 22(4) of the Regulation. The burden to provide evidence to support the test required under the Act is that of the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: September 4, 2001

SUPERIOR LAWN CARE INC.

SUPERIOR LAWN CARE INC.

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

SUPERIOR LAWN CARE INC., Applicant
BILL GRAHAM, Agent for Applicant

DATE OF HEARING: September 4, 2001

DECISION RELEASED: September 6, 2001 Written

REASONS FOR DECISION

A written hearing was held on September 4, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Superior Lawn Care Inc. (the "Applicant")
Motor Vehicle:	1983 Ford Con, no plate # (the "vehicle")
Date of Appeal:	August 13, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 4, 2001 and proceeded as a written hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

THIS APPEAL IS BASED ON "THE ALL REASONABLE EFFORTS" WERE TAKEN TO ENSURE ONLY DRIVERS WITH VOID LICENCES OPERATE OUR VEHICLES. WE ARE RELYING ON THE ATTACHED SHEETS, SHOWING THAT IN JUNE 2001 MR. BENWELL SIGNED STATING HIS LICENCE WAS IN GOOD STANDING AND VOID UNTIL 12/02/02. OUR ONLY DOCUMENT IS ENCLOSED OTHER THAN MANY VERBAL REMINDERS ABOUT ENSURING THAT DRIVERS LICENCES REMAIN VALAD.

Also enclosed was a sheet entitled "sweepers/flushers/dump trucks monthly training and safety report." On this sheet, Mr. Kevin Benwell name appears along with his signature and it is dated 06-08-01.

Another form was enclosed, entitled "Superior Lawn Care, Employee Personal Information Update, dated June 08, 2001. On this form there is listed the biographical data along with licence and job description, i.e. name, address, date of birth, S.I. Number, Licence #, class type, licence in good standing, expire date, position, full/part time, signature and date."

No other documents were enclosed.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kevin Benwell;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 4, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

There is only one issue to be considered in this appeal and it is dealt with hereunder.

The Tribunal finds that Mr. Kevin Benwells' drivers licence was under suspension at the time of the impoundment and that he was driving the Applicant's vehicle at that time. The grounds of appeal under section 50.2(3)(c) of the Act requires that the Applicant show the Tribunal that he exercised due diligence in attempting to determine that Mr. Benwell's drivers licence was not suspended at the time of the impoundment of the Applicant's vehicle.

The Applicant has provided nothing to the Tribunal that indicated that any attempt was made to ascertain if in fact the driver, Mr. Benwell was in possession of a valid driver's licence other than accepting the employee's personal assurance that he had a licence that was in good standing. (Exhibit # 2, Personal Information Update). This form was filled in by Mr. Benwell. The form however was devoid of a driver's licence number which would have been needed to verify the validity of the licence via the Ministry of Transportation. The Applicant, Mr. Graham has not indicated that he even viewed the driver's licence.

The onus is upon the Applicant to establish that he in fact exercised due diligence. The Applicants submissions fail to substantiate his claim of due diligence.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: September 6, 2001

TRAN

THUY LAN TRAN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: MALCOLM FEALING,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

THUY LAN TRAN, Applicant
Accompanied by Lyn Chan, (translator),

DATE OF HEARING: September 4, 2001

DECISION RELEASED: September 6, 2001 Toronto

REASONS FOR DECISION

A hearing was held on September 4, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Thuy Lan Tran (the “Applicant”)
Motor Vehicle:	2000 Toyota 4-Runner, plate no. AFYR 1Z8 (the “vehicle”)
Date of Appeal:	August 15, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 4, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- I need the car to go to work.

In making her submission, the Applicant advised that she lived with her parents, her sister, and her two children. The children are ten and twelve years old respectively. The Applicant is divorced. She needs the car to go to work because there is no direct bus route to her workplace. The workplace is only fifteen minutes drive from her home.

The children are quite capable of walking to school, and in the past have been accompanied by their Grandmother. The Applicant stated that she also needs the car to buy her groceries.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Chi Hung Chan;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 18, 2001.

The Representative for the Ministry of Transportation questioned the Applicant briefly. In response to the questions, the Applicant advised that her Grandfather owns a car, but it is presently being used by her sister who goes to the University in Toronto. She starts work at 6:30 a.m. Her sister Lyn Chan who works from 3:00 p.m. to midnight has been taking her to work. The children have not been inconvenienced thus far because they are only now returning

to school after the summer vacation. Ms. Tran admitted that the only person who has been inconvenienced is her sister who has to wake up early to take her to work.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to issue filed, the evidence established that (a) there is no evidence of loss; (b) there is no educational loss, because the children can walk to school; (c) the Applicant's employment is in no immediate danger; and the Applicant has access to another vehicle in case of a medical emergency.

Section 22(1) of Ontario Regulation 632/98 Amending Reg. 574 Of R.R.O. 1990 states that in determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health and safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

Also, under section 22(4), to determine that an alternative to the impounded vehicle is available, the Applicant must show that every reasonable option has been considered.

As to section 22(a), there is no evidence of a threat to the health or safety of a person transported in the impounded vehicle. There is only some inconvenience. The evidence in this case shows that 22(1)(b) is not relevant to the Applicant's appeal.

In any event, there are alternatives available to the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: September 6, 2001

REGINALD ALLEN HARDY

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

DECISION RELEASED: September 10, 2001

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Reginald Allen Hardy (the "Applicant")
Motor Vehicle:	1996 Ford COF, plate no. YM1977 (the "vehicle")
Date of Appeal:	August 15, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 5, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Notice of Appeal
(Page 2 of 2)

1. The applicant, is seventy years old. He is a foundry worker who suffers from Asbestosis , and regularly needs the care of a treating physician.
2. The applicant resides, by himself, on a farm of approximately fifty acres.
3. The applicant farms and raises:
 - 16 horses
 - 150 chickens
 - 7 Jack Russel breeding dogs
 - 28 ducks.
4. The farm upon which the applicant resides is located some fourteen (14) miles from the nearest municipality, that being the City of Sarnia.
5. The farm is located eight (8) miles from the Bridgen Feed Mill, which is where the applicant purchases feed for the afore mentioned animals.
6. The vehicle in question is a pick up truck that is regularly used for travel back and forth to the feed mill to obtain food for the animals.
7. The applicant makes his living by raising and selling horses, chickens, dogs, and ducks.
8. The horses are regularly sold at auction in Woodstock, Ontario area, approximately two hours by vehicle from the location of the farm.
9. Additionally, the applicant sells the garden produce at a farmers market in the Grand Bend area on weekends. The Grand Bend area is located approximately 1 1/2 hours north of the farm.
10. Lastly, the applicant grows a cash crop namely hay, at a rented location eight mile from the location of the farm.
11. The impounded vehicle in question, a pick up truck is used to transport the livestock to market. The vehicle is used to obtain feed for the livestock from the feed mill. The truck is also used to haul produce for sale, and to haul hay out of the rented field.

12. In short, the loss of use of the vehicle will provide an exceptional hardship to the applicant.

Name (print) "Reginald Hardy"
Date "August 9, 2001"

Signature "Reginald Hardy"

Mr. Ed Gresham, counsel for the Applicant, informed the Tribunal that his client would not be attending the hearing due to the difficulty of arranging transportation to Sarnia from his farm situated fourteen miles away. He submits that the Applicant is somewhat elderly and lives alone in a very rural part of Lambton County. The Applicant is not retired and makes his living raising farm animals for profit as well as selling garden produce on weekends at the Grand Bend Farmer's Market situated approximately one and one-half hours from his farm. Counsel submits that it would take a substantial effort for the Applicant to borrow or rent an alternative vehicle, and that his client already bears the financial burden for towing and storage costs for the impounded vehicle.

The Tribunal made it quite clear to counsel that the Owner's Position statement provides no evidence whatsoever to show that no alternative to the impounded motor vehicle is available and that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded vehicle or to do without the vehicle during the impoundment.

Counsel stated that the Applicant did not plan on attending the hearing, citing transportation difficulties as the cause. Nevertheless, he was able to attend counsel's office on August 9, 2001 to complete and sign the Notice of Appeal and the Owner's Position documentation.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. J. Walter Scott;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 25, 2002.

The Registrar submitted that the criteria to establish exceptional hardship is cumulative and therefore the Applicant must meet all the requirements of the Regulation before his appeal can be considered. Mr. Hardy has failed to meet the conditions set out for demonstrating exceptional hardship, as prescribed in the *Highway Traffic Act*, Section 22(3) of Regulation 574, R.R.O., as amended by Regulation 632/98.

The Registrar further submitted that the Applicant presented no evidence, written or oral, to demonstrate that other options or alternatives have been considered and inquired into to replace the impounded vehicle. The Applicant did not indicate whether he had inquired into renting a truck or whether a 1985 Oldsmobile automobile registered to the Applicant and plated to May 17, 2002 could be utilized for personal transportation.

Further, it was submitted that on no evidence was provided as to whether the Brigden Feed Mill could deliver the animal feed, whether any horse auctions have been missed, or if any financial or economic loss is being experienced during the impoundment period and whether the loss will be immediate, significant and lasting. There was no evidence of the Applicant's monthly income and expenses compared with the amount necessary to perhaps rent a vehicle.

As to the Owner's Position, the Registrar submitted that for the Applicant's claims to be considered for exceptional hardship, he must demonstrate that every reasonable option has been considered for an alternative to the impounded vehicle. The Applicant has not met these requirements.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with particular criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

For the Applicant's claims to be considered under Section 22(2)(a), (b), and (c), he must demonstrate that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

While the Owner's Position makes reference to the Applicant requiring his truck to transport feed for his animals, transport his animals to market, as well as travel to the Grand Bend produce market, the Applicant has not presented the Tribunal with evidence that would demonstrate that every reasonable option has been considered and inquired into as required under Section 22(4) of the Regulation. Without supporting evidence, the Tribunal cannot conclude that the Applicant's farming operation is in jeopardy, and that the impact of the loss will be immediate, significant and lasting.

The Tribunal recognizes that the Applicant is greatly inconvenienced by the loss of the vehicle, however, no evidence is provided that would support a finding of exceptional hardship.

The Tribunal finds that the Applicant has failed to meet the requirements of Section 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: September 10, 2001

MED - 733 -PSYCH

MED - 733 -PSYCH

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: August 31, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant, a 45-year-old former T.T.C. motorman, had his driver's licence downgraded from a "BZ" to a "DZ" after the Ministry received information from a psychiatrist, Physician # 1, that the Applicant had been hospitalized several times for psychiatric problems.

The Applicant stated he had a lot of stress due to incidents at work involving passengers, in his relationship with his girlfriend, a kidney stone, an asthma flare up and heart palpitations. He

visited the Humber River Regional Hospital on October 8, 1996 and was seen by Physician # 1, a psychiatrist, after confessing to suicidal thoughts. He was given a prescription for Ativan and referred to the Day Treatment Program at the hospital.

He was returned to the hospital October 10, 1996 after being found attempting to walk into the Humber River. When he was brought into the emergency, he claimed he had also taken an overdose of Ativan and Restoril. He was hospitalized under Physician # 1 for 12 days and discharged with a diagnosis of Major Depression and Pathological Gambling and again referred to the Day Treatment Program. In evidence, he said he only took a few pills as a gesture.

He was re-hospitalized December 3, 1996 because of depression and paranoid delusions. He claimed people were spying on his conversations and there was a camera attached to the wall of his room. He was discharged December 25, 1996 with a diagnosis of Bipolar Mood Disorder-mixed features and treated with Paxil, Lithium, Perphenazine and Ativan.

He continued to see Physician # 1 for the following six months and was again hospitalized on June 30, 1997 following another suicide attempt by an overdose. He was discharged July 21, 1997 with a diagnosis of Anxiety Disorder and Suicidal Attempt.

He was again hospitalized on October 6, 1997 with suicidal thoughts and Paranoid Delusions. He claimed someone had been tampering with his files and someone at the TTC really wanted to "mess me up". He was discharged on October 22, 1997 with a diagnosis of Delusional Disorder Paranoid Type.

In March 1998, he claimed the pills in a new prescription had been altered. He spoke to Physician # 1 about it, and he was alleged to have told him to give them to his girl friend. This finished him with Physician # 1.

In July 1998, an insurance psychiatrist recommended the Applicant return to transitional work for a 6-month period. After 2 weeks in a collector booth, a trainer expressed concern about his performance, and he was removed from the training program. He failed to respond to requests for information, because of his suspicion of physicians, so his LTD benefits were terminated and he was laid off by TTC in July 1999.

In August 2000, his family physician referred him to another psychiatrist, Physician # 2. His diagnostic impression was:

Major Depressive Disorder
No diagnosis, but Paranoid Personality Traits
Asthma
Occupational and Financial Problems - Severe

Physician # 2 stated the Applicant had been off all medication since 1998 and found him to be mentally stable, in spite of demonstrating paranoid traits, minimizing his former difficulties and presenting himself in a good light. On the basis of his mental status examination and interviews over 2 months, he saw no contradictions to his "B" licence being reinstated.

On February 5, 2001, the Medical Advisory Committee denied the Applicant's request for a "B" licence. The Committee found him to be an unsuitable candidate for a passenger carrying vehicle because of his paranoid traits and symptoms, in particular when under stress, which is current to driving passengers, children or adults.

On March 15, 2001 he consulted the Labour Board about his employment problems, but apparently has not had an answer yet. He found a job at a chicken factory, but the pay is low. He still believes the TTC is conspiring against him to prevent him from finding work, etc. Physician # 2 states he has remained preoccupied with his problems with the TTC and although there is a distinct paranoid flavouring to his beliefs, he did not believe they met the criteria for a diagnosis of paranoid delusional disorder.

In correspondence from Physician # 2 dated April 19, 2001 he reiterated the Applicant's conviction that he had been wronged by the TTC and it was a wrongful dismissal. The Applicant attempted to obtain help from his union, but said they were with the TTC. He has contacted several lawyers, but could not afford the retainer required. He has maintained that the TTC is continuing a conspiracy against him to deny him a job, to deny him his insurance disability benefits and to deny him his "B" licence.

May 30, 2001, the Medical Advisory Committee again denied the Applicant's request for a "B" licence. The Committee repeated that the Applicant was not suitable for a passenger carrying licence. He still continues to have issues with the TTC, which was considered evidence of psychotic symptoms as well as paranoid ideation. It was felt that since he was not being treated and continues to exhibit behaviour with paranoid traits, he is at risk for potential problems for himself and others if granted the requested licence.

In evidence, the Applicant expressed surprise at the amount of information contained in the Respondent's summary. He kept repeating that there were so many mistakes, but when asked to identify them, he could not be specific, but simply gave general statements that "it was all very damaging". He stated that the only physician he trusted was Physician # 2 and possibly his family physician Physician # 3.

The Applicant has no insight into his paranoid behaviour or his obsession with the TTC. He is convinced he deserves compensation from the TTC for the way they have treated him and mentioned amounts up to \$250,000. He blames the TTC for his girl friend of 8 years leaving him in spite of the fact she called the police on him one day and 3 cruisers showed up and took him to the hospital for a psychiatric examination. He said he had no idea why she called them, because she left immediately and has never returned.

The Applicant claims the TTC turned his roommate against him, and that they then went through his house and took some of his personal possessions. Following this his roommate was promoted. Some inspectors were alleged to have played tricks on him trying to set him up so he would be caught looking like a thief. He said one inspector told him " when we get through with you, you'll need a life preserver." Physician # 4, a psychiatrist, retained by the TTC, interviewed him for 10 minutes and told him he was unfit.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;

- (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar had no alternative, but to downgrade the Applicant's driver's licence when they received information regarding the Applicant's psychiatric problems.

The *Highway Traffic Act*, Regulation 340/94, Section 14 states:

An Applicant or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely.

Section 17(1) states:

- (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled:

The Applicant was hospitalized on five occasions in a two-year period for a total of 72 days. He was examined by at least five physicians, four of whom were psychiatrists and only one recommended reinstatement of his "B" licence. There are three suicide attempts documented in the medical records provided.

At the present time he is not taking any medication and yet he exhibited definite paranoidal traits and hostility during his evidence. He did not demonstrate any signs of insight into his problems. As Physician # 1 reported he presents himself in a good light and minimizes his former difficulties. Virtually all of his problems are blamed on the TTC.

He claimed in his evidence that he did not want to return to the TTC, but he wanted a "B" licence, so he could make better money working for a company such as Greyhound. He applied there, but he said the TTC interfered and he was not hired.

The Tribunal agrees with The Medical Advisory Committee's concern about the Applicant's mental stability affecting his ability to drive a bus or a subway train and handle passengers. The evidence presented confirms that the prohibitions set out in Regulation 340/94 apply to the Applicant.

DECISION:

Upon the application by the Applicant to appeal the decision dated April 26, 1999 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of The Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: September 6, 2001

RGC DESIGN BUILDERS INC.

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990, Chapter 0.31

IN THE MATTER OF a REGISTRATION by
RGC DESIGN BUILDERS INC.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranties Plan Act,
made pursuant to section 9 of the *Ontario New Home Warranties Plan Act*

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

RGC DESIGN BUILDERS INC.

Applicant

-and-

REGISTRAR, *ONTARIO NEW HOME WARRANTIES PLAN ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31 as amended (the "Act"), RGC Design Builders Inc. (the "Applicant") initiated an appeal under section 9(4) of the proposal of the Registrar under the Act, dated July 13, 2001 in terms of which the Registrar proposed to revoke registration of the Applicant as a builder;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 9 of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Registrar under the *Ontario New Home Warranties Plan Act* to carry out his proposal dated July 13, 2001 to revoke the registration of RGC Design Builders Inc.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 5, 2001

ADLS – 752- NOMC

ADLS – 752- NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF
HEARING: September 5, 2001

Toronto

DECISION

A hearing was held on September 5, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

ADLS – 752- NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: September 5, 2001

DECISION
RELEASED: September 6, 2001

Toronto

REASONS FOR DECISION

A hearing was held on September 5, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 6, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 16, 2001, and was received by the Tribunal on August 16, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant and his agent failed to appear before this Tribunal or notify the Tribunal in writing to request and adjournment. The hearing proceeded in the Applicant's absentia.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal and medical information received August 16, 2001.

By the Respondent:

- a) Exhibit # 2 MTO Submissions received August 29, 2001m consisting of 12 pages.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

As no evidence was given by the Applicant, the Tribunal accepted the documents submitted by the Applicant into evidence. The Applicants’ medical documentation consisted of emergency room records from Humber River Regional Hospital. The date on these records was August 5, 2001. Along with these records was the Notice of Appeal.

Of particular importance was page 2 of the Notice of Appeal. This page deals specifically with the Applicant’s medical information. This page was left entirely blank.

The report from Humber River Regional Hospital indicated that the Applicant suffered a “3 cm laceration to the scalp” which was stapled closed By Physician # 1. The patient after treatment was discharged back to police custody.

The emergency room report indicated that the patient “smelled of alcohol” as well as the primary assessment indicated the airway was patent, breathing was regular and effortless, skin colour was normal with normal skin temperature, pulse was regular and the patient was alert/oriented.

The Tribunal accepts the documentary evidence as presented.

In an appeal of this nature, the onus is upon the Applicant to substantiate his position. The evidence presented does not substantiate his claim to the effect that he had a medical condition which precluded him from providing a breath or blood sample. The reports submitted do not address the issue.

APPLICATION OF THE LAW TO FACTS:

Reviewing the foregoing facts, it is obvious that the Applicant did not relate any medical condition to Regulation 574 and Section 50.1(2)(b).

The evidence is clear that the Applicant refused to provide an adequate sample of breath for no stated medical reason. The evidence submitted suggests that the actions of the Applicant were such as to lead this Tribunal to believe that he had no intention of giving a proper sample.

In the Tribunal's opinion, the Applicant's actions are more consistent with an attempt to prevent a suitable sample from being retrieved and than actions of someone having difficulty providing a sample because of a medical reasons.

Th Applicant has not discharged the onus to establish a valid medical reason for her failure to provide a breath sample when demanded under Section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by Randhir Mann to appeal the suspension order dated August 5, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

ADLS -756 - LUNGS

ADLS -756 - LUNGS

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: September 6, 2001

Toronto

DECISION AND ORDER

A hearing was held on September 6, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated August 12, 2001 imposed by the Registrar pursuant to Section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to Section 50.1(5).

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: September 7, 2001

ADLS –756 - LUNGS

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: September 6, 2001

DECISION
RELEASED: September 7, 2001 Toronto

REASONS FOR DECISION

A hearing was held on September 6, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 7, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 17, 2001, and was received by the Tribunal on August 17, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Solicitor for the Applicant provided the Tribunal with a brief containing reports written by various authors. There was no objection by the Ministry's representative to having this entered into evidence. The Respondents' representative also submitted the true and certified copies of the Notice to Registrar, vehicle and driver's search along with a copy of Police Officer # 1's note pad. There was no objection as to entering these documents into evidence.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1A-11 Submitted to the Tribunal September 6, 2001.

By the Respondent:

- a) Exhibit # 2 Certified copies of Notice to Registrar, Vehicle Search, Drivers Search.
- b) Exhibit # 3 Medical Letter of Physician # 1.

- c) Exhibit # 4 Generic Medical Letter by neurologist Physician # 2.
- d) Exhibit # 5 Copy of Notes from Police Officer # 1.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and took the stand. She testified that on the evening of August 11, 2001 she was stopped by Police Officer # 1. She was asked to produce her identification but she was unable to do so as she believed she had left her purse at her daughters' home. Police Officer # 1 asked the Applicant if she had any alcohol to drink that evening to which she replied, yes "one drink". At that point Police Officer # 1 asked the Applicant to exit her vehicle and accompany him back to his cruiser to which she complied. The Applicant testified that she took longer than it would normally have taken to get into his vehicle because she was experiencing soreness in her back to which she claims to have informed the officer. Once in the vehicle, she was read the demand for breath sample and the officer demonstrated the use of the device. The Applicant testified that she attempted to provide a sample on four occasions, each registering EO, meaning error code and indicating that there was not sufficient air entering the device. The Applicant was told that she would have to blow continuously for 7 to 8 seconds to get an adequate sample. She testified that she simply could not blow for that long and gave the best attempts possible. The Applicant stated that she wanted desperately to provide a suitable sample but could not understand her inability to do so. She pleaded with the officer to allow her to try again, however the officer decided not to give her any more opportunities. She was subsequently charged and released.

The Applicant testified that her daughter, appeared on the scene and asked to officer to please allow her mother another opportunity to provide a sample. According to testimony, the Applicants' daughter indicated to the officer that the Applicant has some medical problems. However, the officer was determined to end the session and proceed to process and then release the Applicant. The Applicant testified that after her release, she attended at the Humber River Regional Hospital, Church Campus, where a blood sample was collected at 1:32 a.m. on August 12, 2001. The results of the tests indicated $<2.0\text{mmol/L}$. When asked by the Representative for the Respondent if the reason for her attendance at the hospital was for medical treatment, she responded "no, as she believed that there was nothing wrong with her". The Applicant testified that she was advised by her son to attend for the blood tests if in fact she knew that she was not impaired and had genuinely attempted to supply a proper breath sample.

The Applicant's daughter was called to the stand and was sworn. She confirmed that she attended at the scene and stated that she approached the officer. She indicated to him that her mother had several medical conditions and asked the officer to please give her another opportunity to provide a sample. The Applicant's daughter testified that the officer told her that her mother had already been charged and no further attempts were going to be given to her.

The Respondent called Police Officer # 1 to the stand. Police Officer # 1 was sworn and testified that on August 11, 2001 at 11:56 p.m., he stopped a 1990 VW as the driver was talking on a cell phone and it appeared that the driver was writing on a note pad. The driver was the Applicant. The officer asked the Applicant for her documentation, which she was unable to provide. She claimed to have left her purse at her daughter's home. She verbally identified herself by giving her name and address. The officer testified that he detected the odour of an alcoholic beverage and ask her if she had anything to drink? She responded "yes, 1 drink a few hours ago". The officer testified that the Applicant was brought back to the cruiser where a breath demand was made of her. She was asked if she understood and she responded "yes". The testing unit was demonstrated by the officer, and she was made aware of the consequences of not providing an adequate sample. After the second failed attempt, Police Officer # 1 asked the driver to write her name, date of birth and address. The reason for this according to the officer was that when an individual is nervous, it can affect the test so he wanted her to take some time and write her name, address and date of birth. According to his testimony, he again demonstrated the device and again explained the consequences of not providing a sample and asked her if she understood to which she replied, "yes". Again there was insufficient air and EO was recorded. The officer testified that he again demonstrated the device and again explained the consequences of not providing a sample and proceed with the next test using a new mouth piece. Again the results indicated insufficient sample. The driver was advised that she would be charged with failing to provide a suitable sample.

According to the officer, he asked and made notation in his book of four questions. He asked her if she had, "1. any medical condition, 2. on any medication, 3. a recent operation and 4. any reason why she was not able to provide a suitable sample." She replied "no" to all the above questions, and he issued her a form 9, fail to provide sample, section 254(5) of the Criminal Code as well as issuance of a 90 day ADLS. According to the notes of Police Officer # 1, the only complaint was that the driver complained of dry mouth after the final sample.

When asked by the Applicant's counsel if there were any other things complained about, the officer stated he did not think so as no other notations where in his notes. However, he did recall something about her back but did not pay too much attention to this as this was brought to his attention after he had already charged the Applicant. He also testified that he did not make mention of this in his note pad.

In an appeal of this nature, the onus is upon the Applicant to substantiate her position. The Tribunal has examined the medical information provided by various practitioners. As the criteria set out in section 15(1)(2) of Regulation 574 are very specific, some of these reports fail to meet the criteria and have been given the appropriate weight.

The information provided by Physician # 3, family practice indicates that he has seen the Applicant for the past 9 months. It is Physician # 3's opinion that the Applicant suffers from obstructive lung disease and that it cannot be expected that the patient would be able to sustain expiration effectively coupled with the history of smoking and recurrent bronchitis. Physician # 3 has provided recent spirometry readings which indicated FEV1 1.98 70% predicted, PEF 4.26 67% predicted and FVC 2.46 69% predicted.

The Respondent has entered a report prepared by Physician # 1. Physician # 1 had commented on reduced percentages of predictions and the ability to provide a suitable sample. He states, "The vast majority are able to complete a breath test." This report was not specific to the Applicant. Physician # 1 did not have the opportunity to examine the Applicant or to review the specific test results supplied by the Applicant. That being the case, it is uncertain whether the Applicant does or does not fall within that "vast majority" that Physician # 1 refers to in his report who could provide a breath sample.

The other "medical" evidence submitted at the hearing do not indicate how the Applicant's medical conditions would affect her ability to provide a suitable sample and are speculative in nature. These reports were considered and given little weight in the Tribunal's decision.

The Respondent expressed concern that Physician # 3 did not provide a sufficiently detailed history to substantiate her patient's condition.

The Tribunal after very careful and lengthy review has accepted the medical evidence as presented by the Applicants' Physician # 3.

APPLICATION OF THE LAW TO FACTS:

The onus is on the Applicant to establish that she had a medical reason for not providing a breath sample when requested. The Applicant attempted to provide a breath sample, and she was surprised that she would not provide a sufficient amount of breath to comply with the demand. The fact that the Applicant attended immediately after her being charged to have a blood sample taken, indicates that she had nothing to gain by not supplying a suitable sample when requested by Police Officer # 1. The Tribunal accepts the opinion of Physician # 3 that the Applicant could not provide a breath sample and finds that this is for a medical reason. Based on the evidence before the Tribunal, and on the balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50(1)(2)(b), that she was able to demonstrate that she suffers from a medical condition which prevented her from providing a breath sample when requested.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated August 12, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension set aside.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: September 13, 2001

1059294 ONTARIO INC. AND AL PAWLUK

PREHEARING

1059294 ONTARIO INC. AND AL PAWLUK

APPEAL FROM A PROPOSAL DATED JULY 3, 2001 OF THE DIRECTOR
OF VEHICLE INSPECTION STANDARDS ISSUED PURSUANT TO
CLAUSES 91(8)(a),(b) and (e) AND CLAUSES 93(a), (b) and (c) OF THE
HIGHWAY TRAFFIC ACT R.S.O. 1990, CHAPTER H.8 AS AMENDED

To revoke the licence of 1059294 Ontario Inc. as a Vehicle Inspection Station
and the registration of Al Pawluk as a Motor Vehicle Inspection Mechanic

TRIBUNAL: MARJORIE L. HILEY, Presiding Vice-Chair

APPEARANCES:

PATRICK MOORE, Counsel, representing the Director of Vehicle
Inspection Standards
AL PAWLUK, representing himself and 1059294 Ontario Inc.

DATE OF

PRE-HEARING: September 7, 2001

By teleconference

ORDER

Following attendances on September 7, 2001 at a pre-hearing by teleconference before this Tribunal of Al Pawluk, representing himself and on behalf of 1059294 Ontario Inc. (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Thursday, October 4, 2001 at the Cindy Jones Verbatim Reporting Service, 1 King Street West, Suite 1504, Hamilton, Ontario.

1. The Parties to the hearing are:

- (a) 1059294 Ontario Inc.;
- (b) Al Pawluk; and
- (c) The Director of Vehicle Inspection Standards

2. The parties present at the prehearing agreed that there is no resolution of the issues raised in the Director's Notice of Proposal. There are three issues:
 - a) Inspections in connection with the five listed safety standard certificates were either incompetently performed or not performed in accordance with the *Highway Traffic Act*, and its Regulations;
 - b) 1059294 Ontario Inc. failed to provide copies of the safety standard certificates or records of the vehicles inspected at the station when requested by an Inspector of the Ministry of Transportation on or about February 27, 2001.
 - c) The two listed safety standard certificates were issued by the 1059294 Ontario Inc. and signed by Al Pawluk contrary to the *Highway Traffic Act* and its Regulations.
3. The parties agreed that all documents to be entered as Exhibits for the hearing will be disclosed to all parties in accordance with the Rules of Procedure of the Tribunal.
4. The Director intends to call three witnesses, all of whom are Ministry of Transportation Inspectors. All of these inspectors are qualified mechanics. They will give evidence on the three issues stated in the Director's Notice of Proposal.
5. The Applicant is unsure if he will call witnesses. He has agreed to inform counsel for the Director at least 10 days prior to the hearing of the names of those witnesses and the nature of their testimony at the hearing.
6. It is agreed by the parties that the name Allen Pawluk, as listed on the Notice of Proposal of the Director be changed to Al Pawluk.
7. The Applicant understands that if he wishes to retain counsel that person must be available for the hearing date of October 4, 2001 in Hamilton.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Presiding Vice-Chair

RELEASED: September 11, 2001

EUROSUN HOLIDAYS INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
EUROSUN HOLIDAYS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REFUSE TO GIVE CONSENT TO CHANGE OF OWNERSHIP
- Proposal dated: July 20, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal
EUROSUN HOLIDAYS INC.

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a prehearing in the above matter on October 3, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, October 10, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 11, 2001

C.D.

HIGHWAY TRAFFIC ACT

Section 50(1) and Regulation 574, R.S.O. 1990, Chap. H8 as amended

C.D.

IN THE MATTER of an APPEAL of A CHANGE OF CLASS OF
DRIVER'S LICENCE

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 32(12)(b)(i) of the *Highway Traffic
Act* TO CHANGE A CLASS OF A PERSON'S DRIVER'S LICENCE
FOR A MEDICAL REASON dated December 22, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

C.D.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), C.D. (the "Applicant") initiated an appeal under section 50(1) of the Decision of the Registrar of Motor Vehicles made pursuant to section 32(12)(b)(i) of that Act, dated December 22, 2000 to change the class of the Applicant's driver's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated December 22, 2000 to change the class of driver's licence of C.D.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 18, 2001

DARWISH

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
FADI FAHMI DARWISH

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: January 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

FADI FAHMI DARWISH

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Fadi Fahmi Darwish, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 11, 2001

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Fadi Fahmi Darwish
326 Cherokee Blvd.
Toronto, ON M2H 2W7

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Fadi Fahmi Darwish (hereinafter referred to as "the Salesperson") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Powers Procedure Act, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Salesperson agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
2. The Salesperson shall not be an officer, director, owner or partner in a dealership unless he is granted registration as a motor vehicle dealer.
3. The Salesperson agrees to address any payments claimed by the Ontario Government's Family Responsibility Office within 60 days of the date of this Order.
4. The Salesperson agrees not to invite the public to deal at a place other than his employer's registered premises.
5. The Salesperson agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
6. The Salesperson agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Salesperson agrees to make reasonable efforts to research the history of all vehicles he sells prior to sale to ensure all material facts are disclosed in writing to the purchaser.
7. The Salesperson acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the salesperson knows that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
8. In the event that the salesperson purchases motor vehicles on his own account or on behalf of the dealer, the Salesperson will accurately represent the purpose of the purchase.

9. The Salesperson will only buy or sell motor vehicles on behalf of the dealer to whom the Salesperson is registered.
10. The Salesperson will not act as an unregistered dealer.
11. The Salesperson will not purchase vehicles on his own account for the purpose of resale.
12. The Salesperson acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
13. The Salesperson acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
14. The Salesperson agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, or if he is convicted under any relevant provision of the Criminal Code or convicted under any relevant law of an industry-specific offence, the Registrar may carry out the proposal, provided however that the Registrar shall not act unreasonably.
15. The Salesperson will provide a copy of this order to his employer forthwith.
16. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
18. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2001.

Fadi Fahmi Darwish (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

WINANT

RHONDA L. WINANT

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: SIMON DANN,
 Presiding member

APPEARANCES: KIM BEINTEMA,
 Representative for the Registrar of Motor Vehicles

 RHONDA L. WINANT, Applicant
 unrepresented

DATE OF HEARING: September 7, 2001

DECISION RELEASED: September 11, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing by teleconference was held on September 7, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Rhonda L. Winant (the “Applicant”)
Motor Vehicle:	2000 Nissan Quest Van, plate no. AANS 580 (the “vehicle”)
Date of Appeal:	August 15, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 7, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Aug. 14, 2001

License Appeal Tribunal
1 St. Clair Ave West, Suite 1200
Toronto, Ont.
M4V 1K6

Dear Sir/Madame,

We are requesting that our 2000 Nissan Quest Van's (Vin#4N2XN11T3YD80150) impoundment be set aside on the following grounds:

Exceptional hardship: The people directly injured as a result of this impoundment are the victims, not the accused.

Rationale: After an argument/altercation following a golf game, Mr. Nemeth (Brother-In-Law) severely damaged, and then took off in our vehicle without our permission, having previously spirited away the vehicle's keys. The Halton Police later arrested Mr. Nemeth for impaired driving (refer to police report attached) resulting in his section DWI offence and our vehicle being impounded. Prior to this, my Wife and I were unaware that Mr. Nemeth's license was under suspension for a similar incident that occurred this past spring.

The impoundment of our vehicle has resulted in the immediate, significant and lasting loss of our only form of transportation. Our entire family (myself, my wife Rhonda and our 4 small children) (all of which are 5yrs old and younger, one of which is a new born)) depends upon this vehicle to get food and medical attention. Renting a similar vehicle is not an option as I am currently unemployed and the \$3000.00 cost to rent a Minivan, combined with the impoundment fee of \$950.00+along with the estimated cost of \$2500.00 + to repair our vehicle is very onerous, and we simply cannot afford it at this time. Borrowing a vehicle is not an option as neither my wife nor I have family in the area. Moreover, the loss of our vehicle directly impacts my ability to attend interviews so I can get back to work. Most Importantly, this impoundment does not punish the accused. Mr. Nemeth (a resident of London, Ont.), as he and his family retain control of their vehicles. Given the forgoing, I am requesting a teleconference hearing at your earliest convenience to have this impoundment set aside as per Section 22 of Regulation 574, R.R.O. 1990, amd. Ont. Reg 632/98 22(1)a, 22(3) a,b,c,d,(i), (ii) & 22(4).

Best Regards
"Alex and Rhonda Winant"

The Applicant spoke at the commencement of the hearing and advised the Tribunal that her husband, Alex Winant, would have to speak for her as she was under her Doctor's care for pneumonia and was unable to participate. Mr. Winant then proceeded to restate the details contained in the Applicant's Notice of Appeal with additional details about how the impounded vehicle came to be in Mr. Tom Nemeth's (the driver) possession, who is also Mr. Winant's brother-in-law and the damage done to it by Mr. Nemeth. In addition, the vehicle damage would take about a week to repair and the Applicant did not expect to receive any assistance from Mr. Nemeth for the costs to complete the repairs.

Mr. Winant explained how the impoundment was and is causing the family exceptional hardship for the following reasons:

- the family only has one vehicle;
- the Applicant (Mrs. Winant) currently has pneumonia and with nursing a new baby she has a double strain on her health; one child also has bronchitis and is on antibiotics; Mr. Winant also explained that his wife had a difficult pregnancy and was confined to bed during that time;
- the Winants have four children ranging in ages from 10 weeks to 5 years;
- Mr. Winant has been out of work for eight months and has only just obtained new employment with a start date of September 11th - Mrs. Winant does not work;
- two of the children should be starting Jr and Sr Kindergarten classes in another week but they may not be able to attend without a vehicle for Mrs. Winant to drive them to school and pick them up (the school is located about 1.6 kilometres away and with Mrs. Winant being ill and Mr. Winant starting a new job, there would be no one to walk with the children); there are no family relations in the area as Mr. Winant is from New York and Mrs. Winant from London, Ontario;
- there is no local bus service in their neighbourhood and due to the Applicant's financial position, she is unable to afford a taxi shuttle service;
- Mr. Winant explained the family is new to the neighbourhood and the neighbours are mature families with no other young children on the street so there is no car pool opportunity and they do not really know anyone well enough to ask for help or to whom they would entrust their children;
- while Mr. Nemeth (the driver at the time the vehicle was impounded) owns a vehicle which he is unable to drive, he has not offered to loan his vehicle to Mr. Winant during the impound period; Mr. Nemeth has not offered any assistance to the Applicant;
- due to Mr. Winant's loss of employment, the family has had difficulty continuing to meet their financial obligations, including missed mortgage payments, and their credit cards have been maximized;
- for alternate transportation, they have only been able to rent a vehicle on three occasions for medical and job interview reasons (on one occasion having to call a taxi to get to the rental location as there was no local bus service);

- while doctor appointments have been missed during the impound period, Mr. Winant acknowledged ambulance service was available for medical emergencies;
- for his new job, he advised the Tribunal that he would be using a bicycle to travel the two kilometres or so to get to the GO Transit station and into downtown Toronto;
- Mr. Winant stated the loss of the vehicle had also impacted his ability to accept job interview appointments and influenced his acceptance decision, which he felt may not have been the best one but he could no longer afford to be selective due to the family's immediate financial needs;
- if Mr. Winant had not found new employment, which will only provide him with a first pay check a month from his start date, he claimed the family would be looking to put the house up for sale by the end of September.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. John Tommy Nemeth;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood Alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 9, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the Applicant's appeal to have the impounded vehicle returned on the basis that the loss of the vehicle will result in exceptional hardship, the evidence presented was considered on whether or not it met the definition of "exceptional hardship" and if it clearly established the Applicant will experience/is experiencing an unusual circumstance and severe hardship based on the following.

Whether there is "a threat to the health or safety of any person ordinarily transported by the motor vehicle";

The evidence confirms the Applicant's argument on the basis that she is suffering from pneumonia and has four young children in her care, one with bronchitis. While it is acknowledged emergency ambulance services are available, in this instance, the Tribunal

accepts that the need to reach and obtain medical attention, either for herself or for her child, would be better served if she were able to immediately use her own transportation.

Whether there is “a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used”;

The evidence establishes there is none.

Whether “no alternative to the impounded motor vehicle is available”;

The evidence presented establishes that the Applicant is enduring the impoundment as a severe circumstance due to the facts that (1) there is no local area public transit, (2) while the Applicant has been able to rent an alternate vehicle on three daily occasions, she does not have the financial resources to pay for a vehicle rental during the full impound period; (3) the Applicant does not have neighbours or accessible family relations to assist with an alternative arrangement during the impound period; (4) the Applicant's brother-in-law, whose driving of the vehicle resulted in the impoundment, has refused to provide the Applicant with any compensation or vehicle alternative.

Whether the “loss will be immediate, significant and lasting;”

The evidence establishes that the loss has been immediate and significant due to the impact it has had on the Applicant's ability to best deal with and remedy (1) the health of the Applicant and one of her children, (2) the adverse circumstances of the Applicant and her family.

The evidence does establish the loss will not be lasting.

Whether the “the impact of the loss will be upon a person ordinarily transported by the motor vehicle”;

The evidence establishes the loss of the vehicle will impact two of the Applicant's children who would be dependent upon their mother to transport them to and from school based on the facts that...(1) there is no public transit to the school which is about 1.6 kilometers distant; (2) the Applicant is ill and unable to walk with her children; (3) the Applicant's husband is starting a new job and unable to take the children to and from school in place of his wife; (4) the Applicant and her family are new to the neighbourhood, in which there are no other young children, and she has not established any neighbourhood support relationships.

Whether the impact of the loss “will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle”;

The evidence clearly establishes that there is loss to the Applicant, *a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle*, who due to the loss of her vehicle, is unable to meet and thereby failing to meet all of the immediate family obligations for which she is responsible.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: September 11, 2001

1311311 ONTARIO LIMITED O/A PERFORMANCE SALES AND LEASING

1311311 ONTARIO LIMITED O/A PERFORMANCE SALES AND LEASING

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

1311311 Ontario Limited o/a Performance Sales and
Leasing, Applicant

Ronald Terence Albert, Agent for Applicant

DATE OF HEARING: September 6, 2001

DECISION RELEASED: September 11, 2001 Belleville

REASONS FOR DECISION

A hearing was held on September 6, 2001, at Belleville, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	1311311 Ontario Limited o/a Performance Sales and Leasing (the "Applicant")
Motor Vehicle:	1999 GMC Pickup SLE, plate no. WT NEXT (the "vehicle")
Date of Appeal:	August 17, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on September 6, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

1311311 ONTARIO LIMITED
PERFORMANCE SALES AND LEASING
21 ASHLEY ST.
FOXBORO, K0K 2B0
(613) 962-5877

August 15, 2001

NOTICE OF APPEAL

OWNERS POSITION IN APPEAL

Position # 1

I did in fact exercise due diligence to determine that Billy Harrison has in his possession a valid Ontario drivers license. Mr. Harrison has sporadically worked for Performance Sales & Leasing for approximately 1 year, driving to and from work daily. I have seen in person his actual valid drivers license. Due to the fact he drives every day, I've personally seen his license and he believes he truly has a valid license, I had not reason to inquire any further.

I feel that anyone that drives daily, with no reservations, to and from work, drives for work, and is willing to drive virtually anywhere in Ontario towing vehicles certainly has a valid drivers license.

Further more Performance currently has 6 full time and 4 part-time employee's, all with current valid drivers licenses that easily could perform these tasks that Mr. Harrison performed, we certainly wouldn't have a non-licensed driver to drive for us.

Position # 2

This order of impoundment will result in exceptional hardship to both myself and most importantly my business. On average I personally purchase 5-10 salvage/irreparable vehicles through Impact Auto Auctions weekly. These vehicles are located at different locations throughout Ontario.

This vehicle is outfitted with a wheel lift in order to pick-up these vehicles. I have a driver in this truck 5-6 days per week retrieving vehicles. Basically I will be unable to retrieve these vehicles physically or financially without this truck. These vehicles are purchased to repair and/or for parts. Most vehicles are priced well under \$500.00. Most pick ups are located at such distances that paying a tow company would cost more than we pay for the vehicle being retrieved. I would figure approximately \$500-\$700/day.

As well this vehicle is also my personal driver for weekends, and to & from work.

Name (please print) "R. Terence Albert"
(owner of company)

Date: Aug 15/01

At the hearing Mr. Ronald Terence Albert appearing on behalf of 1311311 Ontario Limited—Performance Sales and Leasing, re-iterated the comments in the letter attached Notice of Appeal.

Mr. Albert testified that he assumed the driver of the vehicle at the time of the impoundment, had a valid driver's licence as he was driving on a daily basis. Mr. Albert stated that he had sometime ago seen Mr. Harrison's licence, but did not ask to see it on the day in question.

In cross-examination, Mr. Albert confirmed that Mr. Harrison was only a part-time driver and did not have to be registered with the insurance company.

As for expenses, Mr. Albert testified both in evidence in chief and in cross-examination that he had incurred extra costs and loss of revenue, but nothing significant or long lasting.

Mr. Albert has managed to continue carrying on business not only by arranging alternate transportation for the vehicles he purchases, but also by buying fewer vehicles.

The Applicant, in closing, confirmed that although he thought he had carried out due diligence, he now recognizes that in fact he had not.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. William R. Harrison;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing, the Respondent asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment, on the grounds that "due diligence" requires an Applicant to do more than assume the driver has a valid driver's license.

As for hardship the Respondent maintained that the Applicant's testimony amounted to inconvenience but did not constitute hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish due diligence and exceptional hardship ground of appeal as provided in subsection 50.2(3)(c) and 50.2(3) and (d) of the Act, respectively.

The Tribunal will address the matter of due diligence first. Section 50.2 (3) (c) is clear in the requirement:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

The above ground of appeal is the only ground on which the Tribunal may set aside the order to impound on the basis of the owner's due diligence. In this case, the driver of the motor vehicle at the time in respect of which the order was made was William R. Harrison. To succeed in this hearing on the basis of due diligence, therefore, the Applicant must establish that due diligence was exercised in attempting to determine that Mr. Harrison’s driver’s licence was not under suspension.

Due diligence requires that “all reasonable efforts” be made. By the Applicant’s own admission he now realizes that “Assumption” does not constitute due diligence. Thus the Tribunal finds that the Applicant did not satisfy the criteria of Section 50.2(3)(c).

With respect to undue hardship as per subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant has managed to carry on business by making alternate arrangements to transport the vehicles purchased, as such the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Appellant shows proof that loss will be immediate, significant and lasting.

The Applicant stated that he incurred the cost of tow truck rentals as well as loss of revenue due to being forced to purchase fewer vehicles. Nonetheless neither the extra expenses nor the losses are significant and long lasting.

Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

The Applicant having an alternative vehicle and the loss due to the impoundment not being immediate, significant or lasting, it is not necessary to review further criteria set out in the Regulation.

The individual affected by the impoundment, has an alternative method of transportation, and has incurred no significant or permanent loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: September 11, 2001

EL-KHOURY

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990, Chapter M.42

IN THE MATTER of the REGISTRATION of
MAURICE EL-KHOURY
as a motor vehicle salesperson

AND IN THE MATTER OF the PROPOSAL of the
Registrar under the *Motor Vehicle Dealers Act*
made pursuant to section 7 of the *Motor Vehicle Dealers Act*

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MAURICE EL-KHOURY

Applicant

-and-

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Act"), Maurice El-Khoury (the "Applicant") initiated an appeal under section 7(4) of the proposal of the Registrar under the Act, dated July 19, 2001 in terms of which the Registrar proposed to refuse registration of the Applicant as a motor vehicle salesperson;

AND WHEREAS, the Applicant has failed to pay the filing fee for this proceeding before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 7 of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar, *Motor Vehicle Dealers Act* to carry out his proposal dated July 19, 2001 to refuse the registration of Maurice El-Khoury.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 12, 2001

DEVLIN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
PATRICK AND DEBRA DEVLIN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

PATRICK AND DEBRA DEVLIN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

KANSUN HOMES LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 8, 2001;

AND WHEREAS, upon consent of the parties, the prehearing was adjourned to September 11, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the prehearing *peremptory against the Added Party* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Tuesday, November 27, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 12, 2001

NOEL PARE

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ANASTASIA NOEL PARE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

ANASTASIA NOEL PARE

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

DENIS CAMPEAU CONSTRUCTION INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing by teleconference in the above matter on September 4, 2001 at 9:30 a.m. and a hearing on October 1-3, 2001, at 9:30 a.m. at Ottawa, Ontario;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing by teleconference *peremptory against the Applicant* to commence on Wednesday, October 17, 2001 at 9:30 a.m. at the telephone number provided to the Tribunal and adjourns the hearing to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario, at 9:30 a.m., on Wednesday, November 21, 2001 and to continue November 22 and 23, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 12, 2001

BRAY CONSTRUCTION

CHARLES BRAY & DEBORAH BRAY O/A CHUCK BRAY CONSTRUCTION

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice- Chair Presiding
NEIL J. MACPHEE, Member

APPEARANCES: No one appearing for the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING: August 24, 2001 Windsor

ORDER

BACKGROUND:

This matter had been commenced by a Notice of Proposal from the Registrar, Ontario New Home Warranty Program ("the Program") dated February 23, 2001. In that Proposal the Registrar stated that the Applicants had failed to execute the Vendor and Builder Agreements and had failed to provide updated personal net worth statements together with documentation to substantiate the assets listed.

By their Notice of Appeal dated February 28, 2001 Charles Bray and Deborah Bray o/a Chuck Bray Construction (the "Applicants") requested a hearing before the Tribunal. The Applicants stated that signing the Agreements was an infringement of their constitutional rights. They stated that they had an excellent building record and had always provided proper documentation.

The Tribunal has not been provided with a Notice of Constitutional Question nor has there been filed any proof of service upon the Attorney General of Canada and the Attorney General for Ontario. This procedure is outlined in the Rules of Practice which are provided by the Tribunal to every applicant.

There was no prehearing. The matter was scheduled for hearing on July 4 and 5th, 2001. It was adjourned on consent of parties to August 24, 2001.

On August 24, 2001 Counsel for the Program and witnesses were in attendance. There was no one in attendance on behalf of the Applicants.

Counsel for the Program stated that she had a telephone conversation with the Applicant, Mr. Bray on the evening of August 22, 2001. At that time Mr. Bray stated that he was under the impression that the matter was to be adjourned on August 24th to some date to be determined in the Fall of 2001. Mr. Bray stated that he was starting his holidays and he and his wife would be outside of the Province of Ontario on August 24th, the scheduled date of the hearing. From his statements Counsel for the Program assumed that Mr. Bray wished for an adjournment of the hearing. The Program was opposed to the granting of the adjournment and had attended with two out of town witnesses in order to present its prima facie case to the Tribunal.

ISSUE:

Would the Tribunal grant the adjournment request of the Applicants?

If not, how would the Tribunal proceed on this case?

If the adjournment was granted would it be granted under terms and conditions?

If so, what would be the terms and conditions for the granting of the adjournment?

EVIDENCE:

By the Applicants:

The Applicants were not in attendance nor had they sent an agent to represent them on their request for an adjournment. The fax from Mr. Bray dated August 22, 2001 and received by the Tribunal on August 23, 2001 was entered as an exhibit. In it Mr. Bray states that the Program told him the August 24th hearing would not proceed and on that basis he has booked a holiday with his family. He stated that if the hearing proceeded without him and his witnesses, he would seek action through his local M.P.

The Registrar for the Tribunal responded to Mr. Bray on August 23, 2001 by a letter sent via the fax. In it she stated that the Program had denied telling Mr. Bray that the August 24th hearing date would not take place. The Registrar stated that the parties have been informed several times by the Tribunal that the hearing was to proceed on August 24th and that the Tribunal had not granted an adjournment. The Registrar concluded her letter by stating that the hearing was to commence at 9:30 am on Friday, August 24th, 2001 at the Holiday Inn Select in Windsor, Ontario.

Ms. Street, Counsel for the Program, was in attendance on August 24th, 2001. She informed the Tribunal that in the evening of August 22nd, 2001 she had a telephone conversation with Mr. Bray. He told her that he felt the Program had been telling him that the hearing was not to proceed on August 24th. He was starting a trip with his family for outside of the Province of Ontario that evening of August 22nd and he would not be in attendance on the date of the hearing. He told her he would object if the hearing proceeded in his absence. Ms Street asked him to have someone attend on his behalf at the hearing date of August 24th, but he replied that no one would be attending at the hearing.

Those documents and the comments by Ms. Street concluded the evidence on behalf of the Applicants.

By the Program:

Ms. Street as Counsel for the Program stated that the Program was opposed to another adjournment. Ms. Street stated that this matter was originally to proceed at a hearing date in early July. Just prior to that hearing date, there had been discussions between the Program and Mr. Bray. At that point Mr. Bray had signed the Vendor Agreement and the Builder Agreement. The only point outstanding was the provision of documentation to substantiate the personal net worth statement of Mr. Bray.

Counsel stated that Mr. Bray informed the Program that he wanted to be registered under his corporate name, not under his personal name. He was prepared to provide security to the program for registration as a corporation. On that basis it was agreed that the matter needed to be adjourned to permit Mr. Bray and the appropriate representatives of the Program to work on the registration of the corporation. The adjournment was requested on the consent of the parties. The Tribunal adjourned the hearing to August 24th, 2001. Exhibit A to the affidavit of Ms Cece filed at the Hearing on August 24th by the Program is a letter from Ms. Street to Mr. Bray outlining the consent to the adjournment and what would be required to proceed with registration under the corporate name.

After those discussions, the Program was informed of a number of conciliations involving Mr. Bray when he had been building new homes in Cornwall, Ontario. It was only recently that Mr. Bray moved over to the Sarnia area. Due to the claims being made against the Fund, the Program moved to amend its Proposal against Mr. and Mrs. Bray. The Supplemental Proposal is dated July 19, 2001 and it has been served on the Applicants. In that Proposal the Registrar provided particulars on a number of breaches of warranties for homes in the Cornwall area. In one instance, the Program has made a cash settlement with the homeowners. The Registrar alleged that the Applicants had not corrected matters which had been found at the conciliations to be breaches of warranties.

Counsel stated that as of the hearing date the Applicants had neither provided the documentation originally requested on the personal net worth statement nor provided the necessary documentation to permit the processing of the registration under the corporate entity.

Due to the additional issues as set out in the Supplementary Proposal of the Registrar, it was felt by the Program that more than one day would be required for the hearing. Accordingly, Counsel stated that the Program wrote to Mr. Bray asking if he was in agreement to request an adjournment of the August 24th hearing date and to provide them with dates for a multi day hearing in October or November. This was a letter dated August 7th and faxed to Mr. Bray. It is found as Exhibit B to the affidavit of the Ms Cece filed with the Tribunal on August 24th. Mr. Bray's response is found as Exhibit C to that same affidavit. In it Mr. Bray said he had reorganized himself to attend on August 24th and he stated he could not guarantee a date in November much less a whole week. He said he would let the Program know of his plans as soon as he can. There was a further communication via fax by Mr. Bray to the Program dated August 21, 2001. That is Exhibit D to the affidavit of Ms Cece. In it Mr. Bray states that the Program requested the adjournment and he will not be in Ontario that week. He wished there to be communication between the Program and the Tribunal and a date set with 2 or 3 months notice to him.

Counsel filed as evidence at the hearing the affidavit of Ms Cece dated August 23, 2001 in which she outlines the role of the Program in its discussions with Mr. Bray since late June, 2001. It basically reiterates the litany of events as described by Counsel for the Program.

Counsel for the Program stated that the Tribunal can proceed in the absence of the Applicants. There is a duty of fairness. Natural justice requires notice of the hearing and the opportunity to respond.

Counsel for the Program initially argued for the Tribunal to proceed without the Applicants. She had her witnesses in attendance. She was concerned about the Applicants continuing to build homes as he is still an active registrant. The Tribunal needs to hear evidence to determine if the public interest is being protected. In the alternative, if the Tribunal was to give an adjournment then she requested that it be on a peremptory basis, there be three days of hearing set aside and the venue be changed to Toronto or Ottawa or Kingston as a number of witnesses on the breach of warranties issues resided either in Ottawa or Kingston.

The Tribunal raised the issue of terms and conditions to an adjournment. After the break Counsel for the Program stated that she would consent to an adjournment if based on stringent terms and conditions.

LEGISLATION:

Section 7 of the *Ontario New Home Warranties Plan Act* states:

- 7.(1) An applicant is entitled to registration by the Registrar except where,
- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of the applicant's undertakings;
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on the applicant's undertakings in accordance with law and with integrity and honesty;
 - (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant or imposed by the Tribunal or prescribed by the regulations.
- (3) A registration is not transferable.

Section 8 of the *Ontario New Home Warranties Plan Act* states:

- 8.(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 7.
- (2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches to complete performance of contracts or is in breach of a term or condition of the registration.

Section 9 of the *Ontario New Home Warranties Plan Act* states:

9.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1).

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

.....

ANALYSIS AND DECISION:

The Tribunal was quite concerned that the public interest be protected, especially upon reviewing the supplementary notice of Proposal. It was not impressed that the Applicants had not since late June, 2001 proceeded with their request to register their corporate entity with the Program, instead of being registered under their personal names. There was nothing before the Tribunal on this matter except the assertion by Counsel for the Program that there was indeed a corporate entity and that it had been created in the early part of 2001. The Program had done a corporate search after the request was made by the Applicants in late June, 2001.

Upon review of the letters and faxes, the Tribunal does not see how the Applicants were in any way misled by the Program or were being told that another adjournment had been or was to be granted by the Tribunal. The letter from the Registrar for the Tribunal is quite clear that there had been no adjournment granted by the Tribunal and the hearing was to proceed on August 24, 2001. Accordingly the Tribunal was reluctant to delay this matter as it was not an issue of lack of notice or of a failure to provide an opportunity to be heard.

This Tribunal is only prepared to adjourn the hearing date on stringent terms and conditions. There is no need to set another hearing date. If the Applicants fail to comply with the terms and conditions, they lose their right to a further hearing. If the Applicants do comply with the terms and conditions, then this Notice of Proposal does not proceed as the Applicants will be pursuing corporate registration rather than registration under their personal names.

In considering what terms and conditions need to be set, the Tribunal reviewed the Notice of Proposal, the Supplementary Notice of Proposal, the Appeal request by the Applicants following the initial Notice of Proposal, the fax by the Applicants to the Tribunal of August 23, 2001, the response by the Registrar of the Tribunal dated August 23, 2001 and the affidavit of Ms Cece dated August 23, 2001 and its Exhibits.

ORDER:

After considering the submissions and evidence before it, the Tribunal makes the following order:

1. On or before September 28, 2001 the Program will be provided with an application for registration in the corporate name in which the current Applicants intend to carry on business along with all the required fees, supporting documents and materials required by the Registrar to fully assess the application for registration. By doing this, the current Applicants will have changed their application from registration under their personal names to registration under their corporate name.
2. The Program is to be paid in full the amount of all invoices that the Program has issued to the current Applicants up to and including September 21, 2001.
3. If the current Applicants comply with these conditions #1 and #2, then the Notice of Proposal dated February 23, 2001 and Supplemental Notice of Proposal dated July 19, 2001 is hereby withdrawn by the Program.
4. If the current Applicants fail to comply with these conditions #1 and #2, then the registration of the current Applicants is refused effective October 1, 2001.

5. The hearing before this Tribunal respecting the current Applicants, Charles Bray and Deborah Bray o/a Chuck Bray Construction, is hereby concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

Neil J. MacPhee, Member

Released: September 12, 2001

PEEL CONDOMINIUM CORPORATION NO. 498

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
PEEL CONDOMINIUM CORPORATION NO. 498

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

PEEL CONDOMINIUM CORPORATION NO. 498

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

SUNDIAL HOMES (OSPREY) LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on August 23, 2001;

AND WHEREAS, upon consent of the parties, the prehearing was adjourned to September 26, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the prehearing *peremptory against the Respondent* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, October 1, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 14, 2001

VIOLA

CARL ALBERT VIOLA

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair, Presiding

APPEARANCES:

CARL ALBERT VIOLA, Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: September 6, 2001 Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar, *Motor Vehicle Dealers Act* (the "Act") issued a notice of proposal dated June 7, 2001, in which the Registrar proposed to revoke the registration of Carl Albert Viola ("Viola" and the "Applicant") under the Act. The proposal is based on the opinion of the Registrar that the Applicant cannot reasonably be expected to be financially responsible in the conduct of business and that past conduct of the Applicant provides a reasonable ground for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Applicant requested the hearing before this Tribunal.

THE FACTS:

At the commencement of the hearing, counsel for the Registrar and the Applicant indicated that they have agreed on a number of facts. They are as follows:

1. Viola is currently registered as a salesperson under the Act. He was first registered on or about September 17, 1994.

2. Viola is currently working as a salesperson for a motor vehicle dealer in eastern Ontario. He has been working there since April 18, 2001. That dealer has no knowledge of these proceedings.
3. Viola was employed with Black Palm Aviaries of Canada Inc. operating as the Loan Arranger (the "Loan Arranger") from December 11, 2000 to March 7, 2001.
4. While working as a registered salesperson for the Loan Arranger, Viola misappropriated for his personal use funds intended for the dealership.
5. The amount misappropriated was \$2,620.65.
6. The funds were misappropriated from some fourteen (14) separate transactions which occurred between January 1, 2001 and March 1, 2001.
7. No repayments of the funds misappropriated by Viola have been made to the date of the hearing.
8. There is no written agreement with respect to a repayment schedule between Viola and the Loan Arranger.
9. Viola did not keep specific records of the amount he misappropriated and did not dispute the documentary evidence tendered by the Registrar in respect of the misappropriations.

At the opening of the Registrar's case, the Applicant confirmed the above noted facts and candidly admitted that he did not contest 99.9% of the Registrar's case, but was simply appearing before the Tribunal to explain his situation. Based on those admissions, the Registrar rested their case in chief.

The Tribunal then heard evidence from Mr. Viola. Mr. Viola indicated he had been employed with the Loan Arranger on one other occasion in the past, that is prior to his employment from December 11, 2000 to March 7, 2001. Mr. Viola apologized to the owners of the Loan Arranger for what he had done. He indicated that his reasons for misappropriating the funds were set out in a letter he sent to the owners of the Loan Arranger dated March 4, 2001, which appeared at Tab 3 of Exhibit 3, Book of Disclosure, filed by the Registrar. Essentially, Mr. Viola got in trouble with some "loan sharks" (his words) and was stealing the money from the Loan Arranger to cover the exorbitant interest rate on the loans.

Mr. Viola again candidly admitted that no one at his present employer knew of this proceeding. Mr. Viola indicated he had sold some sixty (60) cars since moving over to the new employer. During the course of his testimony, Mr. Viola offered to make repayments to the Loan Arranger in the order of \$300.00 to \$400.00 a month. Mr. Viola indicated that no criminal charges were laid as a result of the incident.

The Registrar in reply called Chris Euale, the sales manager for the Loan Arranger. Mr. Euale testified on a very narrow point concerning the criminal charges. He testified that he had approached the Metropolitan Toronto Police requesting that criminal charges be laid. While his evidence was clearly hearsay, Mr. Euale indicated that the police were not prepared to lay charges in respect of allegations of fraud in the circumstances given the amount of money at issue.

THE ISSUE:

The issue in this proceeding is whether the Registrar has sufficient grounds to revoke the registration of Viola as a sales person under the Act.

THE LAW:

Section 6 of the *Motor Vehicle Dealers Act* provides:

Section 6

- 6.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and integrity and honesty;
- 6.(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 5 of the Act disentitles an applicant to registration where:

5.(1)

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of the business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

APPLICATION OF THE LAW TO FACTS:

In a proceeding under Section 7(4) of the Act, the Registrar has the burden of proving the reasonableness of his grounds for proposing to revoke the Applicant's registration under the Act. The Registrar proposes to revoke the registration on the grounds that Viola cannot reasonably be expected to be financially responsible and the past conduct of Viola forms reasonable grounds for the belief that Viola will not carry on business in accordance with law. Viola's personal integrity and honesty were put in issue by evidence admitted by Mr. Viola. He quite candidly acknowledged his wrongdoing. Proper and due notice of this position was given to Mr. Viola prior to the hearing.

1. Can Viola reasonably be expected to financially responsible in the conduct of business?

Clearly, Mr. Viola made a gross error in judgment in respect of his prior conduct at the Loan Arranger. In fact, it appears to the Tribunal that the misappropriations could reasonably be considered a breach of the *Criminal Code* notwithstanding the fact that no charges have been laid to date. The Tribunal is of the opinion that Mr. Viola acted contrary to law in the course of his employment as a registrant. Again, Mr. Viola was quite candid in admitting his wrongdoing and did explain that it was as a result of personal circumstances.

The Tribunal was concerned by the fact that the present employer was not aware of these proceedings. Certainly, to the extent that one disposition of this matter might involve imposition of a registration on terms, that would require some supervision by a senior person in the industry to ensure that on a day to day basis Mr. Viola was not again tempted to help himself to monies that were not his as a result of his own personal financial circumstances.

Mr. Viola did not provide any specific evidence of his financial situation at present. The only indicator of his financial circumstances in evidence is his failure to have made any repayments whatsoever or committed himself to anything specific with respect to repaying the Loan Arranger. From this evidence, the Tribunal draws the conclusion that Mr. Viola is still not "out of the woods" with respect to his prior dealings with "loan sharks" (his description) and therefore cannot reasonably be expected to be financially responsible in the conduct of his business on an ongoing basis.

2. Will Viola be able to carry on business in accordance with Law?

The Tribunal must look at the past conduct of Viola in totality in determining the reasonableness of the Registrar's grounds. In this case, Viola did not seek to be excused from his behaviour and acknowledged, again quite candidly, that the Tribunal could accept the proposal based on the totality of what he had done. The fact that the misappropriation occurred over a substantial period of time and on a number of occasions indicates that the misconduct was not a "one time event". Mr. Viola was "caught" by his employer at which time he admitted his wrongdoing. This circumstance does not give the Tribunal confidence that in future Mr. Viola will act in accordance with law.

DECISION:

Pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal hereby directs the Registrar to carry out his proposal to revoke the registration of Carl Albert Viola.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick,
Vice-Chair Presiding

Released: September 14, 2001

GALLO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
BARBARA AND ALFRED GALLO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

BARBAR AND ALFRED GALLO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

GREYSTONE COUNTRY PROPERTIES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 1-2, 2001;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to September 17-18, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Added Party* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, January 15, 2002, and to continue January 16, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 14, 2001

GABRIEL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NORTON MICHAEL GABRIEL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 30, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NORTON MICHAEL GABRIEL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Norton Michael Gabriel, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 14, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Norton Michael Gabriel
20 Hawkheard Crescent
Scarborough, ON M1W 2Z5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Norton Michael Gabriel (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full disclosure on all future applications.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
- 5) The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them the circumstances of his pending charges.
- 6) The Applicant agrees that his explanation of the circumstances of his convictions, are substantially as set out in the disclosure provided to the Registrar.
- 7) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 8) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 9) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.

- 11) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).

Norton Michael Gabriel (initials)

- 12) The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
- 13) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 14) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 15) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 16) The Applicant will provide a copy of this order to his employer forthwith.
- 17) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 18) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 19) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2001.

(Signature) Norton Michael Gabriel

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

BRAMPTON LEASING AND RENTALS LTD.

BRAMPTON LEASING AND RENTALS LTD.

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

BRAMPTON LEASING AND RENTALS LTD.,
Applicant
DAVID A. RIDER, Agent for Applicant

DATE OF HEARING: September 10, 2001

DECISION RELEASED: September 17, 2001 Toronto

REASONS FOR DECISION

A hearing was held on September 10, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Brampton Leasing and Rentals Ltd. (the "Applicant")
Motor Vehicle:	2001 Pontiac Sunfire, plate # AKXV 489 (the "vehicle")
Date of Appeal:	August 23, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 10, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of copies of documents bearing original certification seals, which were entered into evidence as exhibit # 3.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My business is Hertz Rent A Car.
We have been in business for 41 years.
The customer "Don Morrison" presented an ONTARIO Drivers Licence with a valid signing date and a credit card in his name. This is the required documents we require and we rented The car to him on a one week basis. Mr. Morrison represented to us that he had a "valid drivers licence". We followed industry practice and rented him the car upon presentation of his documents.

David A. Rider

Mr. David A. Rider, Agent for the Applicant and co-owner for Brampton Leasing and Rentals Ltd. stated that the Applicant operates a Hertz rental car business, and that they had rented the vehicle to Mr. Morrison, who was the driver of the vehicle at the time of the impoundment. Mr. Rider stated that at the time the vehicle was rented, Mr. Morrison was asked for two pieces of identification, which was the standard practice in the rental industry. Mr. Morrison produced a credit card which was then successfully authorized, and an Ontario driver's licence which appeared to be valid, showing an expiry date for 2002.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Donald C. Morrison;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Ability Impaired under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 22, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

The statement of the Applicant's representative, Mr. Rider, is that at the time his firm rented its vehicle to Mr. Morrison, his staff asked to see Mr. Morrison's credit card and his driver's licence as part of its standard operating procedure. Mr. Morrison then produced an apparently current and valid credit card and driver's licence. The staff then confirmed the validity of the credit card with the relevant financial institution. The staff did not apply any checking procedure for the driver's licence. The vehicle was rented to him. The Applicant argued that this action constituted due diligence as prescribed by the Act.

This driver's licence apparently was a then valid replacement card issued to Mr. Morrison just prior to the date of the offence that caused his licence to be suspended. Even though his licence has been suspended at the time he rented the car, he retained the invalid licence card in his possession.

Even though the act of merely viewing a licence cannot ever insure it is valid, the fact that Applicant asked to see this licence constitutes an action on its part to ensure that Mr. Morrison had a valid driver's licence. Though further measures could have been taken to actually validate the status of Mr. Morrison's licence, such as contacting the Ministry directly, no such further steps are required of the Applicant under the Act. The issue is whether the Applicant's failure to do more than view the driver's licence is an exercise of due diligence.

Under the circumstances, at the time of renting the car, the Applicant's staff had no prior knowledge of Mr. Morrison. They treated him as they would any other customer. He produced an apparently valid and current credit card and driver's licence. They checked one but not the other, when both could be invalid. They made no further enquiries into the licence's status other than to view it and record the particulars on it for their records. The Tribunal finds that the Applicant's own procedure of checking a credit card to determine its validity indicates that a similar degree of prudence should apply to a driver's licence.

The Tribunal finds that in this case, the action of the Applicant's staff who ask to see a person's driver's licence and actually views it, is "attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension" as per section 50.2(3)(c) of the *Highway Traffic Act*, but does not amount to due diligence as required by that subsection.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: September 17, 2001

DAVID G. BARNARD

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	David G. Barnard (the "Applicant")
Motor Vehicle:	1989 Ford PGL, plate # 062ZWH (the "vehicle")
Date of Appeal:	August 20, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 13, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The cost of removing my car is such a high cost for me because I'm raising my children on my own as a single parent. My oldest child lives with me full time and my youngest part time. My youngest has ADHD, and if I have any health problems I don't have my car for the doctor's or counselling for him etc.

Most of my job's I work at are out of town no buses to the job, I need my car to get to my jobs.

I'm losing out on work in Petrolia which is half hour drive from Sarnia for a company name Deck's Unlimited, doing renovation job's for Mr. Mike Preece. He calls me when there is work.

When I don't have my car I can't look for any work full time without my car.

Mr. David G. Barnard

Mr. Barnard testified that he is a single parent with full responsibility for two sons, ages fourteen and seventeen. He stated his fourteen year old is currently under a doctor's care for a learning and behaviour disability. However, as long as his son continues to take his prescribed medicine, he can attend school and function as a normal child. Neither Mr. Barnard nor his sons have missed any medical appointments during the impoundment period.

The Applicant testified that he owns a second vehicle, namely a 1978 GMC pick up truck that is both insured and plated for the current licensing period. However, for the past two months, the motor has had a tendency to overheat and cannot be used as backup to his impounded vehicle. He has been using the City of Sarnia Transit Service, his bicycle and taxi service to keep appointments and travel to the grocery store during the impoundment period.

Nevertheless, he remains unemployed at this time due to the current job situation in Sarnia and the difficulty of arranging transportation to a temporary job in Petrolia and other job opportunities that may exist in the City of London.

The Applicant stated that he is currently claiming social assistance and receiving child tax credits for his two school age sons. He believes he is eligible for Employment Insurance, however, a backlog in the Sarnia Employment Office has delayed the processing of his claim. Mr. Barnard testified that his social assistance allowance and government child tax credits provide him with an income of \$1,384.00 monthly. His monthly rent, which includes heat, hydro and cable, is \$750.00 per month.

Mr. Barnard testified that he has not received any financial or transportation assistance from his parents living in Sarnia. However, he has had three close friends that have been quite helpful with his transportation needs within the City of Sarnia.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Robert A. Black;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to remain at Accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 8, 2001.

The Registrar submitted that the criteria to establish exceptional hardship is cumulative and therefore the Applicant must meet all the requirements of the Regulation before his appeal could be considered. Mr. Barnard has failed to meet the conditions set out for demonstrating exceptional hardship, as prescribed in the Highway Traffic Act, Section 22(3) of Regulation 574, R.R.O., as amended by Regulation 632/98.

The Registrar further submitted that the Applicant has been able to keep all family medical appointments during the impoundment period including looking after their normal shopping needs. The Applicant was able to do this by utilizing taxis, his bicycle, and friends. While the Applicant's ability to seek employment outside the City of Sarnia during the impoundment period has been somewhat impacted, the Registrar submitted that no evidence was presented to demonstrate that other options or alternatives have been considered and inquired into to replace the impounded vehicle. The Applicant simply assumed that no car pools were available and a rental vehicle was too expensive to pursue employment opportunities outside the City of Sarnia.

As to the Owner's Position and the oral evidence provided, the Registrar submitted that for the Applicant's claims to be considered for exceptional hardship, he must demonstrate that every reasonable option has been considered for an alternative to the impounded vehicle. The Applicant has not met these requirements.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with particular criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

For the Applicant's claims to be considered under Section (22)(a), (b), and (c), he must demonstrate that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

While both the Owner's Position statement and the Applicant's oral evidence refers to employment opportunities outside the City of Sarnia, the Applicant has not presented the Tribunal with evidence that would demonstrate that every reasonable option has been considered and inquired into as required under Section 22(4) of the Regulation. Without supporting evidence, the Tribunal cannot conclude that a rental vehicle is not possible due to the initial deposit requirements or that car pools are unavailable, without making reasonable enquiries.

The Tribunal finds that the Applicant has failed to meet the requirements of Section 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: September 17, 2001

ADLS – 757

ADLS – 757

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
CLARKE WALLACE, Member

APPEARANCES: DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

Applicant
unrepresented

DATES OF
HEARING: September 5 and 14, 2001

Toronto

INTERIM ORDER

Following attendance on September 14, 2001, at a hearing before the Licence Appeal Tribunal of the Applicant, appearing on his own behalf (the "Applicant") and David Milner, counsel on behalf of the Registrar of Motor Vehicles (the "Registrar");

WHEREAS a hearing was set to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA") to appeal a 90-day Administrative Driver's Licence Suspension;

AND WHEREAS the Tribunal reserved its decision respecting the Applicant's request that the Tribunal issue summons for certain witnesses to attend and testify before the Tribunal on Wednesday, September 26, 2001 at 9:30 a.m.;

The Tribunal makes the following Order:

1. Summons to attend will be issued by the Tribunal on or before Tuesday, September 18, 2001 for the following persons specifically requested by the Applicant:
 - Zafar Kazmi, Port Credit Detachment, Ontario Provincial Police, 49 South Service Road, Mississauga, Ontario
 - Werner Muller, Port Credit Detachment, Ontario Provincial Police, 49 South Service Road, Mississauga, Ontario
 - K. Tower, 7750 Hurontario Street, Peel Regional Police, Mississauga, Ontario
 - W. Watts, Port Credit Detachment, Ontario Provincial Police, 49 South Service Road, Mississauga, Ontario
2. Summons to attend will be issued to four medical practitioners, provided that the names and addresses of these medical practitioners are provided by the Applicant to the Tribunal no later than 12:00 p.m. on Monday, September 17, 2001 by facsimile transmission to the Tribunal at (416) 314-4270.
3. The summons to attend referred to in paragraph 1 and 2 above will be available and may be obtained by the Applicant at the reception desk of the Tribunal's Office, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on Tuesday, September 18, 2001 between the hours of 8:30 a.m. and 12:00 p.m.
4. The service of these summons to attend will be the responsibility of the Applicant.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Clarke Wallace, Member

RELEASED: September 17, 2001

KYMANTAS AND KUSCHNERAIT

OTONAS KYMANTAS AND IRMA KUSCHNERAIT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair Presiding
RICHARD DELANEY, Member
JOHN ORT, Member

APPEARANCES:
OTONAS KYMANTAS AND IRMA KUSCHNERAIT, Applicants
KAREN JONES, counsel, representing the Ontario New
Home Warranty Program
PAUL STARKMAN, counsel, representing the Added Party,
Sunfield Homes (Georgetown) Limited

DATE OF
HEARING: September 4, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Otonas Kymantas and Irma Kuschnerait (the "Applicants") respecting a decision by the Ontario New Home Warranty Program (the "Respondent") dated May 1, 2001, wherein the Applicants' claim for compensation was disallowed. As set out herein, the Tribunal found that there was an error in the denial of the claim. Accordingly, the Applicants are entitled to succeed in the claim against the Respondent for the reasons hereinafter set out.

ISSUE:

The Applicants' notice of appeal form filed with this Tribunal (Exhibit #2) identifies the basis of the Applicants' appeal.

Should the Tribunal set aside, confirm, or modify the decision of the Ontario New Home Warranty Program to disallow the Applicants' claim for compensation under s.14(1) of the *Ontario New Home Warranties Plan Act*?

FACTS:

The evidence introduced by the Applicants consisted of the testimony of the Applicants Otonas Kymantas and Irma Kuschnerait. In addition, the Applicants introduced documentary evidence through the above parties.

TESTIMONY OF OTONAS KYMANTAS

Mr. Kymantas said that the Applicants wanted a house closer to Ms. Kuschnerait's relatives. He then gave a chronology of events.

Mr. Kymantas stated that the Applicants signed the Agreement of Purchase and Sale on March 12, 2000. The agreement included schedule "F" entitled "Financing Condition". The Applicants paid a deposit of \$15,000. The offer was accepted by the Added Party, Sunfield Homes (Georgetown) Limited.

After consulting their lawyer a second time, the Applicants asked the sales agent if they could make the offer conditional on the sale of their current house. Ms. Clark, the sales agent, gave them a form, which the Applicants signed at the sales office (Exhibit 3, Tab 3), and which states in part: "This offer is conditional upon the sale of the purchaser's property known as 1040 Highbrooke Court in the town/city of Oshawa until September 30, 2000." The sales agent saw the Applicants sign on April 17, but did not sign as a witness. The Applicants inquired many times about the form. Eventually, the sales agent told them that the form was lost.

Mr. Kymantas testified that on May 21 another form (Exhibit 3, Tab 4) was signed by the Applicants and witnessed by Ms. Clark, the sales agent. The form had been filled in by the sales agent and stated in part: "This offer is conditional upon the sale of the purchaser's property known as 1040 Highbrooke Crt. in the town/city of Oshawa until 30 August." According to Mr. Kymantas, a few days later, Ms. Clark, the sales agent, called the Applicants and asked them to pick up the form. When the applicants came, they were given a photocopy of the form, apparently signed on behalf of Sunfield Homes Limited. Mr. Kymantas stated that all the documents that they received back were photocopies rather than originals.

Sometime in August, according to Mr. Kymantas, the Applicants received a telephone call from Ms. Bernhardt, the new sales agent, asking whether they want to extend the date of the

condition on the Agreement of Purchase and Sale. The Applicants stated "no", because they had not received any offers to purchase their current house in Oshawa. Ms. Bernhardt then asked the Applicants to come sign a release. On August 20, 2000, the Applicants signed a form entitled "General Release and Authorization" (Exhibit 3, Tab 6), which was witnessed by Ms. Bernhardt, the sales agent. The release was never signed by the Added Party, Sunfield Homes (Georgetown) Limited, as vendor.

Soon after August 20, the Applicants received a telephone call from Mr. Lecce of Sunfield Homes (Georgetown) Limited and Ms. Clark, the former sales agent. Mr. Lecce stated that signature on form dated May 21 (Exhibit 3, Tab 4) is a photocopy and that the form was never signed by him. According to Mr. Kymantas, Ms. Clark said that that is ridiculous, that the signature on the form is that of Mr. Lecce. During the telephone call, Mr. Lecce arranged a meeting. The next day his office cancelled the meeting. The Applicants called Mr. Lecce several times, but he did not call them back.

The Applicants did not sign the amendment, that would have changed the closing date from November 8, 2000 to December 8, 2000, attached to letter from the Added Party dated August 24 (Exhibit 3, Tab 7).

Various letters were then exchanged among the parties, including the Respondent Ontario New Home Warranty Program, (Exhibit 3, Tabs 8, 9, 10, 11, 12, 13, 14, and 15, Exhibit 4). By letter dated September 4 (Exhibit 3, Tab 8), the Applicants requested return of their deposit of \$15,000 in full. In a letter dated September 14, 2000, Mr. Lecce of Sunfield Homes (Georgetown) Limited claimed that the agreement of purchase and sale is firm. Said letter (Exhibit 3, Tab 9) stated in part: "Alternately I will re-market the property at full price and try to sell it. I will then deduct from your deposit the amount I need to discount the house to sell it." By letter dated February 12 (Exhibit 3, Tab 17), lawyers for the Added Party, Sunfield Homes (Georgetown) Limited offered a settlement of \$10,000 to the Applicants. No explanation was received by the Applicants of why \$10,000 rather than \$15,000 was offered in settlement. The offer of settlement was not accepted. No monies have been received by the Applicants, although the house was resold by the Added Party, Sunfield Homes (Georgetown) Limited, with a new closing date of December 20, 2000.

A Proof of Claim asking for deposit refund (Exhibit 3, Tab 16) was filed on or about January 25, 2001. The decision of the Ontario New Home Warranty Program dated May 1, 2001 (Exhibit 3, Tab 21) denied the Applicants' claim. The decision was appealed to the Licence Appeal Tribunal by Notice of Appeal (Exhibit 3, Tab 22).

Upon cross-examination by counsel for the Respondent, the Ontario New Home Warranty Program, with respect to Schedule "F" entitled "Financing Condition", Mr. Kymantas stated that other than putting his house up for sale, the Applicants made no efforts to obtain financing. Mr. Kymantas testified that he and his wife Ms. Kuschnerait are both pensioners with limited incomes and that they would require financing for almost the entire purchase price in order to

complete the purchase from the Added Party, Sunfield Homes (Georgetown) Limited, without selling their house in Oshawa. The Applicants did not receive any offers to purchase their existing home in Oshawa.

Mr. Kymantas also testified that a purchase in the same subdivision contemplated by his sister-in-law had nothing to do with the purchase by the Applicants.

Further, Mr. Kymantas stated under cross-examination that the signature of Mr. Lecce on the document dated May 21 (Exhibit 3, Tab 4), purporting to make the agreement conditional upon the sale of the Applicants' house, could be forged. Mr. Kymantas testified that he did not know how the document dated May 21 got into the sales agent's files.

Upon cross-examination by counsel for the Added Party, Sunfield Homes (Georgetown) Limited, Mr. Kymantas stated that, when the Applicants signed the Agreement of Purchase and Sale, they thought that the condition as to financing was the same as a condition as to sale of their current house.

Also, Mr. Kymantas stated that the Applicants' house in Oshawa has now been sold for close to the listing price of \$275,000. He admitted that the house was listed for more than the sale price of some of the other houses in the subdivision, but stated that the reason was upgrades of about \$40,000, and a lot containing woods, a pond, and a ravine.

The evidence introduced by the Respondent, the Ontario New Home Warranty Program, consisted of the testimony of Judy Kruse and of documentary evidence introduced through Ms. Kruse.

TESTIMONY OF JUDY KRUSE

Ms. Kruse testified that she is a customer service representative and has worked for the Respondent, the Ontario New Home Warranty Program, in various capacities for about twelve years.

Ms. Kruse said that she made the decision dated May 1, 2001 (Exhibit 3, Tab 21) denying the Applicants' claim. The decision states in part under reasons in paragraph number 7: "The builder had a firm offer...". Ms. Kruse stated that she denied the Applicants' claim because she could not decide whether there was a contract.

Upon cross-examination by counsel for the Added Party, Sunfield Homes (Georgetown) Limited, Ms. Kruse answered that she did not conclude that the signatures, apparently of Mr. Lecce, on the first page of the Agreement of Purchase and Sale and on document (concerning condition regarding sale of current house of Applicants) dated May 21 (Exhibit 3, Tab 4) were exactly the same. She thought that they just looked similar.

The evidence introduced by the Added Party, Sunfield Homes (Georgetown) Limited, consisted of the testimony of Karen Clark, Larry Lecce, and Marnie Bernhardt, together with documentary evidence introduced through said parties.

TESTIMONY OF KAREN CLARK

Ms. Clark stated that she worked for Sunfield Homes from February 1999 to August 2000 as the only sales agent at the Georgetown sales office. She testified that she has worked in real estate for twelve years.

Ms. Clark testified that she prepared the Agreement of Purchase and Sale (Exhibit 6). She was present when Mr. Lecce signed the acceptance on the first page of the agreement on behalf of Sunfield Homes (Georgetown) Limited.

Regarding document dated April 17 (Exhibit 3, Tab 3), Ms. Clark stated that she remembers that the Applicants requested that the agreement be made conditional on the sale of their existing house, and that she said that she would approach the builder and would ask the builder for them. Ms. Clark testified that she gave a blank of the form to the Applicants and that it was never returned filled out by the Applicants.

Concerning the document dated May 21 (Exhibit 3, Tab 4), Ms. Clark states that she presented it to Mr. Lecce, who said "no", and who made no notation on the document.

Ms. Clark recalls a telephone conversation in August in which she was informed that the new sales agent found the document dated May 21 (Exhibit 3, Tab 4) with signature apparently of Mr. Lecce in the sales agent file.

Upon cross-examination by counsel for the Respondent, the Ontario New Home Warranty Program, Ms. Clark stated that she does not know how the document dated May 21 (Exhibit 3, Tab 4) ended up in a file in the Georgetown sales office.

Upon a question from the Tribunal, Ms. Clark stated that she has no knowledge of Mr. Lecce's file. She also testified that there was no condition on the Agreement of Purchase and Sale while she was at the Georgetown sales office. Ms. Clark also asserted that the Applicants never paid for requested upgrades and nothing came of the purchaser's extras. Ms. Clark stated that she prepared only one original of the Agreement of Purchase and Sale.

TESTIMONY OF LARRY LECCE

Mr. Lecce stated that he is the president of Sunfield Homes (Georgetown) Limited.

He has no recollection of the April 17 document (Exhibit 3, Tab 3) purporting to make the agreement conditional on the sale of Applicants' current house.

As to the May 21 form (Exhibit 3, Tab 4), seeming to make the agreement conditional on sale of the existing home of the Applicants, Mr. Lecce testified that he does not recall the document being presented to him. He stated that it is his signature on the paper, but that he did not sign the document and that it was not his original signature. He did not have an original or a copy in his file. The matter first came to his attention when he received a release dated August 20 signed by the Applicants (Exhibit 3, Tab 6) from the sale site. At that time Ms. Bernhardt told him that there was a conditional form in the file. Mr. Lecce stated that he did not sign the release, because he had an accepted offer. He said that he never made an agreement conditional after it was signed.

Mr. Lecce also testified that at the time only one original of all documents was being prepared at the sales office. His office then made photocopies that were distributed. The original stayed in his file.

Mr. Lecce also said that he does not remember particulars of any of the deals.

He believes that offer of settlement of \$10,000 was made as a goodwill gesture.

Upon cross-examination by the Applicant Mr. Kymantas, Mr. Lecce stated that he does not know when the house was resold, that he does not know if it was built by December 8, and that he does not remember if any of the extras requested by the Applicants were put into the house.

When Mr. Lecce was asked by Mr. Kymantas why he did not return telephone calls of the Applicants, Mr. Lecce stated that the matter was then with his lawyers.

Mr. Kymantas asked Mr. Lecce whether he agreed that by the end of August he was aware that the Applicants were not able to sell their existing house. Mr. Lecce replied "yes".

Upon being questioned by the Tribunal, Mr. Lecce confirmed that his initials were at the bottom of schedule "F", dealing with the financing condition. Mr. Lecce also confirmed that schedule "F" was prepared by his lawyer. He also stated that he does not know what the blank in schedule "F" means. Mr. Lecce said that the date that was usually filled in the blank was 5 business days.

Mr. Lecce testified that the sales agent at the Georgetown site was employed by Nordale Realty and not by Sunfield Homes (Georgetown) Limited. He also said that the sales agent would take a draw directly from Sunfield when sales were slow and that such draw was not paid back until matters were adjusted at the end of the year.

TESTIMONY OF MARNIE BERNHARDT

Ms. Bernhardt testified that she has been in real estate for twenty-five years. She stated that she started work for Nordale Realty at the Georgetown sales office in August 2000, around August 3.

Ms. Bernhardt stated that she first met the Applicants on Sunday of the first weekend on the job. She stated that the Applicants had come to meet with the person who installs the security system in the new house. Ms. Bernhardt claimed that she saw Ms. Kuschnerait behind her desk. When Ms. Bernhardt questioned Ms. Kuschnerait, she stated that she had to use the telephone. Ms. Bernhardt also said that Ms. Kuschnerait used the stapler and left. Ms. Bernhardt testified that at that time, sales agent files were piled up behind her desk.

Ms. Bernhardt testified that the May 21 form (Exhibit 3, Tab 4) concerning the condition of selling the purchasers' house first came to her attention when she looked through the sales agent file for a fax from Norma, of head office, requesting an amendment changing the elevation of house to be signed by Applicants. Ms. Bernhardt found the May 21 document stapled to the agreement of purchase and sale. Norma said that she knew nothing about it and later called that she could not find the May 21 form in the head office file and requested that Ms. Bernhardt fax it to her.

Ms. Bernhardt testified that she told head office that the Applicants must be called in to sign an amendment or a release, because of the May 21 document. Ms. Bernhardt stated that she telephoned Ms. Kuschnerait, who indicated that the Applicants could not sell their current house. On August 20 the Applicants signed at the sales office a release (Exhibit 3, Tab 6). Ms. Bernhardt witnessed the signatures of the Applicants. She told Ms. Kuschnerait that she will send the form to head office, but that it is up to them what they will do with it.

After receiving instructions from head office to resell the house, Ms. Bernhardt resold it in September with a new closing date of December 20.

Upon cross-examination by Ms. Kuschnerait, Ms. Bernhardt stated that the house was resold for about the same price. She said that some additional extras requested by the new purchasers were included in the sale price - a backsplash in the kitchen and hardwood floors.

TESTIMONY OF MS. KUSCHNERAIT IN REPLY

Ms. Kuschnerait testified that she and Mr. Kymantas had met Ms. Bernhardt only once, when they signed the release (Exhibit 3, Tab 6) on August 20. At that time, the house was framed, had the front door, but no windows and no floors. She stated that she would not use the sales agent's telephone, because she has a cellular phone.

Ms. Kuschnerait pointed out that the items that were mentioned by Ms. Bernhardt as extras included in the price of the home upon resale - backsplash in kitchen and hardwood floors - were included in the Applicants' agreement of purchase and sale on schedule B(3) as items 6 and 9.

Upon cross-examination by counsel for the Added Party, Sunfield Homes (Georgetown) Limited, Ms. Kuschnerait stated that the Applicants never met the person who installs the security system in the new homes. She said that she called Ms. Bernhardt several times to ask whether the house has been resold, because Ms. Bernhardt told her that if the house were resold, she would probably get the deposit back.

Ms. Kuschnerait also stated that she did not go behind the desk of Ms. Bernhardt.

FACTS FOUND PROVEN:

The Tribunal found both the Applicants, Mr. Kymantas and Ms. Kuschnerait, credible witnesses. In case of conflict in the evidence, the Tribunal accepts the evidence of the Applicants.

The Tribunal finds, pursuant to the evidence given in the hearing, the following to be facts found proven:

1. There is an Agreement of Purchase and Sale dated March 13, 2000 between the Applicants, Mr. Kymantas and Ms. Kuschnerait, and the Added Party, Sunfield Homes (Georgetown) Limited. The agreement was prepared by the lawyer for the Added Party, the vendor, and was filled in (except for address and telephone number of Applicants) by a sales agent that had close ties with the Added Party, the vendor. The agreement contained schedule "F", entitled financing condition, with no date filled in. The agreement was thus conditional on financing. Applicants paid a deposit of \$15,000.
2. The Applicants listed and attempted in good faith to sell their current house.
3. No offer to purchase the Applicants' current house was received. Bridge financing could not be applied for. Being unable to sell their current house, the Applicants reasonably concluded that they were unable to arrange financing.
4. The Added Party did not return telephone calls of the Applicants. Submission of the release dated August 20 (Exhibit 3, Tab 6) by the Applicants, Mr. Kymantas and Ms. Kuschnerait, to the Added Party, Sunfield Homes (Georgetown) Limited, through the sales agent constituted giving notice by the purchasers to the vendor that they were unable to arrange financing.

5. The Added Party, the vendor, had not arranged suitable financing for the Applicants, the purchasers.
6. No part of the deposit of \$15,000 has been returned by the Added Party, the vendor, to the Applicants, the purchasers. The Applicants suffered financial loss.
7. Neither forgery nor fraud has been proved.

THE LAW:

Section 14(1) of the *Ontario New Home Warranties Plan Act* stated in part:

"Where,

"a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract ...

"the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

Section 6(1) of Regulation 892 under the *Ontario New Home Warranties Plan Act* states:

"A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000."

APPLICATION OF LAW TO FACTS:

Schedule "F" of the agreement of purchase and sale states in part: "This agreement of purchase and sale is conditional until _____ on financing approval."

Where a contractual provision is sufficiently ambiguous, and reasonably capable of more than one construction, it will be construed against the party responsible for drafting and tendering the contract and in favour of the opposite party. If reasonable alternatives are available, then the interpretation least favourable to the stipulator may be chosen (*McCann v. Temiskaming Hotel Co.*, [1943] O.R. 337 (Ont. C.A.), contract drafted by corporate solicitor).

The agreement of purchase and sale including Schedule "F" was drafted by the Added Party's, the vendor's, lawyer. The agreement was filled in by a sales agent who stated that she worked for the Added Party, Sunfield Homes (Georgetown) Limited. The president of the Added Party, the vendor, testified that sales agents would be paid a draw directly by the Added Party on occasion. Clearly, there was a close relationship between the sales agent and the Added Party, the vendor. There is no suggestion that the Applicants authorized either the sales agent or the Added Party to fill in the blank in Schedule "F" and the blank was not filled in.

By reason of schedule "F", the agreement of purchase and sale was conditional at all relevant times up to and including the closing date. The condition was never waived. The Applicants, the purchasers, were unable to arrange financing and so notified the Added Party, the vendor, by submitting a general release signed on August 20. The release was presented to the Added Party, the vendor. The Added Party, the vendor, did not arrange financing. By schedule "F", the agreement is null and void and the deposit is to be returned to the Applicants, the purchasers, without interest or deduction. The Applicants paid a deposit of \$15,000 and have not received any of it back. As a result of the vendor's, the Added Party's, failure to return the deposit pursuant to its contract with the Applicants, the purchasers, the Applicants, suffered financial loss, which is payable by the Program to the Applicants under section 14(1) of the *Ontario New Home Warranties Plan Act*.

Thus, the Ontario New Home Warranty Program erred in denying the Applicants' claim.

DECISION:

By virtue of the authority vested in the Tribunal under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to allow the Applicants' claims in the amount of \$15,000.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair,
Presiding

Richard Delaney, Member

John Ort, Member

RELEASED: September 17, 2001

HOBBS

MARILYN E. HOBBS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

MARILYN E. HOBBS, Applicant, unrepresented

DATE OF HEARING: September 14, 2001

DECISION RELEASED: September 18, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing by teleconference was held on September 14, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Marilyn E. Hobbs (the "Applicant")
Motor Vehicle:	1994 Dodge Dakota, plate no. 9327EZ (the "vehicle")
Date of Appeal:	August 27, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on September 14, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

1. The driver of the vehicle has known to be for a period of time, and he has driven my truck on previous occasions. On the day in questions, he and I were driving together helping his mother to move from one apartment to another in the City of Ottawa. There was certainly an understanding which led me to believe that he was qualified to drive not only on this occasion, but on previous occasions, and had I had any suspicions otherwise, I would not have permitted him to drive.
2. I live as a sole single person in an isolated rural area and work as a seamstress at a home industry approximately five miles from where I reside for a very minimal wage. I am not able to maintain employment which I require for my daily sustance without a vehicle.
3. I am 43 years of age and have had heart surgery, and it is essential that I not live for any period of time without a vehicle at my disposal.
4. It is my wish because of my financial situation to have a telephone conference, and I should be obliged if the date of that could be given to me in advance so I will be present at the time.

The following is a summary of the Applicant's affirmed testimony.

The Applicant lives alone in Montaque Township, which is approximately a 20-minute drive to Smith Falls. Her husband passed away 2 ½ years ago. She has 2 unlicensed children, 1 resides in Kingston and the other resides in Arnprior. Montaque Township is not "911" accessible and the closest hospital and g rocery store is 20 minutes away in Smith Falls. There is also no public transit in this community.

The Applicant is employed by "We So" as a seamstress approximately 5 miles from her home. She commenced employment with this home industry in August, 2001. Her hourly wage is \$8 per hour. Due to heart surgery last year, the Applicant is unable to stay seated for long periods of time. Therefore, her usual hours of employment are from 4 a.m. to 8 a.m. and 4 p.m. to 8

p.m. Since the impoundment of her vehicle, she has missed 4 or 5 days of work. The Applicant's employer is aware of his situation and at no time has there been any implied threat of being terminated.

The Applicant's elderly neighbours have been kind enough to lend the Applicant her vehicle whenever the need arises or they drive her to her destination. For example, the Applicant borrows their vehicle to go to work for her early morning shift (4 a.m. to 8 a.m.). Her neighbours have also driven the Applicant to her doctor's appointments. The Applicant, on occasion, obtains a ride from a fellow co-worker if this co-worker is working the same shift. The Applicant has looked into renting a vehicle, but cannot afford it on an income of \$198 per week. She has not been able to pay her phone bills, utility bills, Visa or her income tax since the impoundment.

With respect to the surrounding circumstances of the impoundment, the mother of Carl Leafloor (Mr. Leafloor being the driver of the impounded vehicle), asked the Applicant if she and Mr. Leafloor could use the Applicant's truck to assist her in an apartment move in the Ottawa area.

As the Applicant is not familiar with the Ottawa area, she suggested that Mr. Leafloor drive while she was the passenger. The Applicant only knowing Mr. Leafloor since April, 2001 did not know he was a suspended driver and at no time did she ask to see his driver's licence. She testified that she only assumed he was a valid driver as he made his final payment on his own vehicle this past June and has driven it since the impoundment of her vehicle.

Since the Applicant's vehicle has been impounded, Mr. Leafloor allowed the Applicant to use his vehicle, but on the day the Applicant used it, it had to be towed home. Mr. Leafloor has indicated to the Applicant that he will assist her financially with the release of the impounded vehicle. They have arranged to split the cost of the impoundment fees equally.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Carl L.K. Leafloor;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 30, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal under Due Diligence

One issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Mr. Leafloor's driver's licence at the time in respect of which the order was made was not then under suspension.

The Applicant testified that she is the owner of the vehicle that has been impounded and at the time of impoundment Mr. Leafloor was driving the vehicle.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

The evidence before the Tribunal, in the Applicant's own testimony, was that the Applicant at no point in time asked Mr. Leafloor if he possessed a valid driver's licence. She merely assumed that Mr. Leafloor had a valid driver's licence and the thought never crossed her mind to check. She relied on his honesty and integrity. Unfortunately, the Applicant did not take any measures to ensure that he had a valid driver's licence. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal under Exceptional Hardship

The Applicant has requested an appeal on the grounds of “exceptional hardship” under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for her claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Applicant has testified that there are two other alternative vehicles, an elderly neighbour’s vehicle and Mr. Leafloor’s vehicle. She could use a taxi if needed, but cannot afford the \$30 charge. She also, on occasion, gets a lift to or from work from a co-worker.

With regard to possible threat to the health or safety of any person ordinarily transported by the motor vehicle, it was noted that the community in which the Applicant resides is not “911” accessible. As stated previously, the Applicant had heart surgery last year. She visits her doctor once every 2 to 3 weeks. Since the impoundment, she has kept all of her appointments. If, hypothetically speaking, the Applicant had a heart attack, the Tribunal does not feel that she would be in a position to drive herself to the hospital.

The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting since there is no threat of loss of employment and she has been able to get to work and has only missed 4 or 5 days since the impoundment.

Evidence was heard that the Applicant has incurred some financial hardship as a result of the loss of the vehicle. The Applicant may pursue compensation from the suspended driver, Carl Leafloor, as is stated in section 55.1(21) of the *Highway Traffic Act*:

“The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order”.

After considering the above requirements, the Tribunal finds that the Applicant albeit inconvenient to get to her place of employment, has alternatives to the impounded vehicle and the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: September 18, 2001

J.P.

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

J.P.

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 48.3(2) of the *Highway Traffic Act* TO
SUSPEND A PERSON'S DRIVER'S LICENCE FOR A PERIOD OF 90
DAYS dated July 19, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

J.P.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), J.P. (the "Applicant") initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles made pursuant to section 48.3(2) of that Act, dated July 19, 2001 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 6(1) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated July 19, 2001 to suspend the driver's licence of J.P. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 18, 2001

MOGHADDAM, ALRIEZA AND JKA MOTORS LTD.

JKA MOTORS LTD. AND ALIREZA MOGHADDAM

MOTION TO CONSIDER A STAY OF AN ORDER OF
THE LICENCE APPEAL TRIBUNAL

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: G. PETER ABRAHAM, Counsel representing the Applicants
AVIVA R. HARARI, Counsel representing the Registrar

DATE OF MOTION: September 14, 2001 Toronto

REASONS FOR RULING

1. BACKGROUND:

The Applicants bring a motion to this Tribunal in which they seek an order granting the stay of the Tribunal's decision dated July 25, 2001, to revoke the registrations of JKA Motors Ltd. ("JKA") as a motor vehicle dealer under the *Motor Vehicle Dealers Act* (the "Act") and Alireza Moghaddam ("Moghaddam") as a motor vehicle salesperson under the Act.

2. THE FACTS:

A. GROUNDS OF APPEAL

The Applicants have filed a Notice of Appeal with the Ontario Superior Court of Justice, Divisional Court. The grounds of appeal read as follows:

1. The Tribunal erred when he appeared to have accepted and gave full weight to uncorroborated and hearsay evidence tendered by the Respondent to demonstrate dishonesty on the part of the Appellants.

2. The Tribunal erred when he failed to take into account evidence given by the Appellant, Alireza Moghaddam, and corroborated by the Respondent's own witness that the Appellant, Alireza Moghaddam, oftentimes did assist customers who had problem with their purchased vehicles.
3. The Tribunal erred by not taking into consideration a previous decision of the Tribunal which dealt with identical facts and circumstances.
4. The Tribunal erred by placing too onerous a evidentiary burden on the Appellants and too lenient a evidentiary burden on the Respondent.
5. The Tribunal erred in effect depriving the Appellants the right and opportunity to cross examination and thereby depriving the Appellants of fundamental fairness.
6. The Tribunal erred in failing to apply the principles enunciated by the *Statutory Procedures Act*.
7. The Tribunal erred by giving full weight to questionable and inconsistent evidence tendered by the Respondent.

B. GROUNDS FOR STAY OF PROCEEDINGS

The Applicants rely on the following grounds for a stay of the Tribunal's decision;

1. The Applicants/Registrants have a meritorious Appeal;
2. There are serious issues to be tried;
3. There would be irreparable and irrevocable harm to the Applicants;

C. AFFIDAVIT EVIDENCE

Applicants' motion for a stay is supported by an affidavit of Moghaddam in which he deposes as follows:

1. I am one of the Applicant in this proceeding and the Director of the other Applicant, JKA Motors Ltd.
2. I am a citizen of Canada, born in Iran on April 18, 1958. I came to Canada on July 3, 1989.
3. I hold a master degree in the science of geology from Kashmir University but I am very much interested in motor vehicles having obtained valuable experience in the mechanics of motor vehicles from assisting my father who was a motor vehicle mechanic. My experience was bolstered when I assisted my brother in his motor vehicle sales business.

4. Upon my arrival in Canada I ran a fast food business and took a computer course at the George Brown Community College. I applied for registration as a car salesman and for my company JKA Motors to be a dealer. I obtained the necessary licence in May 1999.
5. I leased premises at 395 Dundas Street East and set up my motor car dealership in March 1999. I employed 3 persons.
6. The inspector with the Ontario Motor Vehicle Industry Council ("OMVIC) attended at my registered premises on September 30, 1999 to conduct an inspection. We were a very young and inexperienced dealership at the time and not every facet of the industry's requirement was in place. For instance, we did not have a garage register. The inspector attended again on September 6, 2000 and on October 27, 2000.
7. On December 28, 2000 the Registrar, *Motor Vehicle Dealers Act* ("MVDA) issued a proposal to revoke the registration of JKA Motors Ltd. as a dealer and myself as a salesperson.
8. The hearing into this proposal took place on May 18, 2001. At the hearing it became clear that none of the witnesses called by the Registrar had come forward spontaneously but were rather contacted and prepared by the Registrar to give evidence against me and my business.
9. Secondly, quite a number of the documentary evidence tendered by the Registrar did not have the support of their respective authors. The documents were tendered and identified but could not really be proven because the authors of them did not testify. There was not opportunity for my lawyer to cross examine on these documents. The tribunal however in his decision seemed to have given full evidentiary weight to these hearsay evidence in deciding that I was dishonest and unworthy of continuing to be a motor vehicle salesperson.
10. Further it seems that the fact that almost all of the witnesses who did show up indicated that I assisted them with any and all follow up problems was of no evidentiary significance to the tribunal. This was particularly troubling from a legal and jurisprudential point of view because it seems that the tribunal had somehow decided to give little or no credit or weight to evidence in my favor but full weight and credence to evidence against me even though the evidence against me was uncorroborated, hearsay evidence.
11. The Tribunal failed to follow or give reasons why it did not follow or distinguished a previous decision of the tribunal which dealt with identical facts and circumstances, and in which case the Tribunal decided that terms and conditions were appropriate.
12. If I am unable to stay in business I will be forced to go into bankruptcy. I have a child whom I have to support, and I have three employees who depend on me and on this business continuing. I have filed an appeal which I believe has significant merits of both procedure and substance. Irreparable harm would befall me if a stay was not granted. Even if I won my appeal I would have been financially crippled if a stay was denied at this time.

13. I ask the tribunal grant me a stay from the decision of the Tribunal of July 25, 2001, until the consideration of my appeal filed with the Divisional Court of Ontario.
14. I swear this Affidavit in support of my Motion to stay the Decision of the Tribunal dated July 25, 2001 and for no other or improper purpose.

The Registrar has filed an Affidavit of Mary Jane South in response to the Affidavit of Moghaddam. Mary Jane South deposes as follows:

1. I am the Deputy Registrar, Motor Vehicle Dealers Act and as such have knowledge of the matters hereinafter deposed.
2. By Proposal dated December 28, 2000 the Registrar sought to revoke the registration of JKA Motors Ltd. as a motor vehicle dealer and further sought to revoke the salesperson registration of Alireza Moghaddam, the sole officer and director of the corporate dealership.
3. Following a hearing before the Tribunal, at which the Applicants were represented by counsel, the Tribunal directed the Registrar to carry out the Proposal to Revoke the registrations of JKA Motors Ltd. as a motor vehicle dealer and to revoke the salesperson registration of Alireza Moghaddam. The decision dated July 25, 2001. Annexed hereto and attached as Exhibit 'A' is a true copy of the Tribunal's decision dated July 25, 2001.
4. Attached hereto as exhibits 'B', 'C' and 'D' respectively are copies of the written submissions of the Registrar, the applicant and the Registrar's subsequent reply.
5. At all material times Moghaddam was the sole officer and director of the corporate dealership.
6. Despite having been advised by the registrar's office of certain disclosure requirements, the applicants failed to make full and honest disclosure to purchasers with respect to the history and condition of vehicles being purchased.
7. Four consumers attended at the hearing and provided evidence that certain material information had not been disclosed to them by the Dealer at the time of purchase. The consumers were not cross-examined on their evidence confirming the lack of full and honest disclosure at the time of purchase.
8. At no time did the dealer deny knowledge of the true history and condition of the vehicles sold which were referred to in the Proposal.
9. I have reviewed the affidavit of Alireza Moghaddam sworn August 15, 2001. While the dealer may have assisted consumers with complaints subsequent to the purchase, the Registrar is concerned with the failure to make full and honest disclosure to consumers at the time of purchase. Any subsequent assistance provided to consumers does not mitigate the lack of disclosure.

10. During inspections conducted by a representative of the Registrar's office, the dealer provided copies of false documents, in particular the dealer provided copies of bills of sale with certain disclosures. However upon further follow up by the Registrar's office, it was discovered that copies of the bills of sale given to consumers did not have any similar disclosure. This is particularly troubling to the Registrar as these documents are carbon copies.
11. Despite repeatedly being advised by a representative of the Registrar' office to maintain an up to date Garage Register, the dealer failed to comply.
12. Given the dealer's and Moghaddam's past conduct I verily believe that the dealer and Moghaddam will not comply with any terms that may be imposed by the Tribunal if the stay motion is granted.
13. I make this affidavit in support of the motion herein and for no other or improper purpose.

In this motion, Exhibit "B" referred to in paragraph 4 of Mary Jane South's above affidavit (Respondent's Motion Record – Tab B) contains the Registrar's written submissions made to the Tribunal which heard the Applicants' appeal to the Registrar's Proposal. Exhibit "C" referred to in Mary Jane South's affidavit above (Respondent's Motion Record – Tab C) contains the Applicants' written submissions made to the Tribunal which heard the aforesaid appeal. Exhibit "D" also referred to in paragraph 4 of Mary Jane South's affidavit is the Registrar's written reply to the Applicants' written submissions contained in Exhibit "C".

No further or other affidavits were filed by either the Applicants or the Registrar.

3. THE LAW:

Section 25(1) of the *Statutory Powers and Procedures Act* reads as follows:

25.(1) An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,

- (a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or
- (b) the tribunal or the court or other appellate body orders otherwise.

The above quoted section results in an appeal from a Tribunal operating as a stay unless it is expressly provided to the contrary in the *Motor Vehicle Dealers Act*.

Section 7(9) of the *Motor Vehicle Dealers Act* reads as follows:

- 7(9) Although a registrant appeals from an order of the Tribunal under section 11 of the *Ministry of Consumer and Commercial Relations Act*, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

In the matter of *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832* (1987) 38 D.L.R. (4th) 321, the court adopted a 3-stage test for courts to apply when considering an application for a stay. This decision was followed in *RJR-Macdonald Inc. v. Canada (A-G)* (1991) 82 D.L.R. (4th) 385 at 405.

FIRST TEST

A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.

SECOND TEST

It must be determined whether the Applicant would suffer irreparable harm if the application were refused.

THIRD TEST

An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

4. ANALYSIS:

In terms of Section 7(9) of the *Motor Vehicle Dealers Act*, the decision of the Tribunal dated July 25, 2001 takes immediate effect and an appeal from that decision does not operate as a stay of such decision. However, the Tribunal may grant a stay of the decision until the disposition of the appeal.

The motion now before this Tribunal is for an order staying its decision of July 25, 2001, pending disposition of the Applicants' appeal.

The Tribunal will now consider each of the tests referred to above and in so doing will apply those tests to the facts presented in this matter.

CONSIDERATION OF THE FIRST TEST

The House of Lords held *American Cyanamid Co vs. Ethicon Ltd.* [1975] A.C. 396, that for an appellant to meet this first test it must satisfy the Court that there is a serious question to be tried, as opposed to a frivolous or vexatious claim. The decision in the *American Cyanamid* case has been followed on this particular point in many Canadian cases and is followed by this Tribunal in this matter.

In the matter of *RJR MacDonald Inc. vs. Canada* (A-G) 111 D.L.R. (4th) 385, heard before the Supreme Court of Canada on March 3, 1994, it was held that there are no specific requirements which must be met in order to answer the question as to what is a serious question to be tried. The threshold is a low one.

The Registrar has the burden of proving the existence of facts which afford reasonable grounds for his belief that the Applicants' registration should be revoked under section 6(2) of the Act. The Registrar based his proposal on the past conduct of the Applicants giving rise to reasonable grounds for his belief that the Applicants will not carry on business in accordance with law, and with honesty and integrity.

In the matter before the Tribunal and applying what was held in both the aforementioned cases, insofar as the first test is concerned, the Tribunal finds that with respect to the vehicles sold by JKA to purchasers Spaczynski, Guzman, Trieu and Razdan the decision arrived at by the Tribunal may raise serious or substantial issues for argument before the Appeal Court. The Tribunal notes that none of the abovementioned four purchasers gave viva voce evidence at the hearing of this matter. The Registrar relied entirely on documentary evidence that those purchasers were not aware of, or had been informed of, accident damage to the vehicles they purchased. The Registrar was entitled to rely on documenting evidence by virtue of section 15 of the *Statutory Powers and Procedures Act* and to weight such evidence. The weight applied by the Tribunal to this documentary evidence may well have been too high having regard to the fact that none of the four purchasers had testified at the hearing thereby denying the Applicants of the opportunity of cross-examining those purchasers. On this basis, and in regard to the allegations pertaining to those four purchasers, the Tribunal believes that the Applicants have met the first test, in that there is a justiciable question that has been presented to the Tribunal.

However, in relation to the vehicles that were sold by JKA to purchasers Musiychuk, Sheik, Cybelius and Roberts, those four persons did attend before the Tribunal at the hearing and did give viva voce evidence and in each instance testified that there had been no disclosure to them as to accident damage to the vehicles they purchased. The Registrar's counsel in her written submissions to the Tribunal that heard this matter (Respondent's Motion Record at Tab B) and in her submissions made to the Tribunal hearing this motion stated that none of the above four purchasers were cross-examined at the hearing "regarding any information or disclosure made to them at the time of purchase". In the Applicants' counsel's written submissions in reply to the Registrar's written submissions at the conclusion of the hearing he conceded that "from the facts it is clear that the Registrant failed to make adequate disclosure to customers in a number of occasions". (Respondent's Motion Record at Tab C, page 1)

The Applicants' counsel did not deny that there had been non disclosure in the four abovementioned purchaser's matters, but contended that the punishment imposed by the Registrar was too harsh and that the imposition of terms and conditions would have been appropriate. This approach is, in the opinion of the Tribunal, not justified.

It is of important to note what Southey J. said in his decision in *Brenner* reported at (1983 Div. Ct.) CRAT 19 (1971-1989) SCO Decisions and Orders, page 59:

... the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

The decision of the Court in *Brenner*, confirms that it is the Registrar that has discretion in reaching a conclusion as to whether past conduct affords reasonable grounds for belief that Applicants will not carry on business as envisaged and required by the *Act*. In this matter, the Applicants have been shown to have clearly breached the *Act*. The Registrar's decision based on that breach was a reasonable one, and he exercised his discretion reasonably and correctly. It is not the Tribunal that has the discretion but the Registrar. For the Registrar's decision to be reversed, the Court in *Brenner* requires that the Tribunal must be able to conclude that the Registrar was in error in his conclusion and that the past conduct of the Applicant does not afford reasonable grounds for the Registrar's decision to revoke.

The Applicants have conceded that in the four matters referred to above there was no disclosure to the four purchasers. Accordingly, applying Southey J.'s decision in *Brenner*, the Tribunal finds the Applicants have not met the first test and that in relation to those four matters there is no serious or justiciable question for consideration by the Court of Appeal.

CONSIDERATION OF THE SECOND TEST

The Registrar's counsel conceded during the hearing of this Motion that the Applicants would suffer irreparable harm if a stay of the Tribunal's decision of July 25, 2001 is not granted to the Applicants. The Tribunal accordingly concludes that the second test has been met by the Applicants.

CONSIDERATION OF THE THIRD TEST

The third test to be applied was described by Beetz J. in *Metropolitan Stores (MTS) Ltd. vs Manitoba Food and Commercial Workers, Local 832* (1987) 38 D.L.R. (4th) 321 at page 334 as:

A determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

The balance of convenience and public interest considerations must be taken into account. It was held in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993) 106 D.L.R. (4th), 507 at page 530 that:

Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

The *Act* regulates the motor vehicle industry and is a consumer protection statute. Considerations of public interest are of great importance and were no doubt behind the rationale for bringing the *Act* into existence.

The Registrar under the *Act* is empowered to ensure that the public interest is safeguarded. The Registrar has a duty to deal with motor vehicle dealers and salespersons who he reasonably perceives to be acting contrary to the public interest and who may cause harm to the consumer. Considerations of public interest are of great importance having regard to the tenor of the *Act*, and its Regulations.

According to the undisputed testimony of OMVIC inspector Gingras' evidence, the Applicants ignored advice and warnings delivered by her to Moghaddam during her inspections at JKA premises on September 20, 1999, September 6, 2000 and October 27, 2000. The September 20, 1999 inspection revealed that a Garage Register was not being maintained by JKA as required by section 60 of the *Act* and by section 2 of Regulation 595 to the *Act*. Gingras not only supplied the Applicants with a Garage Register but personally reviewed with Moghaddam how it was to be completed. On Gingras' inspection of September 6, 2000 she noted that there was, as yet, no Garage Register being kept by the Applicants and observed that on a subsequent visit by her to JKA's premises on October 27, 2000 the Garage Register was still not current.

Furthermore, according to the undisputed testimony of Gingras on her visit to the Applicants' premises on September 20, 1999 she discussed with Moghaddam the necessity of making written disclosure on the bill of sale of the fact that a motor vehicle was an accident repair vehicle. On Gingras' visit to JKA's premises on September 6, 2000 she removed copies of bills of sale for inspection. On her subsequent visit of October 27, 2000 she noted that the Applicants had failed to make disclosure on certain bills of sale regarding accident repair.

The uncontroverted evidence in this matter is that the Applicants, despite having been warned by an OMVIC inspector on more than one occasion, continued to contravene the *Act* and regulations insofar as maintaining a Garage Register and continued in their failure to disclose material information to at least four purchasers regarding the vehicles they were purchasing from the Applicants.

Having regard to the material non disclosures by the Applicants, coupled with a continued failure to maintain a Garage Register as required by the Act and the regulations, the Tribunal is not imbued with any confidence that if permitted to continue in business pending the appeal, the Applicants will comply with the requirements imposed upon them by the Act and its regulations. If the Applicants were permitted to continue to trade, the public would be placed at risk in their dealings with the Applicants and the public interest would suffer harm.

The Tribunal is therefore of the opinion that the Registrar does have a well founded fear that the Applicants, if permitted to carry on business pending the hearing of the appeal, would not conduct themselves within the law and with honesty and integrity.

In the matter of *RJR MacDonald* at page 409 the court stated:

..In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

The acts and omissions of the Applicants have either been admitted by the Applicants or have not been dealt with or contested by them. Accordingly, when it comes to balancing the harm that may be caused to the public interest and the interest of the Applicants, the Tribunal finds the public interest as represented by the Registrar is paramount and takes precedence over the Applicants' interest.

The Tribunal is therefore of the opinion that the Applicants fail to meet the third test.

DECISION:

For the reasons stated above, pursuant to the authority vested in it by section 7(9) of the Act, the Tribunal directs that the Applicants' motion for a stay of the Tribunal's decision of July 25, 2001 until the disposition of the Applicants' appeal to the Superior Court of Justice be and is hereby refused.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

FOURNIER, DONALD AND DON FOURNIER SERVICE CENTRE INC.

DON FOURNIER SERVICE CENTRE INC. AND DONALD FOURNIER

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES 91(8)(a)(c)
and (e) AND CLAUSES 93(c) OF THE *HIGHWAY TRAFFIC ACT* R.S.O.
1990, CHAPTER H.8 AS AMENDED

TO REVOKE THE REGISTRATIONS OF DON FOURNIER SERVICE
CENTRE INC. AS A MOTOR VEHICLE INSPECTION STATION AND
DONALD FOURNIER AS A MOTOR VEHICLE INSPECTION MECHANIC

TRIBUNAL: JOHANNE N. MORISSETTE, Vice-Chair

APPEARANCES: RONALD G. GUERTIN, Counsel, representing the Applicant

PATRICK MOORE, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
HEARING: September 10, 2001

Ottawa

ORDER

Following attendances on September 10, 2001 at a hearing before this Tribunal of Ronald G. Guertin, Counsel on behalf of Don Fournier Service Centre Inc. and Donald Fournier (the Applicants) and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards (the Director);

WHEREAS the Applicants filed an appeal with the Tribunal, requesting a hearing;

AND WHEREAS the hearing scheduled for September 10 and 11, 2001 was to be the continuation of the hearing which commenced on June 25, 26 and 27, 2001 at Ottawa, Ontario;

AND WHEREAS Mr. David Hair failed to attend at the hearing to give evidence to this Tribunal although served with a Summons to attend issued by the Tribunal on September 4, 2001 under the authority of the *Statutory Powers and Procedures Act*.

AND WHEREAS at the hearing on September 10, 2001, Mr. Guertin, counsel for the Applicant requested an adjournment of the hearing due to illness in the family of the Applicant;

NOW THEREFORE THIS TRIBUNAL ORDERS:

- 1) That the hearing of this matter is adjourned upon consent of the parties to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 a.m., on Monday, December 3, 2001 and to continue on December 4, 5 and 6, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Johanne N. Morissette,
Vice-Chair

RELEASED: September 20, 2001

RICHMOND PROPERTIES INC.

PREHEARING

RICHMOND PROPERTIES INC.

APPEAL FROM A PROPOSAL OF REGISTRAR OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE REGISTRATION

TRIBUNAL : DEREK ISRAEL, Vice-Chair, Presiding
ANTOINE AOUAD, M.D., Member

APPEARANCES:

JOHN MCGARRITY, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar, Ontario
New Home Warranty Program

DATE OF
PRE-HEARING: September 19, 2001 Toronto

ORDER

Following attendances on September 19, 2001 at a prehearing before the Licence Appeal Tribunal of John McGarrity, Counsel representing Richmond Properties Inc. (the "Applicant"), and Netanus Rutherford, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, October 16, 2001 and to continue if necessary on October 17, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

- 1) There was no resolution of the issues between the parties
- 2) The Parties to the hearing are the Applicant and the Registrar.
- 3) Both parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair,
Presiding

Antoine Aouad, M.D., Member

RELEASED: September 21, 2001

FLEWITT

PREHEARING

GERALD W. FLEWITT

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *COLLECTION AGENCIES ACT*
R.S.O., 1990 CHAPTER C. 14 AS AMENDED

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

GERALD W. FLEWITT, Applicant
JEANU IU, Counsel representing the Registrar,
Collection Agencies Act

DATE OF

PRE-HEARING: September 19, 2001

Toronto

ORDER

FOLLOWING attendances on September 19, 2001 at a prehearing before the Tribunal of Gerald W. Flewitt, (the "Applicant") and Jean Iu, Counsel on behalf of the Registrar, *Collection Agencies Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, December 11, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

- 1) The Parties record that there has been no resolution regarding the Registrar's Proposal to refuse the Applicant's registration as a collector.
- 2) The Parties to the hearing are the Applicant and the Registrar.
- 3)(a) The Applicant concedes as correct the content of paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 16, 18, 19, 20, 21, 25, 27 and 28 in the Registrar's Proposal of July 17, 2001 under the heading "D. PARTICULARS".

3)(b) In regard to:

- (i) Paragraph 10 in the Registrar's Proposal under the heading "D. PARTICULARS", the Applicant does not concede the criminal convictions of September 20, 1993 and September 24, 1993 for "failure to comply with recognizances" and "assault cause bodily harm" reported in the Canadian Police Information Computer (CPIC) records, but does concede the other four recorded criminal conviction in those records.
 - (ii) Paragraph 17 in the Registrar's Proposal under the heading "D. PARTICULARS", the Applicant does not concede that he was either charged or convicted of the offence of "mischief" but does concede the charge and conviction of "fail to comply with probation".
 - (iii) Paragraph 22 in the Registrar's Proposal under the heading "D. PARTICULARS", the Applicant concedes he was employed by Collect Com Credit Inc. for one or two weeks during September 1997 in the position other than a collector while awaiting approval of his application.
 - (iv) Paragraph 29 in the Registrar's Proposal under the heading "D. PARTICULARS", the application received on June 18, 2001 was made by the Applicant on May 18, 2001 and accompanying such application was a CPIC report dated April 5, 2001.
- 4) The parties are not, at this time, in a position to identify witnesses who may be called to testify at the hearing.
- 5) Both parties shall comply fully and in a timely manner with the disclosure requirements required by Rule 6 of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: September 21, 2001

SHILLING

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1504921 OWNED BY: TINA SHILLING of: 836 Mississauga Road, General Delivery, Curve Lake, Ontario K0L 1R0 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: August 6, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

TINA SHILLING

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Tina Shilling, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: September 12, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

TINA SHILLING

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #1504921** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended, on August 6, 2001.

The applicant, **Tina Shilling**, whose name is shown on the plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.

No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.

The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the Highway Traffic Act, stating **that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.**

Investigations conducted by the Registrar revealed that the driver of the motor vehicle at the time the impound order was made was not then under suspension.

The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.

The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

TINA SHILLING

REGISTRAR OF MOTOR VEHICLES

(signature of Applicant)

(signature of Registrar)

(date)

(date)

CYNTHIA BURGHER O/A CYNTHIA'S BUS CHARTER

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
CYNTHIA BURGHER O/A CYNTHIA'S BUS CHARTER
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 11, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CYNTHIA BURGHER O/A CYNTHIA'S BUS CHARTER

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Cynthia Burgher o/a Cynthia's Bus Charter, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 4, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

CYNTHIA BURGHER O/A CYNTHIA'S BUS CHARTER

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Cynthia Burgher o/a Cynthia's Bus Charter (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 50007136/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since March 16, 2000. The Registrant has a fiscal year end of December 31st.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated November 22, 2000, TICO requested that the Registrant file its financial statements for its fiscal year ending December 31, 2000 by March 31, 2001.
4. On April 10, 2001, TICO sent a second request for the Registrant's financial statements for its December 31, 2000 year-end, which gave the Registrant a deadline of April 30, 2001.
5. By letter dated May 1, 2001, the Registrar, *Travel Industry Act* informed the Registrant that if it did not provide its financial statements by May 16, 2001, the Registrar would initiate administrative action including a proposal to revoke registration.
6. By June 11, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.

EVENTS AFTER THE ISSUANCE OF THE PROPOSAL

7. On June 20, 2001, the Registrant submitted an Income and Loss Statement for its year-ended December 31, 2000. The Statement was not acceptable because it was not accompanied by a "Review Engagement Report" or signed by a licensed public accountant, as required by section 24 of the Regulation.
8. By letter dated June 26, 2001, TICO advised the Registrant that the financial information submitted was deficient.
9. To date, the Registrant has not filed its financial statements for its fiscal year ended December 31, 2000, as required by section 24 of the Regulation.
10. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 11, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall file complete financial statements, as required by section 24 of the Regulation, for its fiscal year ended December 31, 2001, no later than September 30, 2001;
 - (b) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2001, no later than March 31, 2002;
 - (c) The Registrant shall file complete financial statements, as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2002, no later than March 31, 2003;
 - (d) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant.
3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (d) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of August, 2001

Ms Cynthia Burgher
Cynthia Burgher o/a Cynthia's Bus Charter
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

REDPARK HOMES LTD.

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a REGISTRATION by
REDPARK HOMES LTD.

AND IN THE MATTER OF the PROPOSAL by
the Registrar under the
Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),

TO REFUSE TO RENEW REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

REDPARK HOMES LTD.

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on September 24, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on Wednesday, October 10, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 20, 2001

1282868 ONTARIO LTD. (FIRST CHOICE RENT A CAR)

1282868 ONTARIO LTD. (FIRST CHOICE RENT A CAR)

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: MALCOLM FEALING,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

1282868 ONTARIO LTD. (FIRST CHOICE RENT A
CAR), Applicant
ROMAN POP, Agent for Applicant

DATE OF HEARING: September 18, 2001

DECISION RELEASED: September 21, 2001 Toronto

REASONS FOR DECISION

A hearing was held on September 18, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	1282868 Ontario Ltd. (First Choice Rent A Car) (the "Applicant")
Motor Vehicle:	1992 Chevrolet Impala (Cav) plate no. AFKT 947 (the "vehicle")
Date of Appeal:	August 31, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 18, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- 1) The vehicle was rented to Szczeblewski Grzegorz up until Aug 7/2001. The vehicle was not returned to company and the company cannot get in touch with the renter.
We want the vehicle back ASAP.
A/ see attached rented agreement
B/ see attached letter from company president
We would like to have our vehicle removed from the towing company as to minimize our mounting expenses.

The Agent Mr. Pop did not produce any witnesses. He began his submission by proclaiming emphatically that the Ministry of Transportation should not have let the matter get to the point of an appeal. The Ministry, he stated, should have released the vehicle based on the Company's statement that it cannot find the renter, and that it would like to have the vehicle removed from the pound in order to minimise mounting expenses.

Mr. Pound went on to say that he was only able to speak to Grzegorz Szchlewski, the renter by telephone, and that he had been told that Mr. Szchlewski and Mr. Alexander Vrabel were friends and roommates. According to Mr. Pop, the friends had gone fishing and Mr. Vrabel had insisted on driving home. Mr. Szchlewski did not know that his friend did not have a valid driving licence.

According to Mr. Pop, the Company is operated by immigrants who are not sophisticated businessmen. They only place liability coverage on their cars. They are usually more than two years old. The impounded vehicle is a 1992 Chevrolet. Mr. Pop went on at length about the fairness of the legislation, claiming that there should be some remedy in the legislation to allow the Ministry to release the automobile. At this point the Presiding Member had to point out to the Agent that this was neither the occasion nor place for changing the law. He was asked to concentrate on the issue at hand, that is, the ground of appeal, due diligence.

Mr. Pop explained that the President of the Company had called the police to report the car stolen. He said that the police suggested that because the car was being rented on a monthly

basis it could be that the renter was late in returning the automobile and therefore reporting the car stolen was not warranted. Mr. Pop also stated that he had gone to City Hall, Toronto, to report the car stolen and was advised by a Justice of the Peace that he should not declare that the car had been stolen.

During his submission, Mr. Pop was at pains to point out that he had never seen Mr. Szcblewski and could not swear that the person he had spoken to on the phone had in fact been the man who had rented the car.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Alexandre Vrabel;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to provide Breath or Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 14, 2001.

The Respondent first advised Mr. Pop that although he had a lot to say about the legislation, financial hardship to the Company, etc., her purpose as the representative of the Ministry of Transportation was to deal with the subject of the appeal, which was whether or not the Company had exercised due diligence.

Mr. Pop was asked whether he was employed by the Company. He replied that he was not. According to Mr. Pop, the Company neither checks the authenticity of a person's driver's licence when renting a car nor makes a copy of the renter's driver's licence. He asserted that the Company did not have any means of checking the validity of a driver's licence. The Respondent then showed him a document which explained how to access the Ministry records. On examining the document, Mr. Pop pointed out that even though the Company could check drivers' records, it had no way of knowing that Mr. Vrabel would be driving the car and therefore was not culpable.

The Respondent then referred to the Rental Agreement and asked whether it showed that the renter was the only person authorized to drive the car. Mr. Pop was unable to substantiate this.

Once again, without prompting, Mr. Pop began to detail the financial hardship the Company was experiencing. When asked why the Company had not made an Appeal on the basis of Undue Hardship, he stated that when he was filling out the Appeal form he was advised by a staff member of the Licence Appeal Tribunal that choosing more than one option would only confuse matters. When Mr. Pop told that this was not the case and that the employee would be asked why that advice had been given, Mr. Pop stated that he would not be able to point out the person who had given him that advice.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Section 50.2 (3)(c) states that the Tribunal may set aside the order to impound if the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension. Mr. Pop was not able to demonstrate that the Company had exercised due diligence. It was not the Company's policy to seek to confirm the validity of a driver's licence when renting its automobiles.

Accordingly, there is not basis on which the Applicant could establish that due diligence was exercised to determine the validity of its renter's driver's licence or the validity of any subsequent driver, such as, Mr. Vlabel.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: September 21, 2001

794658 ONTARIO LTD. O/A TRAVEL MEDIA/JET-AWAY VACATIONS

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
794658 ONTARIO LTD. O/A TRAVEL MEDIA/JET-AWAY VACATIONS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: March 20, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

794658 ONTARIO LTD. O/A TRAVEL MEDIA/JET-AWAY VACATIONS

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 794658 Ontario Ltd. o/a Travel Media/Jet-Away Vacations, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 12, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

794658 ONTARIO LTD. O/A TRAVEL MEDIA / JET-AWAY VACATIONS

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND:

1. On **October 12, 1988**, the Registrant, 794658 Ontario Ltd. was approved for registration as a travel agent under the Act.
2. On **October 2, 1991**, the Registrant was approved for registration as a travel wholesaler under the Act. On this date, the Registrant also opened a retail branch office.
3. On **July 16, 1996**, and **September 9, 1996**, the Registrant registered two additional branch offices.

COMPLAINTS:

4. TICO has received consumer complaints, which indicate that the Registrant has made unwanted changes to passengers' bookings without their authorization. While the Registrant eventually addressed many of the complaints, the Registrant has not been fully cooperative and has not provided a written response to complaints in a timely fashion, despite an earlier undertaking by the Registrant to reply promptly to complaints, as summarized in paragraphs 4 through 39.
5. By letter dated **July 11, 1996**, John R. Ward, the Registrant's counsel, gave an undertaking to the Registrar, *Travel Industry Act* on the Registrant's behalf that the Registrant would respond to complaints on a timely basis. The undertaking was given in relation to the Registrant's application for a branch office registration. It stated:

794658 Ontario Limited, operating as Travel Media / Jet-a-way Vacations and Chellakadum Varghese Paulson hereby undertake to respond to all correspondence and faxes from the Ministry of Consumer and Commercial Relations relating to consumer complaints within twenty days of the Ministry having requested a response.

MCFARLANE AND JONES COMPLAINTS

6. On **March 30, 1999**, Ms Veronica McFarlane filed a consumer complaint with TICO relating to travel services purchased through the registrant.
7. By letter dated **April 8, 1999** TICO advised the Registrant of Ms McFarlane's complaint and requested the Registrant to respond to the complaint within fourteen days.
8. On **April 16, 1999**, Mr. Paul Jones filed a complaint with TICO. By letter dated **April 27, 1999**, TICO advised the Registrant of Mr. Jones' complaint. The Registrant was requested to respond to the complaint within fourteen days.
9. By letter dated **April 27, 1999**, TICO advised the Registrant that no response had been received to the complaint filed on **March 30, 1999**, by Ms McFarlane.
10. By letter dated **May 18, 1999**, TICO advised the Registrant it had not responded to the complaint of Ms McFarlane. TICO asked the Registrant to confirm receipt of this letter within twenty-four hours, and to advise TICO of when a written response could be expected by the Registrar within fifteen days.
11. By letter dated **May 18, 1999**, TICO advised the Registrant that it had not responded to Mr. Jones' complaint. TICO requested the Registrant to respond within fourteen days.
12. On **June 9, 1999**, Ms Rachel Palozzi, an Inspector designated by the Registrar, under the Act, made a site inspection at the premises of the Registrant, as the Registrant had not responded to the two outstanding consumer complaints. Mr. Paulson advised that a response to the outstanding complaints should be received by **June 14, 1999**.
13. On **June 25, 1999**, Ms Palozzi contacted the Registrant by telephone as no response to the outstanding complaints had yet been received. The Registrant advised that a response would be made by **June 28, 1999**.
14. By letter dated **July 12, 1999**, TICO advised the Registrant no response had been received to the outstanding consumer complaints from Mr. Jones and Ms McFarlane. The Registrant was requested to provide an immediate response.
15. By letter dated **July 12, 1999**, Mr. Paulson responded to the outstanding consumer complaints.

JAMES COMPLAINT

16. On **June 23, 1999**, Mr. Powell James filed a consumer complaint with TICO alleging that travel services advertised by the Registrant, which were not available to Mr. James as advertised.
17. By letter dated **July 6, 1999**, TICO advised the Registrant of Mr. James' complaint. The Registrant was requested to provide a response to the complaint within fourteen days
18. By letter dated **August 26, 1999**, the Registrant responded to Mr. James's complaint and stated that there were no seats available on the dates requested by Mr. James, who was not willing to travel on an alternate date.

HAYWOOD COMPLAINT

19. On **October 6, 1999**, Mr. Keith Haywood made a complaint by telephone to TICO alleging that the travel services, which he had booked with the Registrant for air travel without his consent and to his dissatisfaction.
20. On **October 14, 1999**, the Registrant refunded the deposit paid by Mr. Haywood for his booking.

MCINTYRE COMPLAINT

21. On **March 9, 2000**, Ms Joan McIntyre filed a complaint with TICO alleging that on **September 19, 1999**, she had purchased a charter flight from Jamaica to Canada for her son, which her son was unable to use because of a restriction relating to the charter flights, which required passengers to be Canadian citizens to use a one-way northbound charter flight to Canada originating in Jamaica. Ms McIntyre alleged that the Registrant did not advise her of this restriction.
22. By letter dated **March 10, 2000**, TICO advised the Registrant of Ms McIntyre's complaint and requested the Registrant to provide a written response within fourteen days.
23. By letter dated **March 27, 2000**, TICO advised the Registrant that no response had yet been received with respect to Ms McIntyre's complaint. The Registrant was requested to provide a written response within fourteen days.
24. By letter dated **April 18, 2000**, TICO advised the Registrant that it had still not responded to Ms McIntyre's complaint. The Registrant was requested to provide a written response within 15 days.
25. By letter dated **May 8, 2000**, the Registrant advised TICO that Ms McIntyre had purchased two round trip tickets from Toronto to Montego Bay, Jamaica and the tickets were issued to her accordingly. The Registrant stated that issues arising after the issuance of the tickets were not the responsibility of the Registrant.
26. During a site inspection of the Registrant on **May 12, 2000**, Mr. Greg Robinson, an inspector with TICO, advised the Registrant that its response to Ms McIntyre's complaint was insufficient. The Registrant was requested to provide a response to the complaint by **May 19, 2000**.
27. On **May 24, 2000**, TICO contacted the Registrant by telephone and ask the Registrant to respond to Ms McIntyre's complaint, as no further response had been received to the complaint by **May 19, 2000**. The Registrant indicated that Ms McIntyre had requested two two-way tickets to Jamaica and did not give any further information regarding her son.

BHAJAN COMPLAINT

28. On **May 4, 2000**, Ms Myna Bhajan filed a consumer complaint against the Registrant alleging that she booked and paid for travel services which included several flights to Trinidad departing from Toronto and that the flights and departure times had been changed by the Registrant without her authorization.
29. By letter dated **May 19, 2000**, TICO advised the Registrant of Ms Bhajan's complaint, and requested to respond to the complaint within fourteen days.
30. By letter dated **June 7, 2000**, TICO advised the Registrant that it had not yet provided a written response to Ms Bhajan's complaint. The Registrant was requested to provide a written response within fourteen days.

31. On **June 23, 2000**, the Registrant responded to Ms Bhajan's complaint and advised that it had made its best efforts to book the dates requested and obtain the travel documents from the airline, but it was subject to the airline being able to provide the seats on the dates requested and then provide the travel documents in a timely fashion.

FRANSON COMPLAINT

32. On **July 12, 2000**, Ms Annette Franson called TICO to complain about the Registrant, alleging that she booked and paid for travel services from Toronto to Montego Bay Jamaica departing **July 15, 2000** and returning **July 29, 2000** and advised by the Registrant shortly before the date of departure that her flight was overbooked. The Registrant offered to re-book Ms Franson on a different date or provide her with a refund.
33. On **July 12, 2000**, Ms Cindy Mirochnick, Client Services Representative with TICO, contacted the airline and wholesaler, who provided the travel services for which Ms Franson had paid, and was advised that the travel services for Ms Franson had not been booked. Ms Mirochnick questioned Mr. Paulson about why the booking was not made and he responded in a discourteous manner. The Registrant did provide Ms Franson with a full refund.

CADOGAN COMPLAINT

34. On **October 17, 2000**, Ms Linda Cadogan called TICO and alleged that she and her husband had purchased travel services from the Registrant to travel non-stop from Toronto to Kingston Jamaica departing on **October 19, 2000**. Shortly before departure, the Registrant advised Ms Cadogan and her husband that their flight was unavailable and gave them two options. They could travel on **October 19, 2000**, via Montego Bay with a change of planes, or they could travel on any other day, via Montego Bay with a change of planes. Neither option was acceptable to Ms Cadogan and Mr. Dennis, because they were seniors and a long stop-over would be too much for them.
35. On the afternoon of **October 17, 2000**, Ms Mirochnick contacted Mr. Paulson by telephone to follow-up on the Cadogan complaint. While speaking with Ms Mirochnick, Mr. Paulson became irate and gave his position that Ms Cadogan and her husband could travel on a different day, via Montego Bay, travel on the original date with a fare increase, or obtain a refund. Ms Mirochnick advised Mr. Paulson that she would relay this information to Ms Cadogan and call him back.
36. Ms Cadogan advised Ms Mirochnick that she wanted a refund, because she no longer wished to deal with the Registrant. The Registrant provided Ms Cadogan with a refund.

MILLER COMPLAINT

37. On **December 15, 2000**, TICO received a complaint from Ms Esther Miller alleging that she had, on **November 25, 2000**, paid the Registrant in full for seven seats to Panama City departing on **December 18, 2000** and returning on **January 9, 2001**, but had not yet received the tickets.
38. Ms Mirochnick contacted the Registrant and spoke to Mr. Paulson about the Miller Complaint. Mr. Paulson told Ms Mirochnick to leave him alone. He said that he did not have time for this and that Ms Mirochnick should stop bugging him. Ms Mirochnick asked Mr. Paulson to call her by the end of the day to advise her of when Ms Miller could pick up her tickets. Mr. Paulson again told Ms Mirochnick to leave him alone and hung-up on her.

39. After speaking to Mr. Paulson, Ms Mirochnick contacted Amanda Stafford at Skylink, who advised her that the Registrant had not sent payment for Ms Miller. So, the file automatically cancelled. The Registrant never secured the space and only put it on option. Ms Stafford informed Ms Mirochnick that it could provide Ms Miller with seven seats to Panama departing on **December 17, 2000** and returning on **January 12, 2001**. Ms Miller accepted these flights.

IMPROPER ADVERTISING:

40. The Registrant has placed advertisements in newspapers that do not comply with the Act and the Regulation and has continued to do so despite an order by the Registrar, under section 14 of the Act, to cease and desist such advertising, as summarized in paragraphs 41 through 59.
41. By letter dated **January 29, 1999**, TICO advised the Registrant that a newspaper advertisement appearing in the **December 17, 1998** edition of *Share* newspaper did not comply with the Regulation, because it failed to include the air carrier, the Registrant's registration number and address, or the terms and conditions of availability of the advertised price.
42. By letter dated **October 28, 1999**, TICO again advised the Registrant that an advertisement appearing in the **October 21, 1999** edition of *Share* newspaper did not comply with the Regulation, because it did not include the air carrier, hotel and travel wholesaler (where applicable), the Registrant's registration number, or the terms and conditions, if any, that limit the availability of the price.
43. After receiving a consumer complaint that fares advertised by the Registrant in the *Share* newspaper were not available, Mr. Robinson telephoned the office of the Registrant on **December 14, 1999** and was advised that prices advertised for travel services to Montego Bay and Kingston, Jamaica were not presently available. That day, TICO cautioned the Registrant that failure to ensure that advertisements are compliant might result in administrative action against the Registrant.
44. On **February 21, 2000**, Mr. Robinson telephoned the Registrant to inquire about the availability of advertised prices to Montego Bay in the **February 17, 2000** edition of *Share* newspaper. The price advertised was not available and the Registrant advised Mr. Robinson that the price would not be available until some months in the future.
45. By letter dated **February 25, 2000**, the Registrar, *Travel Industry Act* advised the Registrant that its newspaper advertisements were false and misleading and did not comply with the Regulation. Pursuant to section 14 of the Act, the Registrar ordered the Registrant to immediately cease and desist making false and misleading statements in its advertising. The Registrar also directed the Registrant to provide Mr. Robinson with copies of advertisements that have been corrected to contain the information required by the Regulation by **March 3, 2000**.
46. On **March 10, 2000**, Mr. Paulson, advised TICO that the advertised price for travel services to Montego Bay would be amended in order to represent a price currently available.
47. On **March 13, 2000**, TICO advised the Registrant by telephone that it had received the Registrant's

response on **March 10, 2000**.

48. The Registrant's advertisement in the **May 11, 2000** edition of the *Share* newspaper advertised an unavailable \$299 fare to Montego Bay and failed to include the information required by the Regulation.
49. On **May 12, 2000**, Mr. Robinson made a site inspection at the premises of the Registrant during regular business hours. After the inspection, Mr. Robinson provided Mr. Paulson with a written list of the compliance issues and consumer complaint that had prompted the inspection and that remained outstanding.
50. On **May 16, 2000**, Mr. Paulson advised TICO by telephone that he was still not clear of the compliance issues that were of concern to the Registrar. The Registrant was advised to respond in writing and identify the items of concern.
51. The Registrant's advertisement in the **June 1, 2000** edition of the *Share* newspaper advertised travel services to Montego Bay, which did not clearly identify the terms and conditions of availability and which failed to include the additional information required by the Regulation.
52. By letter dated **June 12, 2000**, the Registrar advised the Registrant that its advertisements in the *Share* newspaper continued to fail to comply with the Act for the reasons that TICO had previously outlined. The Registrant was further advised that if it failed to bring its advertising into compliance with the Act by **June 29, 2000**, TICO would initiate an Interim Suspension Order and a Proposal to Revoke Registration.
53. On **June 12, 2000**, Mr. Paulson telephoned the Registrar and stated that he did not understand the non-compliance issues as stated in the letter dated **June 12, 2000**. The Registrar advised Mr. Paulson that he would issue a letter detailing the compliance issues of concern.
54. By letter dated **June 13**, Mr. Robinson itemised for the Registrant the specific compliance issues that had to be corrected and requested the Registrant to provide a response to these issues by no later than **June 29, 2000**.
55. The Registrant's advertisement in the **June 29, 2000** edition of the *Share* newspaper was not in compliance with the Regulation.
56. The Registrant's advertisement in the **August 24, 2000** edition of the *Share* newspaper was not in compliance with the Regulation.
57. The Registrant's advertisement in the **September 7, 2000** edition of the *Share* newspaper was not in compliance with the Regulation.
58. The Registrant's advertisement in the **October 19, 2000** edition of the *Share* newspaper was not in compliance with the Regulation.
59. The Registrant's advertisement in the **March 8, 2001** edition of the *Share* newspaper was not in compliance with the Regulation.

FORM 1 FILING

60. The Registrant has not always filed its Form 1 filings promptly and in accordance with the Regulation as summarized by paragraphs 61 through 66.

61. The Registrant's Form 1 filing for the period ended **February 28, 1998**, and due by **April 14, 1998**, was received on **April 21, 1998**
62. The Registrant's Form 1 filing for the period ended **August 31, 1998**, and due by **October 15, 1998**, was received on **December 7, 1998**.
63. The Registrant's Form 1 filing for the period ended **February 28, 1999**, and due by **April 14, 1999**, was received on **June 1, 1999**.
64. The Registrant's Form 1 filing for the period ended **August 31, 1999**, and due by **October 15, 1999**, was received on **November 16, 1999**.
65. The Registrant's Form 1 filing for the period ended **February 28, 2000**, and due by **April 14, 2000**, was received on **April 25, 2000**.
66. The Registrant's Form 1 filing for the period ended **August 31, 2000**, and due by **October 15, 2000**, was received on **November 1, 2000**.

FINANCIAL STATEMENTS AND WORKING CAPITAL

67. The Registrant has been consistently late in filing its financial statements, as summarized in paragraphs 68 through 95.
68. On **March 17, 1995**, a site inspection was conducted at the business premises of the Registrant to determine why the financial statements for the fiscal years ending **August 31, 1993**, and **August 31, 1994**, had not yet been filed.
69. By letter dated **July 20, 1995**, the Registrant was requested to file the financial statements for the fiscal year ended **August 31, 1995**, on or before **November 30, 1995**.
70. By letter dated **September 15, 1995**, the Registrar requested the Registrant to file the financial statements for the fiscal year ended **August 31, 1994**, on or before **September 29, 1995**. The statements had been due by **November 30, 1994**.
71. By letter dated **September 28, 1995**, the Registrant requested an extension to file the financial statements for the fiscal year ended **August 31, 1994**, until **October 15, 1995**.
72. By letter dated **October 13, 1995**, the Registrant requested an extension to file the financial statements for the year ended **August 31, 1994** until **October 30, 1995**.
73. The financial statements for the fiscal year ended **August 31, 1994**, were filed on **November 21, 1995**.
74. On **November 22, 1995**, a site inspection was conducted at the premises of the Registrant. The inspector was provided with a copy of the overdue financial statements for the fiscal year ended **August 31, 1994**. The statements revealed a working capital shortfall of \$19,696.00 based on reported sales of \$2,231,952.
75. The Registrant filed a further financial statement for the period ended **January 15, 1995**, which indicated that its working capital shortfall had been addressed.

76. By letter dated **February 7, 1996**, the Registrar requested the Registrant to file the financial statements for the fiscal year ended **August 31, 1995**, on or before **February 23, 1996**. The statements had been due by **November 30, 1995**.
77. The financial statements for the fiscal year ended **August 31, 1995**, and due by **November 30, 1995**, were received on **February 23, 1996**.
78. By letter dated **August 30, 1996**, the Registrant was requested to file the financial statements for the fiscal year ending **August 31, 1996** by November 30, 1996.
79. On **December 11, 1996**, the Registrant was again requested to file the requisite financial statements.
80. By letter dated **December 31, 1996**, the Registrant was requested to file the financial statements for the fiscal year ended **August 31, 1996**, which were due by **November 30, 1996**, on or before **January 14, 1997**.
81. On **February 19, 1997**, the Registrar issued a Notice of Proposal to Revoke Registration for failure to file the financial statements for the fiscal year ended **August 31, 1996**. The statements had been due by **November 30, 1996**.
82. The financial statements for the fiscal year ended **August 31, 1996**, and due by **November 30, 1996** were filed on **February 27, 1997**. The statements revealed a working capital shortfall in the amount of \$30,454.00.
83. By letter dated **February 27, 1997**, the Registrant appealed the Notice of Proposal to Revoke Registration issued on **February 19, 1997**.
84. By letter dated **March 10, 1997**, the Registrar advised the Registrant of the working capital deficiency revealed by the financial statements as filed for the fiscal year ended **August 31, 1996**. The Registrant was requested to address the deficiency on or before **March 26, 1997**.
85. By letter dated **March 24, 1997**, the Registrant requested an extension of time to address the deficiency. The deficiency was subsequently addressed on **May 5, 1997**.
86. By letter dated **May 6, 1997**, the Registrar withdrew the Proposal to Revoke Registration dated **February 19, 1997**.
87. By letter dated **July 29, 1997**, the Registrant was requested to file the financial statements for the fiscal year ended **August 31, 1997**, on or before **November 30, 1997**, in accordance with the regulations.
88. On **December 17, 1997**, TICO made a site inspection at the premises of the Registrant .The inspection was made as a result of several consumer complaints, as well as the failure to file financial statements for the fiscal year ended **August 31, 1997**.
89. On **December 22, 1997**, the Registrant was again requested to file the financial statements for the fiscal year ended **August 31, 1997**.
90. By letter dated **February 10, 1998**, the Registrar requested the Registrant to file the financial statements for the fiscal year ended **August 31, 1997**, on or before **February 23, 1998**. The statements had been due by **November 30, 1997**.

91. By letter dated **March 3, 1998**, the Registrar requested the Registrant to file the financial statements for the fiscal year ended **August 31, 1997**, on or before **March 13, 1998**.
92. The financial statements for the fiscal year ended **August 31, 1997**, and due by **November 30, 1997**, were received on **March 13, 1998**.
93. The financial statements for the fiscal year ended **August 31, 1998**, and due by **November 30, 1998**, were received on **January 11, 1999**.
94. The financial statements for the fiscal year ended **August 31, 1999**, and due by **November 30, 1999**, were received on **December 21, 1999**.
95. The financial statements for the fiscal year ended **August 31, 2000**, and due by **November 30, 2000**, were received on **December 4, 2000**.
96. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

5. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **March 26, 2001**;
6. the Registrant's registration is to be subject to the following terms and conditions:
 - (e) The Registrant shall provide each customer with a completed invoice relating to his or her travel purchase, in a form and format approved by the Registrar. Such invoices shall include the information outlined in subsection 20(1) of Ontario Regulation 806/93 ("the Regulation"), a booking number to readily identify the travel service purchased, and an acknowledgement by the customer that he or she has been advised by the conditions relating to the travel purchase as outlined in subsection 21(2) of the Regulation. The invoices are to be sequentially numbered.
 - (f) The Registrant shall make available to TICO copies of any and all of its invoices, upon request, to ensure compliance with clause 2(a) above.
 - (g) The Registrant shall not make any changes to a customer's travel service purchase without prior written authorization by the customer.
 - (h) When credit cards are used to purchase travel services, the Registrant shall obtain written authorization from the credit card holder permitting the use of his or her credit card for the transaction.
 - (i) By **September 30, 2001**, the Registrant shall provide the Registrar with an authorization and direction appointing Mr. Varghese Podur as a Customer Relations Officer for the purpose of liaising with TICO to address any future complaints relating to the Registrant. The Registrar shall be advised of any change to Mr. Podur's appointment.

- (j) The Registrant shall respond to TICO's request regarding information relating to complaints in a timely manner. An oral response shall be provided within three (3) business days and a written response shall be provided within ten (10) business days, unless such lesser time may be necessary in matters involving imminent departure or other such urgency.
 - (k) The Registrant shall not place an advertisement for travel services without prior written authorization from TICO. Such authorization will not be unreasonably withheld.
 - (l) The Registrant shall file all future financial statements on time and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time.
 - (m) The Registrant shall file its future Form 1 filings on time and make the corresponding payments to TICO, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.
 - (n) By **September 30, 2001**, the Registrant shall provide the Registrar with a business plan outlining its intended operations.
7. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (i) inclusive, during the one (1) year period immediately following the date of this Consent Order, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
8. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of September, 2001

Mr. Chellakudam Varghese Paulson
Travel Media / Jet-A-Way Vacations
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

ADLS – 761 – HYPERACTIVE AIRWAY DISEASE

ADLS – 761 – HYPERACTIVE AIRWAY DISEASE

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: September 18, 2001

Written

DECISION

A hearing was held on September 18, 2001, at Toronto, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: September 19, 2001

ADLS – 761 - HYPERACTIVE AIRWAY DISEASE

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C., Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: September 18, 2001

DECISION
RELEASED: September 19, 2001

Written
Toronto

REASONS FOR DECISION

A written hearing was held on September 18, 2001, at Toronto, Ontario, to consider the appeal of the Applicant pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 19, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 8, 2001, and was received by the Tribunal on August 23, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no additional or late filings from either the Applicant or the Respondent. The hearing proceeded based on the submissions already received.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal Form received by the Tribunal August 23, 2001.

By the Respondent:

- a) Exhibit # 2 MTO submissions, received by the Tribunal September 10, 2001, 32 pages in total.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

On July 28, 2001 at approximately 2:00 a.m., Toronto Police stopped a Honda Civic plate number ADJD626. The driver of this vehicle was identified as the Applicant.

The vehicle was stopped by Toronto Police for apparent speeding, erratic driving as well as making a right turn through a red light. Police Officer # 1 approached the vehicle and spoke with the driver. According to the sworn statement of Police Officer # 1, he stated that during his conversation with the Applicant, he detected the odour of an alcoholic beverage. The Applicant was asked if he had consumed any alcohol. The Applicant replied, "yes, I had three beers an hour and a half ago at the Peel Pub."

The Applicant was escorted to the police vehicle and placed in the rear passenger seat. Police Officer # 1 requested an Alcotest unit to his location. Along with Police Officer # 1 that morning was Police Officer # 2. A demand to provide a breath sample was made of the Applicant by Police Officer # 1. At approximately 2:20 a.m., the Applicant was instructed on the use of the machine and he acknowledged that he understood what was required of him. The Applicant attempted to provide a sample at least six times. Each of these attempts ended in failure with no adequate sample being retrieved. According to Police Officer # 1 and Police Officer # 2, the Applicant either blew around the mouthpiece not forming a tight seal or blew short breaths into the machine.

The Applicant was cautioned numerous times about not providing a proper sample and what the consequences would be if he did not provide a suitable sample. Police Officer # 1 asked Police Officer # 2 to demonstrate the unit to the Applicant on how to provide a suitable sample. According to the statements of both Officers, the Applicant began waving his arms in the air and stating that he had a chest problem. The Applicant again attempted to provide a sample and on these next three attempts, (tries 7,8,9) a proper seal was formed around the mouthpiece, however the Applicant provided only short puffs of air into the unit.

The Applicant was placed under arrest at 2:26 a.m. for failing to provide a proper sample. On further questioning by police of the Applicant, the Applicant informed the police that he had chest problems and did have a puffer but the puffer was at home. When asked by Police Officer # 2 when was the last time that he used the puffer, he could not tell her. Police Officer # 1 and Police Officer # 2 did not observe the Applicant having any difficulty, the Applicant did not request or seek medical attention.

The Tribunal accepts the evidence of Police Officer # 1 and Police Officer # 2 as set out above.

The Applicant submitted the report of Physician # 1, of the Dawes-Halsey Medical Clinic. Sr. Espiritu is the Applicant's general practitioner.

The Respondent has provided the Tribunal the medical opinion from Physician # 2. Physician # 2 is a respirologist and the Director of the University of Toronto Respiratory Program in Rehabilitation.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The Applicant has appealed under Section 50.1(2)(b) of the *Highway Traffic Act* on the grounds that he was unable to provide a breath sample for a medical reason. The medical reason stated is "hyperactive airway disease." The document submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

Physician # 1's report fails to meet the specific requirements of Section 15(1) of Regulation 574 (amended) of the *Highway Traffic Act* as set out below. It does not provide any test results i.e. pulmonary function tests or measurements to indicate a reduce air way capacity. The diagnosis of hyperactive airway disease is not supported by any objective means only a subjective history as relayed by the Applicant to him. Also, the examination of the 30 July 2001, which was 4 days after the supposed exposure to fibreglass, is essentially negative and the Applicant is reported as "almost fully recovered".

No initial examination findings were reported. There is no mention of any history to airway problems or heart problems as indicated by the Applicant to the police nor has the physician indicated any medication that the Applicant is taking or had been prescribed or is taking with respect to any "hyperactive airway disease."

Physician # 2, whose report is filed by the Respondent, reviewed the medical documentation provided, and he concluded "The diagnosis: "hyperactive airway disease" is without any substantiating history or findings.

The Tribunal after very careful review believes Physician # 1's report lacks relevant detail to substantiate the medical condition claimed to be existing that would have precluded the Applicant from providing the necessary breath sample. Accordingly, the Tribunal can attach very little weight to this report respecting the issue under appeal.

After reviewing all of the foregoing facts, the Tribunal finds that the Applicant has not related his medical condition to Regulation 574(amended) and Sections 50(1)(2)(b) of the *Highway Traffic Act*.

During all of the attempts to provide a sample, the Applicant either blew around the mouth piece or when he finally made a proper seal with his lips, he blew with short puffs as not to allow sufficient air into the machine to get a proper reading. The Tribunal can only conclude, based on the evidence presented, that the actions taken by the Applicant were not those of someone who has unable to provide a breath sample, but rather the actions of someone who was unwilling to provide the sample because of the negative consequences of providing that sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 28, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: September 24, 2001

M.P.F.

HIGHWAY TRAFFIC ACT
Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

M.P.F.

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 48.3(2) of the *Highway Traffic Act* TO
SUSPEND A PERSON'S DRIVER'S LICENCE FOR A PERIOD OF 90
DAYS

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

M.P.F.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), M.P.F. (the "Applicant") initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles made pursuant to section 48.3(2) of that Act to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 6(1) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles to suspend the driver's licence of M.P.F. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: September 24, 2001

MOORE

MICHELE MOORE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NORMAN MEALING,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

MICHELE MOORE, Applicant
unrepresented

DATE OF HEARING: September 21, 2001

DECISION RELEASED: September 24, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing was held on September 21, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Michele Moore(the "Applicant")
Motor Vehicle:	1991 Ford Thunderbird, plate no. AKBK 230 (the "vehicle")
Date of Appeal:	August 30, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 21, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The vehicle was taken without consent. I was not home at the time. I had no reason to believe Richard would take the car because I have always driven him around. I would even get my children out of bed so we could drive him to work in the morning. The police have a sworn, videotaped statement. Constable Dave Starcevic, Timmins Police 705-264-1201 was the arresting officer who took my statement.

Michele Moore

The Applicant opened her testimony by re-iterating her written submission. She also introduced into evidence a copy of a Promise to Appear form, dated August 31, 2001, (Exhibit #4) which indicated that the driver of the vehicle at the time of the impoundment, Richard Gamelin, had been charged with taking the vehicle without the permission of the owner under Section 335(1) of the Criminal Code of Canada. This information had been received by the Licence Appeal Tribunal on September 18, 2001, and was introduced into evidence with the concurrence of the Respondent.

Under questioning by the Respondent, the Applicant indicated that she was in a common-law relationship with Mr. Gamelin at the time of the vehicle impoundment, and had been since June of 2001, but that she was no longer in this relationship. She further testified that she had gone out for the evening, and left her car keys in their "usual place" in the house. Mr. Gamelin had taken her car to go and look for her, and had been stopped by the police in the driveway of their home. She testified that she was aware of Mr. Gamelin's driving record, and that he had not driven her car before this incident.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Richard Allen J. Gamelin;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving while licence suspended under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 8, 2003.

The Respondent offered no new evidence. In her concluding remarks, she pointed out that the definition of stolen in Black's Law Dictionary [Sixth Edition] indicates that stolen implies the intention of depriving the owner of the benefit of ownership "permanently". She added that, according to the Applicant's testimony, Mr. Gamelin had taken the Applicant's vehicle to look for the Applicant which would support the position that there was no intent to deprive the Applicant of the vehicle on a permanent basis.

At this point, the Applicant posed a question about appealing on the basis of exceptional hardship. In her testimony, the Applicant had indicated that not having her car was inconvenient, but offered no indication that it had created exceptional hardship. The Tribunal, therefore, responded that it was not prepared to permit the grounds for appeal to be amended to include exceptional hardship to allow for arguments under the condition of exceptional hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another;
larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

As to the appeal on the basis of the vehicle having been stolen, the evidence established that Mr. Gamelin had taken the Applicant's vehicle without her permission, and, as a result, had been charged with this offence under the Criminal Code of Canada. He has not been charged with stealing the Applicant's vehicle.

The definition of stolen as outlined in Black's sets out what can be described as conditions for theft. Stolen involves acquisition or possession as a result of some wrongful or dishonest act of property which belongs to another person with the intent to deprive the owner of possession permanently. Although the evidence supports the position that the Applicant's vehicle had been acquired by Mr. Gamelin without permission, it does not indicate that there was any intent to deprive the Applicant of the possession of her vehicle on a permanent basis. In fact, according to the Applicant's testimony, Mr. Gamelin was stopped at 52 Fairway Village in the City of Timmins at 3:40 a.m. In other words, he was stopped at the residence that he shared with the Applicant at that time. In addition, the Applicant indicated that the driver intended to drive the car to find the Applicant. This is not evidence of an intention to deprive the Applicant of the car and is not evidence that it was stolen.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: September 24, 2001

SWERBRICK and MACINTYRE

DOUGLAS SWERBRICK AND JENNIFER MACINTYRE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS C. MACKINTOSH, Vice-Chair

APPEARANCES:

DOUGLAS SWERBRICK, representing himself and Jennifer
MacIntyre

SEAN KELLY, Counsel, representing the Ontario New Home
Warranty Program,

WAYNE GAY, Counsel, representing the Added Party,
C.H. O'Dette Construction Ltd.

DATE OF
HEARING:

September 17, 2001

Kingston

INTERIM ORDER

BACKGROUND:

The hearing of this appeal to the Licence Appeal Tribunal was scheduled for September 17 and 18, 2001 and was adjourned at the end of the first day at the request and on the consent of all three parties.

Douglas Swerbrick and Jennifer MacIntyre (the "Applicants") are appealing a decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated April 30, 2001. That letter denied warranty coverage for the Applicants on seven items. A subsequent letter dated September 6, 2001 reiterated the denial on the seven items. Recognizing that other issues could be appealed, the letter suggested that the Applicants advise the Program in writing if they wished to seek warranty coverage for the rear/side wall or any other issue. The Applicants did not do so.

The Applicants bought a new 3 bedroom two storey house in Kingston for \$149,000.00 and took possession on December 10, 1999. At that time there were numerous problems. Some seven months later, in July 2000 the Applicants still had 33 unresolved problems, which prompted them to write to the Program and ask for conciliation. This took place some time after November 27, 2000.

The Program issued two conciliation reports, one report respecting the items that it considered warranted and another report respecting 19 items that it considered not warranted. The items noted as not warranted were reduced to seven in the Program's decision.

The hearing on September 17, 2001, Douglas Swerbrick appeared without counsel at the hearing. He was unable to cope with the complexity of the issues and process. For instance, on the form requesting an appeal there are only four numbered lined paragraphs, and he concluded that he was limited to appealing four items although the decision letter had seven. He also wrongly assumed his appeal covered any complaints dealt with in the conciliation report.

After a little more than half a day of hearing, realizing that the Applicants could raise other matters for a further appeal, the other two parties asked that the matter be put over to get all appealable issues heard together by the Tribunal. Also, an adjournment was requested by the Applicant, Douglas Swerbrick, to retain a lawyer. The Applicant stated that the particular counsel he wished to retain is out of the country, apparently until October 10, 2001.

It also became clear that expert opinions respecting engineering will be essential to resolve a number of technical, contentious issues. The Applicants have already obtained an engineering report; the other two parties will require time to obtain theirs.

All parties agreed that a telephone conference conducted by the Tribunal would be helpful, during which time the Tribunal would set a date to continue the hearing of the Applicants' appeal.

ORDER:

Accordingly, THE TRIBUNAL ORDERS:

- 1) By October 24, 2001 the Applicants will confirm in writing to this Tribunal, with a copy to the other parties, whether or not they have retained counsel.
- 2) By November 10, 2001, the Applicants will be allowed to submit an amended notice of appeal to the Tribunal, with a copy to the other parties, identifying any additional items in the Program's decision letter of September 6, 2001 which the Applicants wish to appeal to this Tribunal.

- 3) By December 19, 2001 each party retaining the services of an engineer shall make full disclosure to the other parties, in the manner required by Rule 6.4 of the Tribunal's Rules of Practice and shall deposit any resulting report with this Tribunal.
- 4) On January 7, 2002 a telephone conference will be conducted by the Tribunal with the parties or their counsels. The telephone conference will be conducted by a Tribunal member other than this Vice-Chair. The purpose of this telephone conference will be to set a date for the continuation of the hearing before this Vice-Chair and to consider:
 - (1) the identification of facts or evidence that may be agreed upon;
 - (2) the identification and simplification of the issues;
 - (3) issues relating to disclosure and the exchange of information;
 - (4) the settlement of any or all of the issues;
 - (5) the dates by which any steps in the proceeding are to be taken or begun;
 - (6) the estimated duration of the hearing; and
 - (7) any other matter that may assist in the just and most expeditious disposition of the proceeding.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh,
Vice-Chair

RELEASED: September 24, 2001

VALUE VACATIONS LTD.

VALUE VACATIONS LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

ADAM ALTMID, Counsel for Applicant, Value Vacations Ltd.,
Applicant
TREVOR BRANION, Counsel for Registrar, *Travel Industry Act*
Respondent

DATE OF

HEARING: September 24, 2001

Toronto

ORDER

WHEREAS Value Vacations Ltd. (the "Applicant") appealed the Notice of Proposal of the Registrar, *Travel Industry Act* (the "Registrar"), dated June 21, 2001, to Revoke the Registration of the Applicant under the Act;

AND WHEREAS by Interim Order released July 27, 2001, this Tribunal extended the Registrar's Order of Interim Suspension respecting the Applicant's registration under the *Travel Industry Act*;

AND WHEREAS the Tribunal scheduled a hearing of this appeal to be heard September 24, 25, 26 and 27, 2001;

AND WHEREAS upon commencement of the hearing on September 24, 2001, the Applicant's Counsel requested an adjournment of the hearing, which was not opposed by Counsel for the Registrar, *Travel Industry Act*;

AFTER HEARING SUBMISSIONS for Counsel as to their availability;

THIS TRIBUNAL ORDERS:

- 1) The hearing of this matter is adjourned on consent of the parties to continue at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on Thursday, December 6, 2001 and on Friday, December 14, 2001 and to continue on Thursday, February 7, 2002;
- 2) The Registrar's Order of Interim Suspension of the registration of the Applicant under the Act is continued until the hearing of this matter is concluded.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

RELEASED: September 24, 2001

POSTNIKOFF

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GREGORY P. POSTNIKOFF

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 10, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GREGORY P. POSTNIKOFF

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on November 8, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Friday, December 14, 2001.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 24, 2001

MED – 751 - SEIZ

MED – 751 - SEIZ

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, MD, Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: September 21, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Notice of Appeal from Applicant received at Tribunal August 15, 2001.

Exhibit # 2 - Notice of Suspension from Registrar dated February 16, 2001.

Exhibit # 3 - File Summary received from Respondent September 21, 2001.

Exhibit # 4 - Applicant's Driving Record from the Registrar dated August 22, 2001.

FACTS:

The Applicant, a fifty one year old Real Estate Agent, had her driver's licence suspended February 2, 2001, for medical reasons under Section 47(1) of *The Highway Traffic Act*, after the Ministry received a Medical Condition Report from Physician # 1, at St. Michael's Hospital. Dr. Horak stated he witnessed the Applicant have a generalized clonic seizure in St. Michael's emergency department on January 22, 2001.

On August 28, 2001 the Applicant was convicted of driving while under suspension and her licence was suspended under *The Highway Traffic Act* until December 28, 2001. The Applicant claims she had never been informed of the Medical Suspension in February because it had been sent to a former address.

The Applicant's first seizure occurred in 1976, following which a left frontal meningioma was surgically resected. Apparently seizures continued and she was prescribed Dilantin and Clobazam and remained seizure-free from 1988 until July 12, 1996. Her neurologist, Physician # 2 stated in a Medical Report, that she had blacked out while driving and struck a pole. She probably had a subsequent seizure at St. Joseph's Hospital Emergency. Physician # 2 attributed the seizures to inadequate anti-epileptic drug treatment due to missing several doses of her medication.

The Applicant's driver's licence was suspended from August 27, 1996 until October 7, 1996. The Medical Advisory Committee received assurances from Physician # 2 that she was usually very compliant taking her medication and it had occurred due to circumstances beyond her control.

Physician # 2 notified the Ministry on October 1, 1997 that the Applicant had suffered a seizure on September 30, 1997, after missing two doses of her medication. The Applicant's driver's licence was again suspended on December 3, 1997 under Section 47(1) of *The Highway Traffic Act*. This suspension notice was never claimed by the Applicant and was returned by Canada Post. It was later served by a police officer. The licence was reinstated on March 10, 1998.

On April 27, 2000, a Traffic Inspector from Toronto Police Services reported to the Ministry that the Applicant had been involved in a collision with a transport truck on April 7, 2000. While at the Collision Reporting Centre she was recognized, because she had been there approximately eight times in the previous two years. The Inspector recommended that her driving privileges should be reviewed. No action was apparently taken at that time.

Nine months later, Physician # 1, from St. Michael's Hospital reported the Applicant's generalized clonic seizure in the hospital ER and her driver's licence was suspended again. A

Dilantin blood level at the hospital that day, was reported to be 49. Subsequent levels two and four weeks later were 98 and 86 respectively, which Physician # 2 said indicated she had not been compliant in taking her medication at the time of the seizure. A neurological examination was normal and a CT scan did not show any evidence of any tumour recurrence.

The Applicant's first seizure occurred in 1976 as a result of a frontal meningioma, which was resected. She remained seizure-free from 1988 until 1996, controlled by Dilantin and Clobazam.

On July 12, 1996 the Applicant suffered a seizure while driving her car and struck a pole. Physician # 2 stated in a medical report that she had missed taking several doses of medication in the previous two days. He said this was an unusual occurrence because she was usually very compliant.

The next seizure reported was on September 30, 1997, which Physician # 2 again attributed to the Applicant missing two doses of her medication. Her driver's licence was suspended again under section 47(1), until March 9, 1998

During the following two years the Applicant was convicted of several driving offences:

- improper drive on divided highway lane change
- disobey traffic signal light-red
- pass on right-unsafe condition
- driving while licence is suspended
- suspended licence re, unpaid fines, twice.

The next seizure was on January 22, 2001, which led to the present suspension.

The Applicant could not understand why her licence could not be reinstated, since she had completed six months seizure free and her neurological examinations and tests were all normal.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:-

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Regulation 340/94 Section 14(a) is very specific that a holder of a driver's licence must not suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely.

The Registrar acted appropriately in suspending the Applicant's licence when the Ministry received a medical report from Physician # 1 stating the Applicant had suffered a seizure in St Michael's Hospital ER on January 22, 2001. Physician # 2 determined her Dilantin blood level was very low at the time of the seizure and diagnosed non compliance in taking her medication.

The Applicant repeatedly stated in evidence that she did not know whether she required Dilantin, since the tumour had caused the seizures in the first place and the tumour had been removed.

Nevertheless, she claimed she was always compliant in taking her medication and does not know why Physician # 3 and Physician # 2 said the seizures were a result of missed doses of Dilantin. She also said she never told anyone that she had missed doses, so how would they know? She believed the drop in her Dilantin blood level and the seizures were a result of stress from her divorce and going into bankruptcy, although no doctor has ever told her that was a possibility.

Discrediting the medical diagnoses and advice she has been given over 25 years indicates she has no real insight into her recurring seizures and associated problems. Coupling this with her apparent disregard for rules of the road and road safety, the Tribunal finds the suspension is justified and should continue.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 2, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, MD, Presiding Member

RELEASED: September 26, 2001

THARMATHURAI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
LOGATHASAN AND CELIA THARMATHURAI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

LOGATHASAN AND CELIA THARMATHURAI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

ROSEHAVEN HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on November 6 and 7, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, November 5, 2001 and to continue November 6, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 26, 2001

ADLS – 757- ADJ

ADLS – 757- ADJ

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: CLARKE WALLACE, Member

APPEARANCES: DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: September 26, 2001

Toronto

ADJOURNMENT ORDER

WHEREAS the hearing of this matter was adjourned to 9:30 a.m. on Wednesday, September 26, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, to be heard by the Tribunal's members, Dr. Antoine Aouad and Clarke Wallace;

AND WHEREAS, Dr. Antoine Aouad was due to a medical reason unable to preside at the hearing, on Wednesday, September 26, 2001;

After hearing submissions of the parties as to available dates for continuing the hearing;

THE TRIBUNAL ORDERS:

1. That the hearing of this matter is adjourned and is to continue at 9:30 a.m. on Wednesday, October 3, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue on Thursday, October 4, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Clarke Wallace, Member

RELEASED: September 27, 2001

DEVINE

DEBBIE DEVINE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELMER MERKLEY,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DEBBIE DEVINE, Applicant
unrepresented

DATE OF HEARING: September 25, 2001

DECISION RELEASED: September 27, 2001 London

REASONS FOR DECISION

A hearing was held on September 25, 2001, at London, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Debbie Devine (the "Applicant")
Motor Vehicle:	1992 Chevrolet Cavalier RS, plate no. 542 JDM (the "vehicle")
Date of Appeal:	September 6, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension, the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended, and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(b)(c)(d) of the Act.

This matter came before this Tribunal on September 25, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

A request was made for a ruling as to whether the Applicant's witness is authorized to represent the Applicant in the capacity of Co-counsel during the proceedings. The Respondent objected and the Applicant withdrew the submission. In addition, the Respondent requested that the Applicant's witness leave the room while the Applicant was giving her testimony. The Applicant consented to the Respondent's request and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

TO: LICENCE SUSPENSION BOARD
Suite 1200
1 St. Clair Avenue West, 12th Floor
Toronto, Ontario M4V 1K6

ATT: Impoundment Appeals Hearing Co-ordinator Wednesday September 5, 2001

I am writing this letter to ask you to reconsider your decision to impound my vehicle for 45 days, for the sole reason the driver (Russell Himbury) was operating my vehicle and was charged with Disqualified Operation of A motor Vehicle under section 259(4) c.c.

I am a 45 year old responsible adult who had absolutely no idea Russell Himbury's drivers license was not valid, and there was absolutely no way that I could even have known Russell was under a drivers license suspension when even Russell did not know about the license suspension until being stopped by London Police for the head light being out Saturday morning on September 1, 2001.

I explained to the police I knew he had lost his license for one year I even picked him up the day his license was suspended by the judges order for one year only. I read the paper work he received that day showing me there was a one year suspension (please see attached copy of what I read the day May 25, 2000.) as far as I knew I had no reason to believe that Russell was an unlicensed driver 16 months later.

I never would have left Russell drive my car under any circumstance at all, had I been aware Russell did not have a valid drivers license, I assure you this is the truth.

I would also like to point out to you at this time as well, the direct hardship not having my vehicle back will cause in my life and directly to my parents living with me whom I am their only person to assist in care giving, errands, and doctors appointment, groceries, etc.

The hardship this would cause in my life would be devastating to me for many reasons which I can only begin to name a few, many I am sure would become more and more apparent as time went on and I could not in any way be able to keep up with my continued obligations.

I have a full time job for 4 years as a service co-ordinator for Para-med Health Care Services, and I need my car to be able to continue my employment. Further to that I have moved my elderly parents into my home so I would be able to assist them as their only care giver, they are 79 & 83 years old. My mom has Spinal Sclerosis and my step dad has emphysema with oxygen 24 hours a day. Because of the medical problems both of them have there are a lot of appointments with doctors and specialists. I help them attend at Hospitals and different clinic's. I also have to do all the errands, pick-up groceries, and for sometimes for a social gathering. I am the only person who can do any of these things and both my parents are totally dependent on me.

P.S. I have never been involved before with the M.T.O. for even a demerit point or traffic ticket, nor have I ever even been pulled over by police in 29 years of driving. I respect my license and my car both as much as the other. In your pamphlet you mention that only one time can the owner of the car asked to be considered a hardship case this would be the first and only time you would ever have to make that decision for me because no one will ever drive my car again.

OWNER'S POSITION IN APPEAL

- THERE ARE 3 SEPARATE GROUNDS FOR MY APPEAL
With each one having multiple reasons for each of the appeals grounds.
- 2 COPIES OF THE COURT SUSPENSION for one year not two years.
- 2 copies of the vehicle ownership each one side is 2 pages front and back.
- 2 copies of the appeal.
- 2 copies of why I request a telephone conference.
- 2 copies of owners position in appeal.
- 2 copies of the Registrar's order impounding the vehicle.
- 2 sets with 4 pages each, this being page # 3.
(Please see other 3 pages attached)

Reasons for appeal continued

Another reason/"Drivers license was not under suspension".

Russell is going to plead not guilty at trial because he was not notified of the suspension by the ministry of transportation, he was not illegally driving while being disqualified if he had no intent to do so.. (If this is true that means at the time of my car being impounded he would have not been a disqualified driver until notified that morning of September 1, 2001.).

The problem here is the trial for Russell will be after 45 days of my car impoundment, (the M.T.O. Data Access & Control Centre has already told Russell on the phone today that they have no card in Russell's file and that there should have been if he had been notified, Russell is sending \$6.00 and a request in to ask for a copy of this information and I will be faxing to you a copy immediately when I receive my copy.)

OR

There is also the fact that Russell faxed the driver control centre on May 25, 2000. explaining there were grounds for an appeal and asked if they would not proceed with any possible actions until the appeal was dealt with in the higher court. (He was told this would be alright by his lawyer while awaiting his appeal.) *there will also be a fax sent of this information, as soon as I receive it*

OR

Maybe you could possibly speak direct to the M.T.O. Data Access Centre

Another reason for an appeal/"the vehicle owner exercised due diligence.

I witnessed documentation stating only A 1 year suspension (this was a legal document, see *attached*), also I personally know that Russell Himbury at no time ever (over the 1 year court suspension) would never drive a car until after the time of his suspension. Russell has just bought a car and was telling me he would be getting insurance and a safety check a.s.a.p. this is another reason I thought for sure he was a licensed driver besides the fact of giving me his word.

Please leave me a telephone message telling me what to do or maybe what you can do. Thank you.

REASON FOR TELEPHONE CONFERENCE

This is a written request asking for a TELEPHONE CONFERENCE for the following reasons.

There are several reasons why I would request to have a telephone conference.

- I'm hoping it would be the fastest process to get my car back.
- I work all day, and it would be hard for me to get to Toronto to meet with you.
- I don't have a car to get to the location you may choose.

If this is a problem please notify me as soon as possible.

Debbie Devine

Ms. Devine testified that she has known Russell Himbury, “the driver”, for the past nineteen years. She further testified that she has full responsibility for her elderly parents, ages seventy-nine and eighty-three. Her mother has spinal stenosis and her stepfather has emphysema with a need for oxygen twenty-four hours a day. Since both parents reside in her home, she is required to assist them with their medical appointments, run errands and pick up their groceries.

In respect to the reasons for her appeal, she checked off three boxes and believes that her “Owner’s Position” statement, supported by today’s oral evidence, justifies the immediate return of her impounded vehicle.

In respect to “the driver’s licence was not under suspension”, Ms. Devine submitted that the driver, Mr. Russell Himbury, informed her that he would be pleading not guilty to the “driving while disqualified charge” since he was not properly notified of the suspension by the Ministry of Transportation. She further testified that based on her personal knowledge of Mr. Himbury, he would not knowingly operate a motor vehicle while disqualified.

In respect to “the vehicle owner exercising due diligence to determine that the driver’s licence was not suspended”, the Applicant testified that she had questioned Mr. Himbury on August 1, 2001 about his driver’s licence and was shown a Temporary Driver’s Licence for the Province of Ontario with an expiry date in late September or October 2001.

Based on this information and remembering that the Criminal Court conviction provided for a one year suspension, which should be fully served in May 2001, Ms. Devine allowed Mr. Himbury to drive her vehicle. However, when stopped by the London Police on September 1, 2001 with Mr. Himbury driving, Ms. Devine was made aware that Mr. Himbury’s driver’s licence was under suspension until May 25, 2002.

In respect to “exceptional hardship”, Ms. Devine admitted during cross-examination that she has full access to her stepfather’s vehicle for work purposes as well as providing any transportation for her elderly parents. The Applicant testified that the impoundment has not resulted in any financial loss or any loss of employment. Nevertheless, the impoundment has caused considerable stress for herself and her parents.

The Tribunal believes that the Applicant’s evidence on one very significant point, namely the Temporary Driver’s Licence, was rehearsed and lacked credibility. This conclusion was reached by the Tribunal due to the fact that this significant point was not included in the Owner’s Position supporting statements.

Mr. Russell Himbury, driver of the impounded vehicle and a friend of the Applicant’s for the past twenty years, testified without hesitation that “he lied” to the Applicant about his driver’s

licence and admitted to showing her a copy of a valid Temporary Driver's Licence for the Province of Ontario. Mr. Himbury testified that his memory of the facts was quite vague in respect to how he obtained the Temporary Driver's Licence, the whereabouts of the original document, or where he was when he showed this document to the Applicant.

Mr. Himbury testified and produced documentation indicating that he had filed or was in the process of filing appeals in the Superior Court of Justice concerning the charge "failing to remain at the scene of the accident" and the impaired driving charge. He further testified that he had received approval from the London Legal Aid Office on these appeals. The majority of this information has either been faxed or discussed with officials at the Ministry of Transportation, Driver Control Office in Toronto as well as their legal department.

Mr. Himbury's testimony, except for the point where "he lied" to the Applicant, was both vague and argumentative during cross-examination. For this reason, the Tribunal cannot give weight to much of his testimony.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as Owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Russell M. Himbury;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 25, 2002.

The Respondent submitted that the Criminal Court document referred to by the Applicant showing a one year suspension also mentions that upon conviction your driver's licence may be suspended longer under the *Highway Traffic Act*.

The Respondent further submitted that the Temporary Driver's Licence referred to by the Applicant was a photocopy and based on the number sequence was issued in and around 1996. It is the Respondent's position that in order to claim the ground, "the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended", the Applicant must carefully review any documents she has access to as well as check with the Ministry of Transportation before allowing someone else to drive your vehicle.

In respect to "exceptional hardship", the Respondent submits that the Applicant has had the full use of her stepfather's vehicle, both for work and transportation such as medical appointments and picking up groceries for her elderly parents. The Applicant has noted that there has been no loss of employment, no medical appointments missed, and no financial loss experienced.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(b), (c) and (d).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or

- (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate

or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The relevant sections of the *Highway Traffic Act* permits an appeal of the Registrar's order on specific grounds.

In respect to Section 52.2(b) of the *Highway Traffic Act*, the driver's licence of the driver of the motor vehicle at the time, in respect to which the order was made, was clearly under suspension. While the Applicant and driver allege a service problem with the notice of suspension and intend to pursue this matter, the licence remains under suspension at this time.

In consideration of Section 50.2(c) of the *Highway Traffic Act*, the Tribunal cannot conclude that the Applicant exercised due diligence by simply reading the judge's order resulting from a Criminal Code Conviction, and assuming that a driver's licence will be reinstated one year following without reading all of the document wherein it clearly mentions upon conviction, your driver's licence may be suspended longer under the *Highway Traffic Act*.

In respect to the Temporary Driver's Licence shown to the Applicant on August 1, 2001, the Tribunal is not convinced that the Applicant clearly examined or questioned Mr. Himbury regarding the origin or the legality of this document. Since this is such a significant point, the Tribunal cannot understand why it was not referred to in the Owner's Position statement.

While the Applicant is convinced that Mr. Himbury would not drive while his licence was under suspension, Mr. Himbury readily admits that he misled the Applicant by showing her what has since been deemed a doctored photocopy of a 1996 Temporary Driver's Licence.

In respect to Section 50.2(d) of the Act regarding exceptional hardship, the Applicant readily admits that an alternative to the impounded vehicle is available during the impoundment period, and she has not experienced any employment or financial loss. However, it has been a major inconvenience for her and her stepfather to deal with the loss of the vehicle during the impoundment period.

The Tribunal finds that the Applicant has not established the three grounds of appeal as prescribed under Section 50.2(b)(c)(d) of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: September 27, 2001

LEFEBVRE, STEPHANE D. O/A S.L. GARAGE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
STÉPHANE D. LEFEBVRE O/A S.L. GARAGE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 17, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

STÉPHANE D. LEFEBVRE O/A S.L. GARAGE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Stéphane D. Lefebvre o/a S.L. Garage, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 27, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West
12th Floor
Toronto, Ontario M4V 1K6

FROM: Stephane Denis LeFebvre
O/A S.L. Garage
1570 Concession 1
Chute-À-Blondeau, Ontario K0B 1B0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereinafter the "Act") the parties to the proceeding, Stephane Denis LeFebvre o/a S.L. Garage (hereinafter referred to as "the Dealer"), and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to his registration as a motor vehicle dealer:

1. The Dealer agrees, if he is charged in the future, to immediately notify the Registrar in writing.
2. The Dealer agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Dealer agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
4. The Dealer confirms that the circumstances surrounding the conviction(s) are substantially as disclosed to the Registrar.
5. The Dealer acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
6. The Dealer further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
7. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.
8. The Dealer agrees that all books and records shall be kept at the Dealer's registered premise, and shall be available to an inspector or investigator appointed by the Registrar, at all reasonable times.

9. The Dealer agrees to maintain a sign at the Dealer's registered premise that will be visible to the public.
10. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
11. The Dealer agrees not to invite the public to deal at a place other than his approved location.
12. The Dealer will not conduct any purchases with anyone who is in the business of buying, selling and leasing motor vehicles without confirming that the person is registered as a Dealer under the Motor Vehicle Dealers Act.
13. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
14. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
15. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
16. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
17. The Dealer agrees that he is under a positive obligation to disclose in writing, on the bill of sale, all material facts about the vehicles he sells to his purchasers. Purchasers include both retail and wholesale buyers. Material facts such as, but not limited to: salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, previous daily rental, write off, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
18. The Dealer acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
19. The Dealer will comply with all aspects of the Retail Sales Tax Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
20. The Dealer agrees he will not be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
21. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.

22. The Dealer understands that his registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.
23. The Dealer acknowledges that the Registrar may take further administrative action in the form of a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or compliance with these terms and conditions.
24. The Dealer acknowledges that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
25. The Dealer agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
26. The Dealer hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to the Dealer's consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2001.

Stephane Lefebvre o/a S.L. Garage
I have the Authority to bind the dealership.
(Signature)

These terms and conditions are acceptable to the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

TANDON

PREHEARING

HEMANT TANDON

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
REAL ESTATE AND BUSINESS BROKERS ACT
R.S.O. 1990, CHAPTER R.4 AS AMENDED

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

KRISTINE ANDERSON, counsel, representing the Applicant
GEORGE DRAMETU, counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
PREHEARING: September 28, 2001

Toronto

ORDER

Following attendances on September 28, 2001 at a prehearing before this Tribunal of Kristine Anderson, counsel on behalf of Hemant Tandon (the "Applicant") and George Drametu, counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Thursday, November 1, 2001, and thereafter, if necessary, to continue at 9:30 a.m. on Friday, November 2, 2001, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The parties recorded that there had been no resolution of any of the issues in this matter.
2. The parties to the hearing are the Applicant and the Registrar.

3. The Applicant concedes as correct the allegations contained in all paragraphs of the Registrar's proposal dated July 4, 2001 save and except the contents of paragraphs 61 and 62 of the aforesaid proposal which are not conceded as correct.
4. The Applicant proposes to call 5 persons to testify at the hearing of this matter, who shall speak to the character of the Applicant. The Registrar proposes to call approximately 4 witnesses who will testify at the hearing of this matter.
5. Both parties to the hearing shall comply with Rule 6.3 of the Rules of Practice of this Tribunal. Notwithstanding the aforesaid, both parties undertake at this time to disclose every document and thing now in their possession or under their control that they will refer to or tender in evidence at the hearing, and to deliver a copy of such document to the other party.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: September 28, 2001

FULLER AND SWICK

TIMOTHY FULLER AND PATRICIA SWICK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: C. DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

TIMOTHY FULLER, representing himself and Patricia Swick
SARA KARGES, Counsel for the Ontario New Home Warranty
Program,
COLEEN BURN, Counsel for the Added Party,
ASHCROFT HOMES CENTRAL PARK INC.

DATES OF

HEARING: September 25, 26, 27 & 28, 2001

Kingston

INTERIM ORDER

The appeal commenced on September 25, 2001 and concluded on September 28, 2001 at which point, although all the evidence was in, there was insufficient time left for the parties to make their submissions.

ORDER:

Accordingly the TRIBUNAL ORDERS,

- 1) By October 30, 2001, the Applicants must submit their written submissions to this Tribunal with a copy to each of the other parties.
- 2) By November 15, 2001, the Respondent, Ontario New Home Warranty Program and the Added Party, Ashcroft Homes Central Park Inc., must submit their written submissions to this Tribunal with a copy to the Applicants and to each other.

- 3) By November 25, 2001, the Applicants, if they wish to do so, may submit their reply to this Tribunal with a copy to each of the other parties.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh, Vice-Chair

Released: October 1, 2001

MARASCO

PREHEARING

MARIA MARASCO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
ANTOINE AOUAD, M.D., Member

APPEARANCES:

ANTONIO CONTE, Counsel, representing the Applicant
ANDREW LEWIS, Counsel, representing the Ontario New Home
Warranty Program
No one appearing for the Added Party, Wilbak Homes Inc.

DATE OF
PREHEARING: September 28, 2001 Toronto

ORDER

Following attendances at a prehearing before the Licence Appeal Tribunal (the "Tribunal") on September 28, 2001, of Antonio Conte, Counsel representing Maria Marasco (the "Applicant"), Andrew Lewis, Counsel representing the Ontario New Home Warranty Program, (the "Respondent"), and no one appearing for Wilbak Homes Inc. (the "Added Party");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant, the Ontario New Home Warranty Program and Wilbak Homes Inc.
- 2) There was no resolution of the issues between the parties.

- 3) The parties shall fully comply with the Tribunal's Rules of Practice respecting disclosure, including the disclosure requirements of Rules 6.3 and 6.4.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair Presiding

Antoine Aouad, M.D., Member

Released: October 1, 2001

REYNOLDS, EDWARD AND HARBOURVIEW FLEET & LEASING INC.

EDWARD RAY REYNOLDS AND HARBOURVIEW FLEET & LEASING INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: JOHN E. ORT, Member

APPEARANCES:

EDWARD RAY REYNOLDS, representing himself and Harbourview
Fleet & Leasing Inc.

MARY JANE SOUTH, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

October 2, 2001

Toronto

ORDER

WHEREAS the Registrar, *Motor Vehicle Dealers Act* by proposal dated June 5, 2001 has proposed to revoke the registration of Edward Ray Reynolds (identified as Ray Edward Reynolds in the proposal) and Harbourview Fleet & Leasing Inc. (the "Applicants") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the Applicants requested a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on October 2-4, 2001 at the Tribunal's Chambers;

AND WHEREAS at the commencement of the hearing on October 2, 2001, the Applicants confirmed that their appeal before this Tribunal was withdrawn and filed as Exhibit 8 written confirmation of that withdrawal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John E. Ort, Member

Released: October 2, 2001

J.R. DIAMOND HOMES INC.

PREHEARING

J.R. DIAMOND HOMES INC.

APPEAL FROM A PROPOSAL OF REGISTRAR OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair Presiding
JOHN ORT, Member

APPEARANCES: BRIAN CAMPBELL, Counsel, representing the Applicant
CAROL STREET, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
PRE-HEARING: September 11, 2001 Toronto

ORDER

Following attendances on September 11, 2001 at a prehearing before the Licence Appeal Tribunal of Brian Campbell, Counsel representing J.R. Diamond Homes Inc. (the "Applicant"), and Carol Street, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order:

- 1) The Parties to the hearing at this time are the Applicant and the Registrar. There is some discussion that the Applicant may wish to bring a motion to add a Third Party. The Counsel for the Applicant undertakes to inform the Counsel for the Registrar by October 15, 2001 if there will be a motion to add a Third Party.
- 2) There was no resolution of the issues between the parties. There could be a resolution of some issues at a later date. Counsel for the Applicant and Counsel for the Registrar will continue their discussion on the issues. If they feel it would be helpful, another prehearing conference can be scheduled at a later date after there has been full disclosure of all documents.

- 3) The parties shall fully comply with the Tribunal's Rules of Practice respecting disclosure. Counsel for the Registrar has advised that a number of warranty representatives will be called as witnesses. Counsel for the Applicant is unsure as to what witnesses will be called at the hearing. It is agreed that Counsel for the Registrar will make full disclosure of documents and witnesses by December 3, 2001. It is agreed that Counsel for the Applicant will make full disclosure of documents and witnesses by December 13, 2001.
- 4) The hearing will commence at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario on Monday, January 7, 2002 and continue January 8, 9, 10, and 11, 2002 and to further continue on Monday, January 21, 2002 and continue January 22, 23, 24 and 25, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair
Presiding

John Ort, Member

RELEASED: October 1, 2001

SOURIAL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990 Chapter M.42

IN THE MATTER of
ADEL SOURIAL

AND IN THE MATTER of a decision of the
Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund

TO DISALLOW A CLAIM
- Decision dated: June 6, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

ADEL SOURIAL

Applicant

- and -

BOARD OF TRUSTEES
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 24, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Monday, January 21, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 2, 2001

BUCHHOLZ

BRIAN BUCHHOLZ

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

BRUNO BRIAN BUCHHOLZ, Applicant, unrepresented

DATE OF HEARING: September 27, 2001 ***By teleconference***

DECISION RELEASED: October 1, 2001

REASONS FOR DECISION

A hearing was held on September 27, 2001, at Toronto, Ontario by way of teleconference, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Bruno Brian Buchholz (the "Applicant")
Motor Vehicle:	1999 GMC Sierra, plate no. (the "vehicle")
Date of Appeal:	September 6, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 27, 2001 and proceeded by way of teleconference.

The Tribunal would like it noted that the Representative for the Registrar of Motor Vehicles forwarded her submissions to both the Applicant and the Tribunal by facsimile less than 24 hours before the hearing commenced. According to the Licence Appeal Tribunal's Rules of Practice, Section 6.5(1) and (2)(c)(i) specifically stipulates the disclosure requirements:

6.5(1) A party to the hearing shall

- (i) disclose to all parties the existence of every document and thing that the party will refer to or tender as evidence at the hearing and shall deliver a copy of such documents to the other parties, and
- (ii) disclose and make available for inspection by every other party all things, other than documents that the party will refer to or tender as evidence, within the time for disclosure set out in Rule 6.5(2)

6.5(2)(c) where the hearing is an appeal under section 50.2 of the Act,

- (i) by the party requesting a hearing before the Tribunal at least ten (10) days prior to the hearing, and
- (ii) by any other party at least five (5) days prior to the hearing.

The Tribunal asked the Applicant the following questions: (i) if he had sufficient time to review and understand all the documentation received; (ii) if he wished to proceed with today's hearing; (iii) or would he want to seek legal counsel. The Applicant acknowledged that some of the documentation was a bit technical, but wanted to proceed and did not want to adjourn today's hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I Brian Buchholz request an telephone hearing as I am out of town.
Appeal is based on (iv) Due hardship; as the vehicle is used for company reasons, primarily by my daughter who lives up North. I was un aware her husband was a suspended driver.

The following is a summary of the Applicant's affirmed testimony.

The Applicant is the owner and operator of a masonry restoration company, which is run from his home office in Scarborough. He has been in business since 1977 when he incorporated his company. He has 2 other employees, his brother and his daughter who resides in Brantford.

The Applicant owns 2 vehicles, one registered in the company's name, which is driven by the Applicant and the other registered to him personally, which is driven by his daughter. The daughter also has another vehicle registered in her name, being a GMC Jimmy.

The Applicant's daughter uses the Applicant's vehicle in her capacity as Project Co-Ordinator which includes meeting customers and providing them with estimates, transporting material and some equipment to job sites and does all the paperwork. Her hours are flexible.

Although unsure of what transpired the day the vehicle was impounded, the Applicant testified that his daughter asked her husband to run an errand for her. Mr. Lambe, the suspended driver, took the Applicant's vehicle instead of the GMC Jimmy because there was something wrong with it. Although the Applicant's daughter has been with her common-law husband for the past 6 years, the Applicant is of the opinion that she may not have known that he was a suspended driver. The Applicant was unaware and had no idea that Mr. Lambe was a suspended driver.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gary W. Lambe;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 22, 2006.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner

of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for his claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Applicant has testified that there are two other alternative vehicles, the company vehicle which is driven by himself and his daughter's GMC Jimmy.

The Applicant testified that there is no possible threat to the health or safety of any person ordinarily transported by the motor vehicle.

The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting. There is no threat of loss of employment or income. He has incurred some additional expenses because he has had to carry on the duties of his daughter position while the vehicle is impounded.

The Applicant may pursue compensation from the suspended driver, Gary Lambe, as is stated in section 55.1(21) of the *Highway Traffic Act*:

“The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order”.

The Tribunal finds the Applicant is faced with a hardship that does not amount to exceptional hardship. He continues to operate his business although not with the same level of productivity as when there were 2 trucks available. His daughter uses her personal vehicle to carry on her day-to-day duties of her employment unless, of course, there is a large volume of materials to be transported, which cannot be done by her vehicle. If this is the case, the Applicant must perform double duty.

After considering the above requirements, the Tribunal finds that the Applicant, albeit inconvenient to carry on his day-to-day operations, has alternatives to the impounded vehicle and the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: October 1, 2001

MULVIHILL

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1505740 OWNED BY: JANET VIOLA MULVIHILL of: 86 Dundas Street East, Belleville, Ontario K8N 1C1 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: September 12, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

JANET VIOLA MULVIHILL

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Janet Viola Mulvihill, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: *October 1, 2001*

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

Janet Viola Mulvihill

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #V1505740** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on September 12, 2001.
2. The applicant, **Janet Viola Mulvihill**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating **that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received information from the police, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

Janet Viola Mulvihill

Kim Grosskurth

(signature of Applicant)

(signature of Registrar)

(date)

(date)

ADLS –757

ADLS –757

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
CLARKE WALLACE, Member

APPEARANCES: DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF
HEARING: October 1, 2001 *By teleconference*

INTERIM ORDER

WHEREAS the hearing of this matter before the Tribunal was adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Wednesday, October 3, 2001;

AND WHEREAS by letter dated September 26, 2001, counsel for the Registrar of Motor Vehicles advised the Tribunal that the Applicant, was required to attend the Port Credit detachment of the Ontario Provincial Police at 9:30 a.m. on Wednesday, October 3, 2001, which would conflict with his attendance at that time before this Tribunal and requested that this hearing proceed at 11:30 a.m. on that day;

AND WHEREAS the Tribunal communicated the Respondent's request to the Applicant by telephone call to the Applicant at (416) 333-3333, which is the means of communication requested by the Applicant who would not provide his address to the Tribunal;

AND WHEREAS on Friday, September 28, 2001, the Tribunal notified the parties that it would conduct a telephone conference at 11:00 a.m. on Monday, October 1, 2001 to hear submissions from the parties respecting the Respondent's request to change the hearing time from 9:30 a.m. to 11:30 a.m. on Wednesday, October 3, 2001;

AND WHEREAS the Tribunal convened on Monday, October 1, 2001 at 11:00 a.m. to hear submissions from the parties by telephone conference, with counsel for the Respondent in attendance but the Applicant not in attendance, the Applicant not responding to the Tribunal's telephone call to the Applicant's telephone number (416) 333-3333;

AND WHEREAS the Tribunal heard evidence from the Tribunal's Group Leader/Hearings Supervisor confirming that notice was given to the Applicant that the Tribunal would hear submissions respecting the Respondent's request at 9:30 a.m. on October 1, 2001;

THIS TRIBUNAL ORDERS:

- 1) the hearing of this matter previously scheduled to commence at 9:30 a.m. on Wednesday, October 3, 2001 shall instead commence at 11:30 a.m. on that day.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Clarke Wallace, Member

RELEASED: October 2, 2001

776 - SEIZ

MED – 776 - SEIZ

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: September 27, 2001 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 - Notice of the Appeal filed by the Applicant and received September 4, 2001.

Exhibit # 2 - Notice of the Suspension dated May 22, 2001.

Exhibit # 3 - Applicant's Driving Record.

Exhibit # 4 - File Summary from the Respondent received September 27, 2001.

FACTS:

The Applicant, a 59 year old Eastman Kodak worker had his driver's licence suspended on May 22, 2001, after the Ministry received a Medical Condition Report on April 30, 2001, from Physician # 1. She reported that the Applicant had suffered a "seizure" on April 18, 2001. The report also stated the Applicant had a long history of alcohol dependence with blackouts, memory problems and falls.

The Applicant stated in evidence that he had been a social drinker for years, but had been drinking more the past two to three years. He usually drank beer in the large cans. He considered heavy drinking to be seven to ten cans in a day. The "blackouts" and "falls" referred to in the letter were when he passed out when drunk. Following one of these episodes in June 2000, he fell off of his bicycle, hit his head and lay unconscious for some time. Someone stole his bicycle and wallet while he was unconscious.

Following the above noted episode, the Applicant applied to "Donwood". He completed three weeks of treatment in September, 2000. Following this, he stated he had a relapse and started drinking again, but only one or two cans a day. He did not have any beer at home and his wife was apparently unaware that he was drinking.

The Applicant worked twelve hour shifts, from 4:00 to 4:00 on a regular rotation. On April 18, 2001, he was working the night shift and came home after 4:00 a.m. He slept for 4-5 hours and when he got up to go to the bathroom, he had a dizzy spell. He fell down striking his chin on the toilet bowl and then fell back hitting his head on base of the shower stall. His wife heard him fall and came upstairs immediately. He was conscious, lying on his back with his hands twitching slightly. He had a deep gash on his chin, which was bleeding profusely, so his wife called 911. The laceration was sutured and a physical examination was negative, although some alcohol was detected in his blood.

He saw Physician # 1 on April 25, 2001, who reported the incident to the Ministry. She believed the "seizure" was related to his alcohol use. He was prescribed Disulfiram (Antabuse) and referred to a neurologist, Physician # 2. A CT scan, EEG, neurological examination and liver enzymes were all normal. Physician # 2 believed the "seizure" was a result of alcohol withdrawal or head trauma. Neither physician thought it was epilepsy.

The Applicant had remained abstinent since April 18, 2001, takes Antabuse regularly and sees Physician # 1 every two weeks. His wife substantiated his evidence and said she was monitoring his activities and ensuring he takes his medication.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Regulation 340/94, Section 14 states:

"An applicant or a holder of a driver's licence must not,

(a) suffer from a mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely.

(b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

"Registrar may suspend -----licence,

(g) any other sufficient reason not referred to -----"

The Registrar acted appropriately in suspending the Applicant's licence after receiving the Medical Condition Report from Physician # 1 stating that "the Applicant had a long standing history of alcohol dependence and suffered a seizure which was likely alcohol related."

The Applicant admits to a two to three year history of alcoholism, but during that period he never missed a days work or drove his car when he had been drinking. After receiving treatment at the Donwood, when he started drinking again, his wife was apparently not aware of it, because he never drank at home. From this, the Tribunal concludes that the Applicant could not have been drinking very much.

On review of the April 18, 2001 incident, the Tribunal has a problem trying to decide which came first, the seizure or the fall and also, was this really a seizure?

The Applicant said he got out of bed, went into the bathroom, felt dizzy and fell. This could have been a postural hypotensive episode causing the dizziness and the fall. Evidence presented did not suggest he had been drinking excessively at the time, and there was an undisclosed alcohol blood level, which is inconsistent with an alcohol withdrawal seizure.

The Applicant remained conscious after the fall, inspite of receiving two blows to the head. The neurological examination and tests did not reveal any evidence of epilepsy and both Physician # 1 and Physician # 2 questioned the aetiology of the so called seizure. Physician #

1 has been seeing the Applicant every two weeks and has recommended that his driver's licence be reinstated.

The Applicant has remained alcohol-free and seizure-free since April 18, 2001 and states he has no desire to drink again. Considering the circumstances, the Tribunal does not find any reason why the licence should not be reinstated at this time, since the evidence presented does not verify a disability that falls under Regulation 340/94 or Section 47(1) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 1, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: October 1, 2001

THE ONTARIO HISTORICAL SOCIETY

PREHEARING

THE ONTARIO HISTORICAL SOCIETY

APPEAL FROM A DECISION OF THE REGISTRAR
OF THE *CEMETERIES ACT* R.S.O., 1990 CHAPTER C. 4
AS AMENDED

TO CLOSE A CEMETERY

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: CATHERINE E. BRAY, Counsel representing the Applicant
JEAN IU, Counsel representing the Registrar, *Cemeteries Act*

DATE OF
PRE-HEARING: October 1, 2001 Toronto

ORDER

FOLLOWING attendances on October 1, 2001 at a prehearing before the Tribunal of Catherine E. Bray, Counsel on behalf of The Ontario Historical Society, (the "Applicant") and Jean Iu, Counsel on behalf of the Registrar, *Cemeteries Act* (the "Registrar");

The Tribunal makes the following Order respecting a hearing scheduled to commence at a date and time to be set by the Registrar of the Licence Appeal Tribunal, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

- 1) The Parties to the hearing are the Registrar and the Ontario Historical Society.
- 2) The above parties agree that the issues dealt with in paragraphs in Appendix "A" hereto next to which are the initials of both counsel will not be in dispute at the hearing of this matter. There has been no resolution of any of the other issues.

- 3) The parties to the hearing shall comply with Rule 6.3 and 6.4 of the Rules of Practice of this Tribunal. Notwithstanding the aforesaid, the parties undertake at this time to disclose and make available for inspection every document and thing in their possession or under their control that they will refer to or tender as evidence at the hearing, and to deliver a copy of such document to the other.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: October 3, 2001

AND WHEREAS, at the prehearing on October 1, 2001, Counsel for the Program requested a further adjournment of the prehearing and submissions were heard from the parties respecting the request from the Ontario New Home Warranty Program for more time to review its experts' findings;

TAKE NOTICE, upon consent of the parties, the Tribunal Orders that:

- 1) the prehearing in this matter is further adjourned *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m. on Monday, November 26, 2001;
- 2) the hearing in this matter shall commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m. on Tuesday, January 15, 2002 and to continue January 16, 17 and 18, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

Released: October 3, 2001

WALES

DEBORAH J. WALES

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DEBORAH J. WALES, Applicant
unrepresented

DATE OF HEARING: October 2, 2001

DECISION RELEASED: October 4, 2001 Belleville

REASONS FOR DECISION

A hearing was held on October 2, 2001, at Belleville, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Deborah J. Wales (the “Applicant”)
Motor Vehicle:	1997 Chevrolet Cavalier, plate no. ARVJ801 (the “vehicle”)
Date of Appeal:	September 10, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 2, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My Car is my means for work. I am employed with the Red Cross and I travel from Client to client.

On the evening before I had done my laundry and it was in the car which I always keep locked.

I asked my son to take it out and hang it on the line. I went to Kingston (drove my mother's van with her and three other elderly ladies to Bingo). We stayed quite late so I stayed at my mother's for the night. I received the call from Constable Clapp there about 4:00 a.m. The incident happened near my house 5-10 min walking distance. The officer never fully completed the impound order. No signatures.

I would like a oral hearing because of the distance to travel. We live on a farm out by Kingston and my good travelling car has been impounded. I have borrowed a van from my mother. I stay at her place most nights when working so I don't put too many miles on it. It is an older van that burns oil and gas (1988 Plymouth Voyager).

- My son took my car without my permission.
- I thought I'd have to go to Toronto.

The Applicant was aware that her son's driver's licence was under suspension but left the keys to her car with her son to remove some laundry. The Applicant then left for Kingston with others in her mother's van.

About 4:00 a.m. the Applicant was advised by the police the details of the impoundment of her car. The Applicant did not provide the reason why her son was stopped but did state that in another few minutes he would have been in their lane and safe from the law.

The Applicant received a copy of the Notice to Registrar of the impoundment without the officers signature, however the Applicant received a fully signed and complete notice a short time later from the Registrar.

The Applicant is now using her mother's van and is currently working as usual although in an older vehicle.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Corey L. Wales;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

The Respondent reviewed with the Applicant the necessary evidence that must be presented or disclosures that must be made to support her application for appeal under section 50.2(3)(d) of the Act. The Respondent also advised her of the provisions in the Act, section 55.1 subsection 21 to assist in recovery of any costs she might sustain. It was also pointed out to the Applicant that the driver, her son, was stopped and was again charged with driving with an alcohol level beyond the legal limit. It was then disclosed by the Applicant that her son was in court in Napanee while her appeal was being heard in Belleville.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(d) of the Act on the basis that the impoundment of her vehicle will and has resulted in exceptional hardship and has caused her difficulty in doing her work. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

In order for the Applicant's claim to be considered under section 22(2)(b)(c) the Applicant must have demonstrated that all 22(3) has been met. Furthermore, section 22(4) of the Regulation requires demonstration that every reasonable option has been explored, including an alternative vehicle.

The Applicant has another vehicle available to her. Also, she has not presented the Tribunal with any evidence that would support exceptional hardship, which is her ground for appeal under section 50.2(3)(d) of the Act. The burden to provide evidence to support her appeal under the Act is on the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: October 4, 2001

GOPAUL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
DAVY GOPAUL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 15, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DAVY GOPAUL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Davy Gopaul, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 9, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Davy Gopaul
170 Highway 7, East
Pickering, ON L0H 1J0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Davy Gopaul (hereinafter referred to as the "Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

1. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
2. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
3. The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided by the Applicant in entering into these terms and conditions.
4. The Applicant agrees to make reasonable efforts to resolve the outstanding amount claimed by the Ministry of Community and Social Service's Family Responsibility Office.
5. The Applicant agrees not to apply for registration as a motor vehicle dealer under the *Motor Vehicle Dealers Act*.
6. The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.
7. The Applicant agrees not to invite the public to deal at a place other than his employer's registered premises.
8. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles he sells prior to sale to ensure all material facts are disclosed in writing to the purchaser.

9. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.

Davy Gopaul (initials)

10. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
11. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
12. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
13. The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
14. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
15. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
16. The Applicant will provide a copy of this order to his employer forthwith.
17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
19. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of October 2001.

(Signature) Davy Gopaul

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

ADLS –757

ADLS –757

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
CLARKE WALLACE, Member

APPEARANCES: DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF
HEARING: October 1, 2001

By teleconference

INTERIM ORDER

WHEREAS the hearing of this matter before the Tribunal was adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Wednesday, October 3, 2001;

AND WHEREAS by letter dated September 26, 2001, counsel for the Registrar of Motor Vehicles advised the Tribunal that the Applicant, was required to attend the Port Credit detachment of the Ontario Provincial Police at 9:30 a.m. on Wednesday, October 3, 2001, which would conflict with his attendance at that time before this Tribunal and requested that this hearing proceed at 11:30 a.m. on that day;

AND WHEREAS the Tribunal communicated the Respondent's request to the Applicant by telephone call to the Applicant at (416) 333-3333, which is the means of communication requested by the Applicant who would not provide his address to the Tribunal;

AND WHEREAS on Friday, September 28, 2001, the Tribunal notified the parties that it would conduct a telephone conference at 11:00 a.m. on Monday, October 1, 2001 to hear submissions from the parties respecting the Respondent's request to change the hearing time from 9:30 a.m. to 11:30 a.m. on Wednesday, October 3, 2001;

AND WHEREAS the Tribunal convened on Monday, October 1, 2001 at 11:00 a.m. to hear submissions from the parties by telephone conference, with counsel for the Respondent in attendance but the Applicant not in attendance, the Applicant not responding to the Tribunal's telephone call to the Applicant's telephone number (416) 333-3333;

AND WHEREAS the Tribunal heard evidence from the Tribunal's Group Leader/Hearings Supervisor confirming that notice was given to the Applicant that the Tribunal would hear submissions respecting the Respondent's request at 9:30 a.m. on October 1, 2001;

THIS TRIBUNAL ORDERS:

- 1) the hearing of this matter previously scheduled to commence at 9:30 a.m. on Wednesday, October 3, 2001 shall instead commence at 11:30 a.m. on that day.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Clarke Wallace, Member

RELEASED: October 2, 2001

ADLS - 757

ADLS - 757

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
CLARKE WALLACE, Member

APPEARANCES: Applicant,
representing himself

DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

DATES OF HEARING: September 5, 14 and 26, 2001 and
October 1, 3 and 4, 2001

Toronto

INTERIM ORDER

WHEREAS the appeal by the Applicant was heard before the Tribunal on September 5, 14 and 26, 2001 and October 1, 3 and 4, 2001;

AND WHEREAS during the hearing in the afternoon of October 3, 2001, the Applicant requested that an affidavit that he had filed on September 26, 2001 with the Tribunal and that had been delivered on October 2, 2001 to the Respondent be marked as an Exhibit in the proceedings, and the Tribunal made that document Exhibit 15;

AND WHEREAS later in the hearing the Applicant requested that Exhibit 15 be marked by the Tribunal as confidential, to which Counsel for the Respondent had no objection;

AND WHEREAS Exhibit 15 is an affidavit of the Applicant containing medical confirmation;

AND WHEREAS during the afternoon of October 4, 2001 the Applicant filed the originals of the documents contained in Exhibit 15 and the Tribunal made the originals Exhibit 28;

NOW THEREFORE, the Tribunal orders that:

- (a) Exhibit 15 and Exhibit 28 in these proceedings shall not be accessible to the public;
- (b) Exhibit 15 and Exhibit 28 shall be kept separate from the public record;
- (c) Access by the public to Exhibit 15 and Exhibit 28 shall only be by written order of the Tribunal or as otherwise authorized by law;
- (d) The Registrar of the Tribunal shall separate Exhibit 15 and Exhibit 28 from other exhibits filed in these proceedings, place it in a sealed envelope and mark that envelope "Confidential".

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Clarke Wallace, Member

RELEASED: October 5, 2001

SOLTY

PETER S. SOLTY

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
MOTOR VEHICLE DEALERS AND SALESPERSONS
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE THE REGISTRATION OF PETER S. SOLTY
AS A SALESPERSON

TRIBUNAL: TERENCE A. WARDROP, Q.C, Vice-Chair

APPEARANCES: EARL LEVY, Q.C., Counsel, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar of Motor Vehicle
Dealers and Salespersons

DATES OF
HEARING: August 27, 28 and 31, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated April 25th, 2001, (the "Original Proposal"), issued by the Registrar of Motor Vehicles Dealers and Salespersons (the "Registrar"), to refuse the registration of Peter Solty (the "Applicant"), as a salesperson under the provisions of Section 6(1) of the *Motor Vehicles Dealers Act* R.S.O. 1990. Ch. M.42 (the "Act"), and which said Notice was issued and served on the Applicant pursuant to Section 7(1) of the Act. The Registrar is appointed pursuant to Section 2 of the Act to exercise the powers and perform the duties conferred or imposed under the Act. The Registrar issued a Notice of Further and Other Particulars dated August 10th, 2001, (the "Supplemental Proposal") which, by adding information and statements supplemental to the Original Proposal, had the effect of making the Original Proposal current as at the date of the Supplemental Proposal. This hearing dealt with the Original Proposal and the Supplemental Proposal together, as a single proposal (collectively the "Proposal").

The Applicant by a Notice of Appeal (the "Appeal") dated May 3, 2001, requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 7(2) and 7(4) of the Act.

ISSUES:

The Registrar issued the Proposal under Section 7(1) of the Act based upon the Registrar's opinion that the Applicant is disentitled to registration as a salesperson pursuant to Section 5(1)(b) of the Act. It is the opinion of the Registrar, as stated in the Proposal, that the Applicant's past conduct is inconsistent with the intention and objective of the Act and that the has failed to act with honesty and integrity during such time as he was formerly registered as a salesperson under the Act.

The Applicant in his Appeal stated that his past conduct as alleged by the Registrar was not industry related and disputed the alleged facts contained in the Original Proposal.

EVIDENCE:

The Respondent presented evidence by way of the testimony of several independent witnesses to support the opinions of the Registrar as stated in the Proposal.

Brian Locke (an employee of Ford Credit Canada Limited) and Edward Sullivan (a salesperson with Erinwood Ford Sales Limited) gave evidence respecting thirteen motor vehicles identified in Exhibits #3 and #4 purchased by Erinwood Ford Sales Limited ("Erinwood") through the wholesale auction facilities operated by Canadian Auction Group at Brampton, Ontario (the "Brampton Auction") and the sale of such vehicles through the facilities of the used car division of Erinwood to both wholesale and retail purchasers. In the case of several of such vehicles purchased and sold in the spring of 2000 while the Applicant was the Used Car Manager of Erinwood, it was apparent that words had been obliterated in the declaration section of the sales agreements from the Brampton Auction which disclosed "accidented and repaired" and/or "frame damage", so that any salesperson of Erinwood would be unaware of such disclosure when dealing with the sale of vehicles to unsuspecting purchasers. In addition, Mr. Sullivan gave general testimony as to the usual procedures and circumstances at Erinwood respecting the sale of used motor vehicles and the particular instances in which he was involved in the repurchase of vehicles from, or settlements with dissatisfied customers unaware of such disclosures.

Staff Sergeant Corey Smith of the Halton Regional Police Service gave testimony on behalf of the Respondent concerning a cooperative investigation by several police forces and the Ontario Motor Vehicle Industry Council under the code name "Project Phantom". This investigation involves an alleged scheme to avoid payment, or a possible conspiracy to defraud governments in Canada, of tax exigible on commercial sales of motor vehicles and heavy equipment in which the Applicant was a participant, either innocently or not. In its simplest form, the scheme involves the legal exemption from tax available to native persons resident on a reserve and the deduction of the equivalent amount allowed to the vendor. The investigation even suggests that the motor vehicles and heavy equipment involved in this scheme were fictitious and did not, in fact, exist at all but was mere paper documentation of

sales of nonexistent personal property by non-locateable number companies to a purchasing company owned by a native person on a reserve through a middle corporation, in this case Erinwood, which could utilize the GST rebate, and hence the description “phantom”. Sergeant Smith referred to a recorded and videotaped statement under oath by the Applicant which was filed as an exhibit at the hearing respecting the Applicant’s participation in the scheme. An inordinate amount of time at the hearing was taken up with an understanding of the “Project” and, although fascinating, did little to help this Tribunal decide whether or not the Applicant was, indeed, a co-conspirator in the alleged fraud. Nevertheless, the evidence did establish that the Applicant, and hence Erinwood, was an essential participant in the scheme as the “middle-man”, whether legal or fraudulent. Criminal charges with respect to the scheme have been laid against the alleged co-conspirators, including the Applicant, and are pending but will not be heard for sometime as the investigation and preparations for trial are still ongoing.

Mary Jane South, as Deputy Registrar to the Respondent, gave testimony respecting the various inspections carried out by the Respondent at Erinwood which disclosed faulty and/or inadequate documentation and which, in turn, led to the opinion reached by the Registrar and the decision noted in the Original Proposal.

A former employee at Erinwood, Eric Stein, also gave evidence respecting the procedures adopted at Erinwood respecting the purchase of motor vehicles at the Brampton Auction (and other auctions), delivery of the same to the Erinwood premises and the sale thereof by the used car division at Erinwood. He became the Assistant to the Manager of Used Cars at Erinwood and was familiar with the physical layout of the Erinwood environment and personnel.

Bruno Beltrame, a wholesale motor vehicle dealer, gave evidence on behalf of the Applicant and endorsed the security and integrity of all business dealings which he transacted with the Applicant.

The Applicant himself, Peter Solty, gave lengthy testimony respecting all of the issues raised by the Registrar in the Proposal, including the circumstances of his participation (and that of Erinwood) in the scheme described by Sergeant Smith as Project Phantom.

The evidence given by witnesses at the hearing was in the most part straight forward, clear and precise, thus giving this Tribunal little trouble in understanding the facts which give rise to the Proposal. However, by contrast, the testimony presented by the Applicant himself was evasive, disdainful and competitive and likewise assisted this Tribunal in understanding the Proposal. Mr. Solty, particularly under cross-examination, frequently challenged the questions put to him and even, on several occasions, responded by answering the question asked with a question.

THE FACTS:

From all of the evidence given at the hearing, this Tribunal finds as facts the following:

1. The Applicant was first registered as a salesperson pursuant to the Act on November 15, 1982;
2. The Applicant was registered as a salesperson to Erinwood pursuant to the Act from August 11, 1997, until June 9, 2000;
3. The Applicant as at the date of the Original Proposal was not registered as a salesperson pursuant to the Act, having applied for such registration on January 29, 2001;
4. The Original Proposal was issued by the Registrar on April 25, 2001, and the Applicant's Appeal was dated May 3, 2001;
5. The Supplemental Proposal was issued by the Registrar on August 10, 2001, to which the Applicant has not responded;
6. The Applicant was the Used Car Sales Manager of Erinwood at all material times during which motor vehicles identified in the material filed at the hearing as part of the Exhibits were purchased by the Applicant on behalf of Erinwood at the Brampton Auction for resale to customers of, or purchasers from, Erinwood;
7. Photocopies of the Original Sales Agreements from the files of Erinwood for each of the motor vehicles disclose obliterations of portions of the said Sales Agreements and photocopies of duplicate copies of such Sales Agreements obtained from the Brampton Auction disclose that the said obliterations deleted the words "FRAME DAMAGED, ACCIDENTED & REPAIRED" or words of similar purport;
8. The Applicant has participated with others in a scheme which has led directly to criminal charges being laid against the Applicant for Fraud and Conspiracy to Commit Fraud.

THE LAW:

Pursuant to section 6(1) of the Act, the Registrar may refuse to register the Applicant as a salesperson for any reason that would disentitle the Applicant to registration under section 5(1)(b) of the Act:

“6 (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar’s opinion the applicant is disentitled to registration under section 5.”

Pursuant to section 5(1)(b) of the Act, the Applicant is entitled to registration by the Registrar except where the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty:

**“5. (1) An applicant is entitled to registration ... by the Registrar except where,
(a) ...;
(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;”**

Based upon the above noted facts, the Registrar has reached the decision that there are reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. Pursuant to sections 7(1) and 7(2) of the Act, the Registrar is required to serve a notice of proposal on the Applicant:

**“7. (1) Where the Registrar proposes to refuse to grant ... a registration ..., the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant
(2) A notice under subsection (1) shall state that the applicant ... is entitled to a hearing by the Tribunal if the applicant ... mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant ... may so require a hearing.”**

The appeal comes to this Tribunal by virtue of section 7(4) of the Act, which provides:

“7. (4) Where an applicant ... requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar’s proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.”

DECISION:

This Tribunal finds that the Applicant has little or no perception of the disclosure requirements of the motor vehicle industry, or if he does, he has set his own standards of compliance.

By way of explanation, he admitted that a motor vehicle being auctioned fell into one of two categories or markets, one of “frame damage” and/or “accident repair”, and the other was free of any such damage. Indeed, at the hearing, testimony was given that at the moment of a vehicle’s auction sale in the arena, a set of coloured lights flash intermittently to signal to all potential purchasers that the particular vehicle has suffered “frame damage” or “accident repair” and immediately a lower price range is anticipated since many buyers do not participate in the auction sale of such a vehicle. Mr. Solty stated that this labeling is often in error and he disregards it when purchasing an auctioned vehicle since he himself is capable of over-ruling this determination based upon his own later inspection of the vehicle. His superior knowledge of “frame damage” and/or “accident repair” then displaces the earlier determination made by a mechanic at the auction. It follows then that it is unnecessary to make any disclosure to a purchaser and the price differential is subverted to the unsuspecting purchaser unless later discovered.

That such an earlier mechanical determination was obliterated in Erinwood’s copy of the sales agreement was either known, or ought to have been known by the Applicant as Manager of the Used Car Sales at Erinwood, particularly since he purchased the vehicles at the auction. There was no direct evidence given at the hearing as to who actually obliterated the disclosure words but certainly the obliterations were known by other employees at Erinwood though perhaps not the actual words that were obliterated.

Further, the Applicant saw no reason to disclose such prejudicial information since by his own opinion such was inaccurate or otherwise not material due to the warranty being offered to purchasers of used vehicles by Erinwood. The past conduct of the Applicant thus strikes at the very centre of the disclosure requirements that the legislation seeks to enforce and the theory of consumer protection the Act embodies. Not only did the Applicant not realize the duty upon him as Manager of the Used Car Division of Erinwood to disclose the past condition of the

vehicles to purchasers, but also he prevented other salespersons from complying by condoning the deletion of disclosure words from the vehicles' history available to such other salespersons.

As stated above, there was a great deal of evidence presented at the hearing on the subject of the criminal charges laid against the Applicant and his alleged past conduct related thereto. Although the allegations were interesting, this Tribunal finds no evidence to support any findings of fact on the Applicant's participation in the scheme underlying these charges. However, it is equally clear that the Applicant's brokering participation in and of itself in such a scheme for easy immediate profits tends to show a lack of due diligence on his part and thus reflects adversely on his integrity as an issue of past conduct that the Registrar is entitled to consider. The evidence of the Applicant at the hearing indicated the Applicant was aware of more information than he disclosed respecting this business undertaking.

Based upon all the evidence presented at the hearing, this Tribunal is in accord with the Registrar's conclusions set forth in the Proposal.

ORDER:

The onus of proof that the Proposal is correct lies with the Respondent, and this Tribunal finds that this onus has been discharged in light of all of the evidence given at the hearing and for the reasons hereinbefore stated. Accordingly, pursuant to the authority vested in it by section 7(4) of the Act, this Tribunal directs the Registrar to carry out the Proposal to refuse the registration of the Applicant as a salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

RELEASED: October 11, 2001

LESANALSHARIYATI

ARASH LESANALSHARIYATI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE THE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ARASH LESANALSHARIYATI, representing himself
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: October 5, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal dated June 18, 2001, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Arash Lesanalshariyati ("Lesanalshariyati") as a motor vehicle salesperson under the provisions of the Act.

THE ISSUES:

The Registrar bases his proposal to refuse the registration of Lesanalshariyati as a motor vehicle salesperson under section 7(1) of the Act which states as follows:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

The Registrar also bases his proposal to refuse registration of Lesanalshariyati under section 6(1) and section 5(1)(b) of the Act which state as follows:

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

and

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

In support of his Notice of Proposal to refuse registration of Lesanalshariyati (Exhibit 1, Tab 1) the Registrar furnished particulars, which read verbatim as follows:

PARTICULARS

The reasons for this proposal are:

1. Robinson Arash Lesanalshariyati (hereinafter referred to as the "Applicant"), applied for registration as a motor vehicle salesperson on or about April 30, 2001. He proposes to work for Canadian Fine Motors.
2. On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where an absolute discharge has been ordered). If yes, list all charges and/or convictions and the circumstances surrounding each (attach additional sheets if necessary)."
The Applicant said "no".
3. A criminal record search found that the Applicant has the following charges pending:
Living on the avails of prostitution
Exercising ctrl for the purpose of prostitution, January 15, 2000.
4. On or about June 15, 2001 in response to a written request by the Registrar's Office, *Motor Vehicle Dealers Act* dated June 4, 2001 the Applicant provided a letter disclosing the pending charges and the circumstances surrounding same.
5. The Applicant failed to make full disclosure on his application for registration submitted to the Registrar.
6. The Applicant has failed to comply with the Motor Vehicle Dealers Act and in particular with section 5.

THE EVIDENCE:

The evidence introduced by the Registrar consisted of documentary evidence and the testimony of Police Constable Aaron Masnaghi and Laura Gordon. Their evidence is summarized hereunder:

Aaron Masnaghi

Aaron Masnaghi ("Masnaghi") testified that he is a police constable with the Peel Regional Police with whom he has been for the past 11 years. He was assigned as a constable in the vice unit of the Peel Regional Police at the time of the incident on January 14, 2000.

On January 14, 2000 he received a complaint regarding an allegation of a female person working as a prostitute for an escort agency, which agency operated under the name of Classique Escort Services ("Classique"). The complainant provided Masnaghi with the telephone number of Classique and Masnaghi directed a police officer to communicate with Classique for the purpose of obtaining the services of a prostitute. The police officer telephoned Classique and then spoke with a male person when arrangements were made for the services of a prostitute to be provided by Classique at the Ramada Inn hotel in Mississauga for 7:00 p.m. on January 14, 2000. Masnaghi obtained a copy of the Toronto Sun newspaper of January 14, 2000 (Exhibit 4) and referred the Tribunal to page 77 of that newspaper where Classique had placed an advertisement under the heading of "Adult Entertainment" in the classified advertisement section. After the police constable spoke with the adult male at Classique at the telephone number given by the complainant, Masnaghi telephoned the number given in the Classique advertisement appearing in the Toronto Sun and confirmed it was the same telephone number as that given to him by the complainant.

The police officer who telephoned Classique to arrange the services of a prostitute informed Masnaghi that he was quoted "a rate of \$170.00 for one hour full service". Masnaghi stated that "full service" is a term to describe "full intercourse". Arrangements were made by Classique to reserve a hotel room at the Ramada Inn Hotel in Mississauga from 7:00 p.m. on January 14, 2000.

At about 7:00 p.m. on that day, surveillance officers were placed outside of the hotel. At approximately that time, Masnaghi received a number of calls from a male who stated he was calling from Classique and that the female person "was somewhat delayed" and identified such female person as "Ursula".

Masnaghi went on to testify that at 7:57 p.m. on January 14, 2000 a motor vehicle was observed to enter the Ramada Inn's property. The motor vehicle was driven by a male and alongside him was a female passenger who was seated in the passenger seat. The female passenger was dropped off at the hotel's entrance and the male driver then parked the motor vehicle in the hotel's parking lot. The female entered the hotel upon being dropped off at the entrance.

The female and an undercover officer met. They spoke at the bar in the hotel lobby and negotiated the fee payable to the female for her services. The officer was informed by the female that he would have to pay her \$170.00 for sexual intercourse and that he would have to wear a condom. The officer paid the female \$170.00 whereupon the officer and the female proceeded to room 127 of the hotel where Masnaghi was waiting. Masnaghi then arrested the female for communicating for the purpose of prostitution after she was advised of her right to Counsel and was also cautioned by Masnaghi.

After having been cautioned by Masnaghi as to her rights the female made a statement to Masnaghi. She identified the male driver of the motor vehicle who drove her to the hotel as "Rash", stated that she worked for him and that he owned Classique. She also informed Masnaghi that she was to pay "Rash" \$80.00 from the \$170.00 she was to be paid for her services. "Rash", she informed Masnaghi, set the price with the customer and also arranged her "dates". He would telephone her when he had a customer for her and arranged to pick her up, transport her to the arranged location where she was to be with the customer and would wait for her until she is finished with the customer. She pays "Rash" his \$80.00 then and he drives her home. On her arrest, the female further stated she responded to an "adult help wanted" advertisement in which female escorts were sought. Pursuant to the advertisement, she was interviewed by Lesanalshariyati. She also stated that when "dates" were arranged for her, Lesanalshariyati made all the arrangements and that on all "dates" intercourse took place with customers.

After receiving the aforementioned information from the female person, Masnaghi arrested Lesanalshariyati while he was still seated in his motor vehicle at the Ramada Inn hotel. He identified the driver as Lesanalshariyati. At the time of his arrest, documents were found in the car and were seized by Masnaghi. Among the documents seized were bills that had been paid by Lesanalshariyati to the Toronto Sun newspaper for advertising charges for Classique; also, there were paid telephone bills addressed to Classique. Furthermore, he seized a book containing dates and addresses of locations to which Lesanalshariyati had brought females and a record of break downs relating to various monetary transactions involving females who worked for Classique.

While Lesanalshariyati, upon his arrest, confirmed to Masnaghi that he was to receive \$80.00 from the female he also stated that he was only acting as a driver and was watching over the business for a friend.

Laura Gordon

Laura Gordon ("Gordon") testified that she is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC") and that OMVIC oversees the administration of the Act which is a consumer protection statute.

She reviewed the Notice of Proposal (Exhibit 1, Tab 1) as well as Lesanalshariyati's written application for registration as a motor vehicle salesperson (Exhibit 1, Tab 4). She observed that Lesanalshariyati's answer to question 9 in his application caused her concern as a result of which a C.P.I.C. report was called by OMVIC and was duly received (Exhibit 1, Tab 7).

Upon reviewing the C.P.I.C. report she observed that Lesanalshariyati had a pending criminal charge which he had failed to disclose in answer to question 9 of his application for registration. Accordingly, she addressed a letter dated June 4, 2001 to the motor vehicle dealership when Lesanalshariyati was employed as a salesperson under a conditional registration in terms of section 13(3) of Regulation 801 to the Act (Exhibit 1, Tab 5).

Lesanalshariyati wrote in response to the Registrar's letter of June 4, 2001. Lesanalshariyati's letter reads as follows:

In January 2000 I worked as a driver for an escort service agency. I only worked during the weekend. Two weeks later police close down the agency and because I worked as a part time driver police took us to the court and since then which is almost one year and half I'm still waiting for the court date, however my lawyer has already told me that the case against me will be discharged because I was only a driver and also the case is taking too long. He also ensured me that before the court date (August 28, 2001) he is going to fill out an application and have the case cancelled. He said the case will be cancelled for sure. Should you have any question regarding this matter please call my lawyer at :905-238-1411 Michael J. Bukovac

Gordon further testified that the Registrar relies on the good faith and honesty of all Applicants and registrants to fully and truthfully answer all questions when they complete their application forms.

Arash Lesanalshariyati

Lesanalshariyati gave evidence on his own behalf. He called no witnesses.

He stated in testimony that he "did not read the question properly" when referring to question 9 in his application. He stated that he had been working for Mr. Sub and was trying to improve his position by becoming a driver for Classique. He further stated that he only "drove" for Classique and beyond that he has no connection with Classique.

Under cross-examination, he confirmed that he completed and signed the application for registration as a salesperson (Exhibit 1, Tab 9). He further stated that he “did not understand what was meant” in question 9 of his application. He did not seek assistance from either OMVIC or his employer when completing his application for registration.

FACTS FOUND PROVEN:

The following are the facts found by this Tribunal to have been proven:

1. Lesanalshariyati completed and signed his application for registration as a motor vehicle salesperson dated April 20, 2001 (Exhibit 1, Tabs 3 and 4).
2. At the time that Lesanalshariyati completed and signed his application for registration as a motor vehicle salesperson dated April 20, 2001, he had criminal charges pending against him for living on the avails of prostitution and exercising control for the purposes of prostitution.
3. At the time that Lesanalshariyati completed and signed his application for registration as a motor vehicle salesperson dated April 20, 2001, he was aware that the criminal charges referred to in paragraph 2 above were pending against him.
4. Lesanalshariyati failed to disclose in his application for registration as a motor vehicle salesperson dated April 20, 2001 that the criminal charges referred to in paragraph 2 above were pending against him.
5. Lesanalshariyati was to receive \$80.00 from the female whom he drove on January 14, 2000 to the Ramada Inn Hotel, Mississauga.

DECISION AND REASONS:

The issue for decision is whether the Registrar erred in his decision that Lesanalshariyati should have his application for registration as a motor vehicle salesperson refused.

Section 6(1) of the Act states the Registrar may refuse to register an applicant where in the Registrar’s opinion the Applicant is disentitled to registration under section 5.

Section 5(1)(b) of the Act entitles an Applicant to registration by the Registrar except where the past conduct of the Applicant affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Registrar has the onus of proof to satisfy the Tribunal that he has reasonable grounds to believe that the registration of Lesanalshariyati ought to be refused. The proper question is whether Lesanalshariyati's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971–1989) page 95 Southey J.* held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

Brenner 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in this case Southey J. sent it back for a rehearing, however, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

On an examination of the evidence placed before the Tribunal, it is clear that he did not answer question 9 on his application for registration honestly. Lesanalshariyati, in his evidence in chief, stated that he did not read question 9 properly while under cross-examination he stated he did not understand what question 9 meant.

The Tribunal had the opportunity of listening to Lesanalshariyati testify and found that his grasp and appreciation of English was more than adequate. He was observed to have no difficulty in following the proceedings which were conducted in English and in fact stated, in answer to a question put to him by the Tribunal, that he attained grade 12 at school. The Tribunal therefore finds that Lesanalshariyati would have found no difficulty in either reading or understanding question 9 in his application. The Tribunal also finds that he knew of the pending charges when he completed and signed his application for registration. The Tribunal is of the opinion that he deliberately did not disclose the pending charge for fear of jeopardising his chances of being registered as a motor vehicle salesperson. His non disclosure of this obviously material fact is dishonest and reflects a lack of integrity. It amounts to conduct that, in the opinion of the Tribunal, justifies the conclusion of the Registrar that such conduct affords the Registrar reasonable grounds for belief that Lesanalshariyati will not carry on business in accordance with law and with integrity and honesty.

The Tribunal, quite apart from the material non disclosure by Lesanalshariyati in answering question 9 on his application for registration, is satisfied having listened to Lesanalshariyati's testimony and the testimony of Masnaghi that the latter's testimony was the more acceptable and persuasive. In his cross-examination, Lesanalshariyati did not even question the great majority of Masnaghi's testimony and admitted to the latter when he was placed under arrest that he was to receive \$80.00 from the female whom he drove to the Ramada Inn hotel.

While the evidence given by Masnaghi was to a large extent hearsay, the Tribunal is permitted to admit such hearsay evidence in terms of section 15 of the *Statutory Powers Procedure Act*. In admitting such hearsay evidence the Tribunal accepts the veracity of Masnaghi's testimony more particularly in that his testimony was not placed in contention by Lesanalshariyati.

On the basis of Lesanalshariyati's material non disclosure coupled with the fact that his testimony was neither compelling nor persuasive, the Tribunal is of the belief that his conduct does afford the Registrar reasonable grounds for the belief that Lesanalshariyati has not conducted himself in accordance with law and with integrity and honesty.

DECISION:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the Act, directs the Registrar to carry out his proposal dated June 18, 2001 to refuse the registration of Lesanalshariyati as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: October 11, 2001

EDWARDS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
DWIGHT A. EDWARDS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 23, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DWIGHT A. EDWARDS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Dwight A. Edwards, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 12, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Dwight A. Edwards
1608 – 35 Kingsbridge Garden Circle
Mississauga, Ontario, L5R 1Z5

Pursuant to subsection 5(2) of the *Motor Vehicle Dealers Act*, Dwight A. Edwards (hereinafter referred to as "the Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Power Procedures Act, do hereby waive the requirements of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry-specific offence or if he is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
6. The Applicant confirms that the circumstances surrounding the conviction are substantially as disclosed to the Registrar.
7. The Applicant agrees to make reasonable efforts to resolve the outstanding arrears claimed by the Ministry of Community and Social Service's Family Responsibility Office.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

Dwight A. Edwards (initials)

10. The Applicant will provide a copy of this order to his employer forthwith.

11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of September 2001.

Dwight A. Edwards (signature)

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton
Registrar, *Motor Vehicle Dealers Act*

Date:

K.J.J.

HIGHWAY TRAFFIC ACT

Section 50.1 and Regulation 574, R.S.O. 1990, Chap. H8 as amended

K.J.J.

IN THE MATTER of an APPEAL of A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 48.3(2) of the *Highway Traffic Act* TO
SUSPEND A PERSON'S DRIVER'S LICENCE FOR A PERIOD OF 90
DAYS dated June 29, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

K.J.J.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), K.J.J. (the "Applicant") initiated an appeal under section 50.1 of the Decision of the Registrar of Motor Vehicles made pursuant to section 48.3(2) of that Act, dated June 29, 2001 to suspend the Applicant's driver's licence for a period of 90 days;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 6(1) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50.1(4) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated June 29, 2001 to suspend the driver's licence of KJ.J. for a period of 90 days.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: October 12, 2001

HILLO, ANDY ADVERTISING LTD.

ANDY HILLO ADVERTISING LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

ANDY HILLO ADVERTISING LTD., Applicant
ANDY HILLO, Agent for the Applicant

DATE OF HEARING: October 9, 2001

DECISION RELEASED: October 12, 2001

Bracebridge

REASONS FOR DECISION

A hearing was held on October 9, 2001, at Bracebridge, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Andy Hillo Advertising Ltd. (the "Applicant")
Motor Vehicle:	1986 Ford Pickup (F150), plate no. 813 8CD (the "vehicle")
Date of Appeal:	September 19, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on October 9, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant requested that the Tribunal enter into evidence two further documents, previously not provided to the Ministry. There was no objection from the Respondent's representative and the documents were received and subsequently entered.

The documents presented by the Applicant and Respondent were entered into exhibit with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I did possess a drivers licence on Sept. 7, yet a MTO computer did not show it. A May 29th stay of charges (on a impaired conviction Dec 6.00) was successful and Hon. Judge Maclean had at that time reinstated my driving privileges. The mistake between the court & MTO (licence control) showed no such stay, therefore the police impounded. I have a copy of the stay of charges by Hon. Maclean.

Exhibit # 2 Notice of Appeal dated September 19, 2001.

Exhibit # 4 Order of Stay dated April 12, 2001.

Exhibit # 5 Disposition.

Exhibit # 6 Letter from Mr. W. Williams LLB to Mr. Hillo dated April 16, 2001.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Andrew Hillo;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 6, 2001.

Mr. Hillo took the stand and was sworn. He testified that he was under the impression by his Attorney that everything was taken care of and that he in fact has his driving privileges returned to him as indicated in his letter of April 16, 2001 (Exhibit # 6). In fact he had been stopped by police in June 2001 and was charged with failure to have his documents. The police were also in the process of impounding his vehicle when the Applicant was able to contact the Crown who had been involved in his stay. The Crown indicated to the police at that time that in fact Mr. Hillo was not a suspended driver and the vehicle was released from the tow truck hoist. On July 10, 2001 he was stopped by the same police officer and was told that he was driving while suspended and that the vehicle was impounded and to take it to court.

The Respondent asked Mr. Hillo if he had informed the Ministry of the Court's ruling as the Ministry is the licensing agency that licenced drivers in the Province of Ontario? Mr. Hillo responded that he took it for granted that the Courts would inform the Ministry and the appropriate documents would be forward to him. The Ministry was informed on September 15, 2001 however Mr. Hillo is still not in possession of the specific documentation namely a temporary permit or permanent permit. The Applicant had no further information to present and was excused from the stand.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(b).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 730 of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
 - (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

APPLICATION OF LAW TO FACTS:

The evidence presented has established that in fact, the Applicant Mr. Hillo was not suspended at the time of the impoundment order. The Tribunal finds that in this case, there has been a breakdown in communications between the Applicant and the Ministry with respect to the process involved in updating Ministry records respecting the Applicant's driver's licence and the appropriate steps needed to be taken by the Applicant to facilitate matters.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: October 12, 2001

IRWIN

JOSEPH WESLEY IRWIN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

JOSEPH WESLEY IRWIN, Applicant
unrepresented

DATE OF HEARING: October 10, 2001

DECISION RELEASED: October 12, 2001 **Peterborough**

REASONS FOR DECISION

A hearing was held on October 10, 2001, at Peterborough, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Joseph Wesley Irwin (the “Applicant”)
Motor Vehicle:	1997 Chrysler CX1, plate no. AHCV 482 (the “vehicle”)
Date of Appeal:	September 20, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 10, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent’s evidence.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I AM THE PRINCIPLE DRIVER AND HAVE NO ALTERNATIVE TO THE AVAILABILITY OF THE IMPOUNDED VEHICLE.
I AM A FARMER AND FREE LANCE LABOURER.
I MUST HAVE THE VEHICLE TO GET TO PLACES OF EMPLOYMENT.
THE FARM IS UNDER TRANSFER TO ORGANIC FARMING AND HAS LITTLE INCOME AT PRESENT.
THIS IS THE REASON FOR THE NECESSITY OF MY OFF FARM INCOME.
WE STILL HOLD A SUBSTANTIAL MORTGAGE/LOAN AGAINST THE FARM. WE CAN NOT BORROW ANY MORE MONEY.
WE HAVE RAISED FIVE CHILDREN. THREE HAVE RECENTLY GRADUATED FROM UNIVERSITY BUT WE STILL HAVE TWO DEPENDANTS AT HOME.
I MUST WORK AND MAKE OFF FARM INCOME ON A MONTHLY BASIS JUST TO SUSTAIN CASH FLOW. IF I AM UNABLE TO GENERATE CASH FLOW, IT COULD RESULT IN DECLINED CREDIT RATINGS AND ULTIMATELY BANKRUPTCY.

J. WESLEY IRWIN

At the hearing the Applicant reiterated the statements contained in his letter to the Tribunal, testifying that the impounded vehicle is needed as he must freelance and take odd jobs outside the farm in order to support his family.

The Applicant lives on a farm that is in the process of changing to organic farming. At the moment given his present financial situation and outstanding debts, the Applicant feels that it would be probably impossible to arrange a new loan.

The Applicant is registered with the Labourer's work force and has missed work because of not having a vehicle to get to and from the jobs. The Applicant also freelances, and has done some work for a neighbour that is within walking distance, but the possibility of finding others clients is hindered by the lack of a vehicle.

The teen-age children still at home are also affected. Although they are able to get to and from school in the school bus, they are unable to carry out extra curricular activities, as they would have no transportation to return home.

The Applicant explained that the impounded vehicle was actually purchased by his father so that he could drive him to medical appointments. The Applicant and his wife are responsible for "four seniors", the Applicant's father, aunt and in-laws.

No member of the family has missed any appointments. When required the Applicant uses either his aunt's car or his mother-in-law's.

As for expenses, Mr. Irwin testified both in evidence in chief and in cross-examination that there may have been extra costs and definitely loss of revenue, but nothing significant or long lasting.

The Applicant admitted to owning another vehicle but although maintaining current licence plates, said vehicle is not road worthy, as it has no seat belts. The Applicant is questioning whether the truck, being a 1988 vehicle, is worth the cost of the seat belts and the necessary repairs required for emission control.

The Applicant, in closing, confirmed his need for the vehicle.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

- 1) Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
- 2) Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David Irwin;
- 3) Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
- 4) Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 4, 2002.

The Respondent offered no viva voce evidence at the hearing, choosing to stand on the information provided.

In closing, the Respondent read out the applicable legislation and asked the Tribunal to confirm the decision of the Registrar and uphold the impoundment, on the grounds that the Applicant's testimony amounted to inconvenience but did not constitute hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that whenever necessary he has used both his aunt's and in mother-in-law vehicle. The Tribunal understands the Applicant's desire not to inconvenience his family or relatives but as there are alternative means of transportation available to the Applicant, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant stated that he has lost some work and may lose more until the vehicle is returned but the losses are not significant and long lasting. Thus, the Tribunal may not consider O. Reg. 632/98, Subsection 22(3)(b).

The individual affected by the impoundment, has an alternative method of transportation, and has incurred no significant or permanent loss.

The Applicant having an alternative vehicle and the loss due to the impoundment not being immediate, significant or lasting, it is not necessary to review further criteria set out in the Regulation.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established the exceptional hardship ground of appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 12, 2001

KNORR

SVETLANA KNORR

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING,
Presiding member

APPEARANCES: KIM BIENTEMA
Representative for the Registrar of Motor Vehicles

SVETLANA KNORR, Applicant
not represented

DATE OF HEARING: October 10, 2001

DECISION RELEASED: October 12, 2001 Toronto

REASONS FOR DECISION

A hearing was held on October 10, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Svetlana Knorr (the "Applicant")
Motor Vehicle:	1994 Acura Integra, plate no. 282 AESE (the "vehicle")
Date of Appeal:	September 21, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on October 10, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

Applicant's written submission filed with the Tribunal in support of appeal states:

- I, Svetlana Knorr, the owner of the Acura Integra (plates # AESE 282) would like to repossess my vehicle because I'm a victim of somebody's irresponsibility.
- On Wednesday September 19, my ex-boyfriend took the keys of my car without any of my permission. He was pulled over by OPP on the way to Toronto, and the car was towed away because he is a suspended driver.
- I would like to get my car back because I am a full time 3rd year York University student and I need my car to get to school everyday. I am also a bartender at the PCYC in Mississauga. My sister and mother also use this car. In addition to that I need this car for my basic daily routine such as go grocery shopping, go to the library to study, etc. It is going to affect and cause a big impact on my way of living. I don't believe that I should be suffering for other people's mistakes.
- I would like you to take this in consideration, and I thank you, for taking your time to read this letter. I hope you will understand my situation and make the right decision.
- If you have any questions, please do not hesitate to contact me at(cell phone)
.....(home)

Sincerely yours
Svetlana Knorr

September 20/2001

In giving evidence, Miss Knorr explained that she had been staying with her boyfriend Eduard Ponomarenko on a boat in Newmarket. She knew that Eduard's driving license was suspended. As a precaution, she had hidden the car keys inside the car. On September 19, while Miss Knorr was asleep, Eduard opened the car, found the keys and drove off. Svetlana, (Miss Knorr), found out that the car had been impounded on the 20th. She called the police on the same day and attempted to charge her boyfriend with theft, but the police did not accept the charge. The police said that since there was no evidence that Eduard did not intend to return the automobile and that he would therefore be charged with taking the car without consent.

Miss Knorr's claim of exceptional hardship was based on the fact that because it took nearly two hours to go from Jane Street to Mississauga where she worked, she sometimes could not get to work on time. Consequently she lost the job. She also found it difficult to travel back and forth to York University by bus. She lives with her mother and cannot take her shopping. This makes everyday living very difficult.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Eduard Ponomarenko;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 28, 2002.

On being questioned by the Respondent, Miss Knorr stated that she had not been able to speak with Eduard. She had spoken to his parents, but they had not offered to help her. She stated that she was not sure whether the boy friend would return with the automobile.

She had worked in Mississauga, at the Port Credit Yacht Club for three years. She took home approximately \$200.00 per week. This money was used to supplement her OSAP. Now that she was unemployed she had to use some of her savings to get by. She had also borrowed money from her mother.

She was asked why she did not use a second car which was registered in the family name. She claimed that the car belonged to her sister, who is presently in Russia. In any case the sister did not want to help her, because she felt that Svetlana's problems were of her own making and that she should solve them herself.

Svetlana agreed that she had not attempted to get one of her friends to take her to work. She had not missed school, but having to use public transportation was very tedious. She felt quite certain that she would be able to get her job back once she had her car.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or

set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or

(d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement

during the impound period.

APPLICATION OF LAW TO FACTS:

As to the first issue filed, the evidence established that the automobile had not been stolen.

The shorter Oxford Dictionary defines stolen, "As obtained by theft."

Black's Law dictionary defines stolen as, "acquired or possessed as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with true intent to deprive the owner of the benefit of ownership permanently."

Although Miss Knorr testified that she was not sure whether Eduard would return the car, she did indicate that he had driven the car before, and she was not positive that he did not intend to return it.

In addition, she advised that the police had not been convinced that the car had been stolen, and had decided to lay a charge of "taken without consent."

Consequently, the Tribunal finds that subsection 50.2 (3) (a) of the Highway Traffic Act has not been proven.

As to the second issue filed, Section 22 (2) of Ontario Regulation 632/98 amending Reg. 574 of R.R.O. 1990, states that in determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training of an educational or training opportunity to any person.

All of the evidence provided by Miss Knorr relates to inconvenience, and financial loss as a result of losing her job. She has been able to attend school.

She has not demonstrated under Section 22.(3) that no alternative to the impounded vehicle is available or that the loss will be permanent and lasting.

The only other person to be inconvenienced is her mother who finds it difficult doing her grocery shopping without the car. Inconvenience, however, is not exceptional hardship.

In view of the evidence given, the Tribunal finds that the claim of exceptional hardship has not been substantiated.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: October 12, 2001

BOLEJSZO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
TADEUSZ AND STANISLAWA BOLEJSZO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

TADEUSZ AND STANISLAWA BOLEJSZO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1136364 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 15 and 16, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chamber's, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, January 23, 2002 and to continue January 24, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 12, 2001

PERGUNAS

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MARGARET PERGUNAS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MARGARET PERGUNAS

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1160773 ONTARIO LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 4 and 5, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario, at 9:30 a.m., on Tuesday, December 11, 2001 and to continue December 12, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 17, 2001

KATZBERG

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BERNIE KATZBERG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: September 14, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BERNIE KATZBERG

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Bernie Katzberg, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 17, 2001

TO: The Registrar
Motor Vehicle Applicant Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Bernie Katzberg
190 Tansley Road
Markham, ON L4J 5T5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Bernie Katzberg (hereinafter referred to as "the Applicant"), and the Registrar, Motor Vehicle Dealers Act (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to his registration as a motor vehicle salesperson:

1. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
2. The Applicant will not be allowed to deposit or authorize cheques or payments of any kind on behalf of a motor vehicle dealer.
3. The Applicant agrees to comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
4. The Applicant agrees not to be an officer, director, owner, partner, shareholder or to be the person in charge of a dealership.
5. The Applicant agrees to comply with the "Minutes of Settlement" entered into with Rochelle Goldstein on August 24, 2001.
6. The Applicant agrees to pay \$1,200 per month towards the outstanding judgement in favour of Segal Motarcar Co. Inc. Said payments will be made by certified funds and will commence on or before July 1, 2002.
7. The Applicant agrees to pay \$300 per month towards the outstanding judgement in favour of Trans Canada Credit. Said payments will be made by certified funds and will commence on or before July 1, 2002.

8. The Applicant agrees to pay \$500 per month to the Motor Vehicle Dealers Compensation Fund in respect of a claim paid out to Daniela Zanini on behalf of 1183000 Ontario Inc. O/A Thornhill Auto (1996). Said payments will continue until the indebtedness of 1183000 Ontario Inc. O/A Thornhill Auto (1996) to the Motor Vehicle Dealers Compensation Fund has been extinguished. Said payments will be made by certified funds and will commence on or before July 1, 2002.
9. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
10. The Applicant agrees not to be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration. Without limiting the generality of the foregoing, the Applicant acknowledges and understands that his registration will be terminated if the Registrar receives notice from his sponsoring dealer of a termination of his employment or authorization and the Applicant has not complied with clause 10 above with respect to transferring his registration to another dealer.
11. The Applicant agrees not to negotiate the purchase, sale or lease of a motor vehicle accept on behalf of the dealer to whom he is registered.
12. The Applicant agrees to provide full disclosure on all future applications to the Registrar and will ensure that he provides complete and truthful information on any statement or other document provided to the Registrar or his representative.
13. The Applicant will provide a copy of this Order to his employer forthwith.
14. The Applicant hereby acknowledges that in the event of a breach of any of the terms and conditions set out herein or if the Applicant is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, the Registrar is directed to, and shall revoke the registration of the Applicant.
15. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to his financial circumstances and his honesty and integrity.
16. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

17. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

18. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

19. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto this ____ day of October, 2001.

Bernie Katzberg

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Applicants Act.

Date:

Carl Compton
Registrar
Motor Vehicle Applicants Act

BALDASSARRE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LUISA MARY ROSE BALDASSARRE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 28, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LUISA MARY ROSE BALDASSARRE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 22 and 23, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Monday, November 5, 2001 and to continue November 6, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 22, 2001

NGO

VINH THUAN NGO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE THE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

VINH THUAN NGO, representing himself

B. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

October 10, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written Notice of Proposal (the "Proposal") dated June 26, 2001, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Vinh Thuan Ngo (the "Applicant") as a motor vehicle salesperson under the provisions of the Act.

THE ISSUES:

The Registrar bases his proposal to refuse the Applicant's registration under section 6.(1) of the Act which reads as follows:

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

The Registrar further bases his proposal under sections 5(1)(b) and section 7.(1) of the Act which reads as follows:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

and

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

In support of his Notice of Proposal to refuse, the Registrar furnished the following Particulars:

The reasons for this proposal are:

1. The Applicant was first registered as a motor vehicle salesperson on or about February 17, 1993. The Applicant's registration was terminated on or about January 24, 2001.
2. The Applicant applied for registration as a motor vehicle salesperson on or about April 30, 2001. He proposes to work for 1076634 Ontario Inc. o/a Dave Nicholls Toyota.
3. On the application to become a registered salesperson question 9 asks:
"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where an absolute discharge has been ordered).
The Applicant said "no".
4. A criminal record search found that the Applicant has the following convictions:
Aggravated Assault – September 22, 1989
Assault with a Weapon – September 18, 1990
Escape Lawful Custody – September 18, 1990
5. The Applicant has provided false and misleading information on applications previously submitted to the Registrar.

THE EVIDENCE:

The evidence of the Registrar consisted, in addition to documentary evidence, of the testimony of Mary Jane South ("South") and Louise Gingras ("Gingras"). The evidence of South and Gingras is summarized hereunder.

Mary Jane South

South testified that she is the deputy Registrar under the Act and is employed by the Ontario Motor Vehicle Industry Council ("OMVIC"). OMVIC is delegated with responsibility to

administer the Act which is a public protection statute. South's duties include overseeing the process of registration that relate to motor vehicle dealers and salespersons.

South first became familiar with the Applicant when she spoke to him by telephone on July 3, 2001. She stated that on that date she responded to a telephone message the Applicant had left on her voice mail on June 29, 2001. When she spoke with the Applicant he stated that he did not understand what was going on regarding the Registrar's proposal which he had received. He contended that he had been registered since 1993 without a problem. South asked the Applicant whether he had disclosed his previous criminal convictions in his 1993 application for registration, to which he replied he had disclosed those convictions to his manager and thought he had also disclosed them when completing his 1993 application. When South asked the Applicant if he had disclosed his criminal convictions on his applications that he made subsequent to 1993, he replied that his manager had completed such forms and he had signed them without reading the contents. Further, when South told him he was required to disclose his convictions in all his applications he informed South that his non disclosure was "just a mistake". South told the Applicant she did not believe he had made an honest mistake.

The Applicant did not take issue with South's testimony and upon being invited by the Tribunal to question South in regard to her testimony, he advised that he had no questions which he wished to put to South.

Louise Gingras

Gingras testified that she is an inspector with OMVIC and has been for the last four years. She reviewed the proposal and stated that basically the reason for the Registrar's refuse to grant the Applicant registration was due to this failure to disclose past criminal convictions registered against him.

She confirmed that the Applicant was initially registered as a motor vehicle salesperson pursuant to his written application of 1993. In January 1995, the Applicant made a written application for renewal of his registration which was granted, as were his written renewal applications of January 1997 and January 1999. Until recently, there were no criminal background checks of Applicants who were applying for renewal of their registrations. At present, criminal background checks are made, albeit randomly. When the Applicant's registration expired in 2001 without his making written application for renewal, his registration terminated and he was obliged to file a renewal application. This he did when he filed his application dated April 27, 2001 which was received by the Registrar on April 30, 2001.

In regard to the written applications by the Applicant made by him in 1993, 1995, 1997 and 1999, no criminal background checks were made, reliance being placed on the good faith and integrity of the Applicant to make a full and honest disclosure in response to all questions in the application forms. However, when in April 2001 the Registrar received the Applicant's application for renewal of his registration, a C.P.I.C report was requested. This C.P.I.C. report, when received by the Registrar, revealed the following three convictions:

THE CRIMINAL RECORD HELD IN THE CPIC IDENTIFICATION DATA BANKS

AS OF: MAY 7, 2001

NAME: NGO, VINH THUAN

D.O.B. MAY 18, 1965

<u>DATE & PLACE</u>	<u>CHARGE</u>	<u>DISPOSITION</u>
SEP 22 89 TORONTO	AGGRAVATED ASSAULT SEC 268 CC	12 MOS
FEB 13 90		PAROLED
SEP 18 90 TORONTO	(1) ASSAULT WITH A WEAPON SEC 245.1(1) (A) CC (2) ESCAPE LAWFUL CUSTODY	(1) 5 MOS (2) 2 MOS CONSEC & PROBATION 2 YRS & FIREARMS PROHIBITION 5 YRS

(Exhibit 1, Tab 7)

Upon receipt of the CPIC report, the Registrar wrote to the Applicant's employer informing the latter that the Registrar had cancelled the Applicant's conditional registration that had been issued to the Applicant in terms of section 13(3) of Regulation 801 to the Act. Both the employer and the Applicant were invited to respond to the Registrar's letter and to offer an explanation (Exhibit 1, Tab 5).

The Applicant did respond to the Registrar's letter in a written unsigned note stating as follows:

JUN 15, 2001

TO WHOM IT MAY CONCERN

I write this letter on behalf of renewal my sales license. I do aware about my criminal records now that happened almost 11 years ago, I have had a good intention to straighten up my life ever since and I have been cleared with no further criminal convictions nor charges against me since the 1990. I entered to automobile industry in 1992 with Downtown Toyota and had been granted a sales license and then I moved to join Downtown Mazda and then Markham Mazda. I currently work for Dave & Nichol Toyota for about 2 months when this issue came up and I was not awared of its at all until I spoke with Ms Thaya Genga about my sales license has been under reviewed. I hope that my sales license would be renewed at as early possible date.

Here are the details as much I can remembered:

First charge dating back on sept 22.1989 was a dispute over the pool game and I had quite a few drinks, after it over I had been charged because the other person got hurt more than I do. The second and third charges were also happened in the bar and I was trying to help a friend got jumped by few guys. I picked up anything that I could and hit them then I took off from the scence.

I had learnt over the incidents and realized that not worth it at all but cost myself a great deal of problems. From there I stayed very much away from drinking because drinking make me hyper.

The last thing I would like to ask OMVIC is looking at my situation since 1990 to now I have been clean with no criminal records and importantly is I have had turned my life around with cars industry and I am good at.

Thank you for your consideration.

Sincerely,

In each of the Applicant's written applications sent by him to the Registrar from 1993 through 2001, the Applicant was asked if he had ever been found guilty of or convicted of an offence under any law. To these questions in each application form signed by the Applicant, the repeated answer was "no".

The evidence for the Applicant consisted solely of his testimony. He called no witnesses to testify on his behalf.

Vinh Thuan Ngo

The Applicant confirmed that he spoke with South on July 3, 2001 as he wished "to follow up" on his April 27, 2001 renewal application. Prior to speaking with South, he had been advised by his employer's manager that his employer had received OMVIC's letter advising of the cancellation of his conditional registration as a salesperson. After this conversation with South, he wrote to OMVIC (Exhibit 1, Tab 6).

The Applicant went on to state that he was "not aware that convictions would appear" on his record. He did not deny the criminal convictions as recorded on the C.P.I.C. record (Exhibit 1, Tab 7) but stated that the convictions were now eleven years old since which time he has had no further trouble with the law. He stated that he has been careful since his convictions not to contravene the law and jeopardise his career.

He went on to state that he has held the position as manager at two car dealerships since he was first registered as a motor vehicle salesperson. In 1999, he acted as manager of Downtown Mazda and thereafter he was the manager of Markham Mazda. While he was manager of Downtown Mazda, he hired two salespersons to work for that dealership, both of whom faced pending criminal charges.

Under cross-examination, the Applicant confirmed that, prior to signing, he reviewed all his applications for registration or renewal. He was aware of his convictions as recorded in the CPIC report. He also stated that he cautioned two salespersons who work for him and who had previous convictions registered against them, that they had to disclose those convictions to OMVIC when completing the applications required by OMVIC.

In conclusion, the Applicant stated that he is now married and has two children ages 10 years and 6 years.

FACTS FOUND PROVEN:

The following are the facts found by this Tribunal to have been proven:

1. Pursuant to the Applicant's written application for registration as a motor vehicle salesperson, he was initially registered as such on February 17, 1993.
2. The Applicant made written applications for renewal of his registration as a motor vehicle salesperson in January 1995, January 1997 and January 1999. Pursuant to the aforementioned applications, the Applicant's registration as a motor vehicle salesperson was renewed.
3. In April 2001, due to the lapse of Applicant's registration as a motor vehicle salesperson, he made written application for reinstatement of his registration as a motor vehicle salesperson.
4. In all the aforesaid applications for registration, renewal or reinstatement by the Applicant as a motor vehicle salesperson he was asked whether he had been found guilty or convicted under any law and in each instance he answered "no".
5. The Applicant was convicted on September 22, 1989 of aggravated assault under section 268 of the Criminal Code of Canada and was sentenced to 12 months imprisonment.
6. The Applicant was convicted on September 18, 1990 of assault with a weapon under section 245.1(1) of the Criminal Code of Canada and of escape lawful custody and was sentenced to 5 months imprisonment on the assault with a weapon conviction and to 2 months imprisonment with probation for 2 years on the escape from lawful custody conviction.
7. At all times when the Applicant completed and signed his applications for registration, renewal or reinstatement as a motor vehicle salesperson, he was fully aware of the convictions as stated in paragraphs 5 and 6 above.
8. The Applicant has had no further or other convictions registered against him since September 1990.

DECISION AND REASONS:

The issue for decision is whether the Registrar erred in his decision that the Applicant should have his application for registration as a motor vehicle salesperson refused.

Section 6.(1) of the Act states the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is disentitled to regulation under section 5.

Section 5.(1)(b) of the Act entitles the Applicant to registration by the Registrar except where the past conduct of the Applicant affords the Registrar reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Registrar has the onus of proof to satisfy the Tribunal that he has reasonable grounds to believe that the registration of the Applicant should be refused as his past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

In the leading case of *Brenner 19 CRAT SCO Decisions and Orders (1971–1989)* page 95 Southey J. held that a Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for belief that such Applicant would not carry on business in accordance with law and with integrity and honesty.

Brenner 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In the *Brenner* case, due to the particular facts in this case Southey J. sent it back for a rehearing, however, he adds in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of an Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will in the future carry on business in contravention of the

Act and its Regulations. This was confirmed by Divisional Court in the matter of *Albert Fascenda (1994) 26 CRAT Part II 1050* where that court on appeal quashed the

Tribunal's decision to direct a Registrar not to carry out his proposal and in sending the matter back for re-hearing stated at page 1051.

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

On an examination of the evidence placed before the Tribunal, it is clear that the Applicant was aware of his convictions when he signed and completed his applications for registration, renewal or reinstatement as a motor vehicle salesperson. His answer to the question, repeated in each application form, as to whether he had ever been charged or found guilty or convicted under any law, was always "no". These answers were not only incorrect and false but were repeatedly made knowing them to be false. The Registrar was deliberately misled by the Applicant who on his own admission knew he should disclose any convictions; he had counselled two of his salespersons to disclose their previous convictions when he was manager of a motor vehicle dealership. The Applicant's dishonesty in not disclosing his convictions was ongoing and repeated.

While it agrees with the Registrar that the past conduct of the applicant was dishonest in that he repeatedly failed to disclose his previous convictions, the Tribunal does not agree with the Registrar that this past conduct will be indicative of the applicant's future business conduct.

The question that concerns the Tribunal is whether the past conduct of the Applicant, both as to his actual convictions and the repeated non disclosure of such convictions, indicates that the Applicant will in the future not carry on business in accordance with the law and with integrity and honesty.

The actual convictions were recorded in 1989 and 1990. Those convictions are some twelve years and eleven years old respectively, since which time the Applicant has been conviction free. Furthermore, the convictions were not industry related and occurred before the Applicant was initially registered as a salesperson in the motor industry. The Applicant since being registered as a motor vehicle salesperson in 1993 has had an unblemished record both within and outside of the motor industry. The Act is directed to the protection of consumers in their dealings with motor vehicle dealers and salespersons and in this matter there is no evidence to show that the Applicant has jeopardised consumers' rights. All the aforementioned facts mitigate in favour of the Applicant.

The following facts however stand in contradiction of the mitigating facts listed above. These are the repeated, false and misleading denials in his 1993, 1995, 1997, 1999 and 2001 applications of his criminal convictions. The Applicant knew his denials were false and misleading, yet he persisted in such denials until the hearing before the Tribunal at which time he conceded the falsehood of his repeated denials as to his convictions.

It is upon the repeated false and misleading statements made by the Applicant on his

applications that the Registrar bases his contention that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The Tribunal has considered the above facts, both those that weigh in favour of the Applicant and those that weigh against the Applicant. The fact that the Applicant has been clearly dishonest when denying his previous convictions in his applications to the Registrar does not however lead the Tribunal to the conclusion that in the future he will "not carry on business in accordance with law and with integrity and honesty." The Applicant's conduct since 1990 when his last conviction was registered and his conduct in the industry since 1993 when he became a registered motor vehicle salesperson show that he has carried on business in accordance with the law and with integrity and honesty. Since 1993 the conduct of the Applicant in his business of a motor vehicle salesperson has given the Registrar no cause for concern. His activities in business have been beyond reproach, and he has advanced his position in the business to that of manager of car dealerships.

The test under section 5 of the Act is directed to the Applicant's future business conduct and particularly whether that conduct will be in accordance with law and with integrity and honesty. The Applicant's conduct with respect to his completion of applications for renewal of registration is relevant but is not determinative in predicting his future business conduct.

The Tribunal believes that the conduct of the Applicant during the last eleven or twelve years has been exemplary and that this fact coupled with the other facts in the Applicant's favour outweigh the negative aspect of the Applicant's non disclosure in his applications. The conduct of the Applicant over the period since his convictions indicate that he has conducted himself in business in accordance with the law and with honesty and integrity.

The Tribunal believes in this instance that the Registrar is in error when he equates dishonesty in the completion of applications for renewal by the Applicant with dishonesty in the future conduct of business by that Applicant. In other cases with different facts this may have been appropriate for the Registrar to draw such a conclusion. However such a conclusion is not justified in this particular matter having regard to eleven or twelve years of business activity having been conducted without blemish by the Applicant.

Viewing the Applicant's conduct within the industry over the past eleven or twelve years the Tribunal does not believe there are reasonable grounds for the Registrar's belief that the Applicant will not carry on the business of a motor vehicle salesperson with law and with integrity and honesty. The particular facts in this matter lead the Tribunal to the conclusion that a refusal to register the Applicant under the Act is too severe a penalty and that terms and conditions to that registration are appropriate.

Accordingly, the Tribunal believes that the Applicant is entitled to registration as a motor vehicle salesperson, subject to terms and conditions.

DECISION:

Accordingly, the Tribunal pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, directs the Registrar to refrain from carrying out his proposal dated June 26, 2001 to refuse the Applicant's registration subject to the Applicant complying with the following five terms and conditions.

1. If the Applicant at any time in the future shall be charged with, found guilty of or convicted of any offence under any law he shall forthwith advise the Registrar.
2. If the Applicant at any time in the future is convicted of any charge under the Criminal Code of Canada the Registrar shall be entitled to forthwith revoke the Applicant's registration as a motor vehicle salesperson.
3. The Applicant shall at no time in the future, unless with the Registrar's prior written consent, become an officer, director or partner in a motor vehicle dealership.
4. The Applicant shall not transfer his registration as a motor vehicle salesperson without the prior written consent of the Registrar.
5. The Applicant, in all his future applications for registration, renewal or reinstatement as a motor vehicle salesperson, shall fully and honestly answer all questions in his application forms. Should he fail to do so, the Registrar shall be entitled to forthwith revoke the Applicant's registration as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Released: October 22, 2001

NGUYEN

DOAN BUI NGUYEN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: SIMON DANN,
 Presiding member

APPEARANCES: LUBA NEUWIRTH,
 Representative for the Registrar of Motor Vehicles

DOAN BUI NGUYEN, Applicant
HUNG TAN TRUONG, Counsel for Applicant

DATE OF HEARING: October 16, 2001

DECISION RELEASED: October 22, 2001 ***By Teleconference***

REASONS FOR DECISION

A hearing by teleconference was held on October 16, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Doan Bui Nguyen (the “Applicant”)
Motor Vehicle:	1990 Toyota Camry, plate no. AKSR 237 (the “vehicle”)
Date of Appeal:	September 28, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 16, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I live with my mother and my three younger siblings at the ages of 15, 13, 12 who are going to school;

My mother was involved in a motor vehicle accident and is currently injured and her daily activities are seriously restricted by the injury;

My mother needs help in house cleaning, house keeping, and cooking and other activities;

My mother needs the car to go to the doctor's appointment for her on-going treatment;

I need the car to go to work;

For a family of five members that lives on Social Assistance, it is financially impossible to use the public transportation;

For a family of five members that lives on Social Assistance, it is extremely difficult without the car;

I make this declaration for my application to appeal from the Registrar's impoundment decision pursuant to section 50.2 of the Highway Traffic Act;

and

I make this declaration for my application to appeal on the ground that the loss of the vehicle has resulted in exceptional hardship to my whole family pursuant to Section 22 of Regulation 574, R.R.O. 1990 as amended by Ontario Regulation 632/98.

CANADA	)	IN THE MATTER OF
	)	vehicle impoundment by
PROVINCE OF ONTARIO	)	the Order of the Registrar of
	)	the Ministry of Transportation,
CENTRAL SOUTH DISTRICT	)	Order No. 1505882
AT KITCHENER	)	
	)	
TO WIT	)	

I, Doan Bui Nguyen, of the City of Kitchener, in the Regional Municipality of Waterloo, in the Province of Ontario and as such have the knowledge of the facts herein deposed:

1. My present address is 167 Morgan Ave. Kitchener, Ontario;
2. I am 19 years of age and my date of birth is April 17, 1982;
3. I am the registered owner of the 1990 Toyota, Camry, having license plate no. AKSR 237;
4. I live with my mother and my three younger siblings at the ages of 15, 13, 12 who are going to school;
5. My mother was involved in a motor vehicle accident and is currently injured and her daily activities are seriously restricted by the injury;
6. My mother needs help in house cleaning, house keeping, and cooking and other activities;
7. My mother hired Mr. Duc Ngoc Le to be a babysitter and general helper in the house;
8. Mr. Le has been our helper for about a year;
9. In the past he sometimes used my car and my mother's car and we consented to his use of our cars;
10. On September 19, 2001, while I was sleeping, Mr. Le borrowed my car as usual;

11. On September 19, 2001, Mr. Le drove my vehicle while his driver licence has been suspended;
12. On September 19, 2001, I did not know that Mr. Le's driver licence had been suspended;
13. On September 19, 2001, while Mr. Le was driving my car, he was stopped by the Waterloo Regional Police with occurrence number 105895-01; and my car was impounded by the Order of the Registrar of the Ministry of Transportation, Order No. 1505882;
14. My mother needs the car to go the doctor's appointment for her on-going treatment;
15. My younger siblings need the car for schooling;
16. I need the car to go to work;
17. For a family of five members that lives on Social Assistance, it is financially impossible to use the public transportation;
18. For a family of five members that lives on Social Assistance, it is extremely difficult without the car;
19. I make this declaration for my application to appeal on the ground that the loss of the vehicle has resulted in exceptional hardship to my whole family pursuant to Section 22 of Regulation 574, R.R.O. 1990 as amended by Ontario Regulation 632/98.

I make this declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if it made under oath and by virtue of the Canada Evidence Act.

DECLARED before me at the City of)
 Kitchener, in the Regional Municipality)
 Of Waterloo, this 26th day of September 2001.)
)
)

 Doan Bui Nguyen

“ “

The hearing was conducted via telephone conference call and while the Applicant was understood to be in Counsel's office, the evidence in the hearing was provided by the Applicant's Counsel, Mr. Hung Tan Trong.

Mr. Trong commenced by restating the details presented in the Applicant's Notice of Appeal. Additional evidence presented was as follows:

- The Applicant's mother had been injured in two separate automobile accidents, the first in June 2000, the second in January 2001. She experienced injuries to her spine, right arm and shoulder and as a result she has been in some pain and discomfort which are said to affect her physical mobility and require her to use a cane; she is also receiving specialist treatment every two weeks and periodically visits her family doctor to obtain treatment for her discomfort.
- Counsel advised that the Applicant's mother needed the vehicle for travel and "once in a while" the other children would need a ride. In subsequent evidence, Counsel indicated the kids would need a ride if they were late for school, had missed their bus or had to attend other activities but no school had been missed.

- While Counsel confirmed the Applicant needed the vehicle for work, it was also revealed that the Applicant had (i) lost his job on October 4, 2001 and (ii) that the Applicant's license had been suspended on September 9, 2001.
- Therefore, by the time of impoundment, the Applicant was already dependent upon others for transportation to and from his work; evidence was given that during this ten day period (between Sept. 9th and 19th), he had on several occasions walked to work (a distance that required either a 90 minute walk or 1.0 hr bus ride), he had received a ride from someone else and had also been driven by his mother;
- Evidence showed the Applicant lost his job on October 4, 2001 because he had been late for work every day after the impoundment; Counsel stated the Applicant worked the afternoon 3:30p.m. to midnight shift and was unable to change his shift (he had been with the company for three months) and that no one was available to provide an afternoon ride;
- When asked by Ms Neuwirth, Representative for the Registrar of Motor Vehicles, if the job loss was more a result of the Applicant's driver license suspension, Counsel answered "yes".
- Evidence provided to the Tribunal by Counsel showed the Applicant's mother had used a taxi on two occasions as well as received a ride from her nephew; the Tribunal was advised that this nephew was not always available as he lived across town, attended school full-time and also had a part-time job. There were no neighbours to assist the family with their transportation requirements.
- The number of specialist treatment appointments was stated as being three with only one remaining during the balance of the impound period; visits to the family doctor were irregular and related to the day-to-day condition of the Applicant's mother. Evidence provided by Counsel showed that no doctor's appointments had been missed and the family did have access to 911 for emergency ambulance service though Mr. Trong stated these costs would not be covered by social assistance payments.
- The Tribunal learned that there was one other vehicle in the family, which was registered to the Applicant's mother but as it was a manual transmission she was unable to manage the gear shift motions due to her arm and shoulder injuries.
- Counsel advised that taxis had been used but the cost was not a viable alternative because of the family's financial position;
- On questioning by Ms Neuwirth, evidence showed the average weekly fuel cost for the impounded vehicle was about \$80.00 a week. Therefore, the use of taxis as alternate transportation for the Applicant's mother, from home to her specialist appointments, at about \$22.00 each way, could be off-set by the fuel savings.

- Evidence showed the Applicant's family received \$1,200.00 per month in combined social assistance and federal child payments; the Applicant's income from his last job was \$9.90 per hour. The income from these sources was compared to the family's housing cost of \$700.00 per month.
- Evidence regarding the relationship of the driver of the impounded vehicle, Duc Ngoc Le, to the Applicant's family was given by Counsel directly as well as from information he received from the Applicant and his mother, who were in attendance in Mr. Trong's office.
- The Tribunal was advised that while Mr. Le had been described as a "babysitter and general helper", the Applicant had erred in describing Mr. Le as a 'babysitter' because there were no children young enough to need a babysitter and Mr. Le should have been referred to as a family helper;
- Mr. Le did not live in the family home;
- The Applicant's mother had originally hired Mr. Le to help her around the house and that he was hired on a credit arrangement and would be paid by the insurance company once the automobile accident claim was settled.

Mr. Trong advised the Tribunal that his representation of the Applicant was not being adequately compensated due to the family's financial situation, and it was expected that the Applicant's mother would be able to cover all the costs she was incurring once the insurance company paid under the injury claim. While Mr. Trong stated the Applicant's mother was diligently keeping expense records related to her accident injuries, there were no receipts available for Ms Neuwirth, who asked to see them as supporting evidence.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Duc Ngoc Le;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 11, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different

persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the Applicant's appeal to have the impounded vehicle returned on the basis that the loss of the vehicle will result in exceptional hardship, the evidence presented was considered on whether or not it met the definition of "exceptional hardship" within the meaning prescribed by the *Highway Traffic Act* and its Regulations.

Whether there is “a threat to the health or safety of any person ordinarily transported by the motor vehicle”;

Evidence presented showed that while there is considered inconvenience in having to rely on other means of transportation than that of the Applicant or his family's choosing, there was no evidence to show circumstances or personal conditions existed to pose *“a threat to the health or safety of any person ordinarily transported by the motor vehicle”*.

Whether there is “a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used”;

There was no evidence to show that there was such a threat.

Whether “no alternative to the impounded motor vehicle is available”;

The evidence presented establishes that while the Applicant's mother has experienced some difficulty and inconvenience resulting from the vehicle impoundment, she has been able to find alternatives for the occasions when transportation was required for medical appointments.

The evidence does not clearly establish that there were no alternatives for the Applicant to arrive at work on time. There was no evidence regarding the specifics of alternatives such as using an early bus or arranging with the Applicant's employer to cover a late arrival during the impound period.

Whether the “loss will be immediate, significant and lasting;”

There is no evidence to clearly establish that the loss has been immediate and significant. The evidence is clear that the loss will not be lasting.

Whether “the impact of the loss will be upon a person ordinarily transported by the motor vehicle”;

The evidence does not clearly establish the loss of the vehicle was a factor in the Applicant's job loss. There was also no specific evidence presented to show what role the availability of the vehicle would have, as a means of transporting the Applicant to and from work and in finding new employment.

Whether the impact of the loss "will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle";

The evidence of loss on the Applicant and his family has been established, but is not exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: October 22, 2001

SNOW

DORIS LUELLA ANN SNOW

**Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"),
from the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NIVES MONTANO,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DORIS LUELLA ANN SNOW, Applicant
unrepresented

DATE OF HEARING: October 19, 2001

DECISION RELEASED: October 22, 2001 ***By teleconference***

REASONS FOR DECISION

A hearing was held on October 19, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Doris Luella Ann Snow (the "Applicant")
Motor Vehicle:	1984 Buick Park Avenue, Unplated (the "impounded vehicle")
Date of Appeal:	October 3, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on October 19, 2001 and proceeded by way of teleconference.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows (Exhibit 2).

Applicant's written submission filed with the Tribunal in support of appeal states:

To whom it may concern,

Following is the events that led to my car becoming impounded and the hardship that this will cause me.

Since I purchased this vehicle I have had a very difficult time getting it to pass emissions. I had it fixed and retested four times, all failing. I felt my only resource was to take it to the Ministry and have them look at it and all my documentation.

I do not like to drive in larger cities and on Oct 2/01. I asked a friend, Al Duxbury if he could drive me down. At this time I was under the assumption that Mr. Duxbury was employed as a driver for Plaks Plus in Barrie. So I trusted he would get me there safely. On our way down we were stopped and my car was impounded.

Not having my car will cause me great hardship. I am currently on disability pension and without a car will be confined to my house. I cannot afford a rented car or taxis. I am very sorry for what has happened and I have learned a valuable lesson. Please could you release my vehicle before the required 45 days impoundment.

Sincerely
Luella Snow

The following is a summary of the Applicant's affirmed testimony.

The Applicant lives alone on the outskirts of Barrie. She has been unemployed since 1987 and has been receiving a disability pension. She has a hard time getting around due to the pain in her back and legs. Her last surgery was in 1998 and is currently scheduled for unrelated surgery in January 2002. Her area of residence is "911" accessible and there is also public transit in this community.

With respect to the surrounding circumstances of the impoundment, as stated above in the Applicant's written submission, the Applicant was having a difficult time in having the used vehicle she recently purchased pass the emissions tests. After numerous repairs, she decided to take the vehicle to the Ministry of Transportation in Toronto and have them determine why the vehicle kept failing the emissions test. Since the Applicant is not comfortable in driving in large cities, Mr. Duxbury, the driver at the time the vehicle was impounded, volunteered to drive the Applicant and her vehicle to Toronto. The OPP pulled the impounded vehicle over due to the temporary sticker/temporary plate not being visible.

The Applicant only knowing Mr. Duxbury as a friend/acquaintances, did not know he was a suspended driver and at no time did she ask to see his driver's licence. She testified that she only assumed he was a valid driver since he was employed as a driver in Barrie.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 and 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Allan J. Duxbury;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 13, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal under Due Diligence

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Mr. Duxbury's driver's licence at the time in respect of which the order was made was not then under suspension.

The Applicant testified that she is the owner of the vehicle that has been impounded and at the time of impoundment Mr. Duxbury was driving the vehicle.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

The evidence before the Tribunal, in the Applicant's own testimony, was that the Applicant at no point in time asked Mr. Duxbury if he possessed a valid driver's licence. She merely assumed that Mr. Duxbury had a valid driver's licence and the thought never crossed her mind to check. She relied on his honesty and integrity. Unfortunately, the Applicant did not take any measures to ensure that he had a valid driver's licence. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal under Exceptional Hardship

The Applicant has requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for her claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Applicant testified that she purchased the impounded vehicle during this past summer (either July or August, 2001) at a cost of \$850. She is also the owner of a 1985 Chevrolet 4x4, which is currently off the road since it requires a new transmission at an estimated cost of \$600. The Tribunal was given an unclear span of time wherein the Applicant was without a vehicle.

In her testimony, the Applicant has affirmed that she has not missed any doctors' appointments and has managed to get to her appointments and has been able to purchase groceries and pay visits with the assistance of her friends. The generosity of her friends have been a constant, before she purchased the second vehicle as well as during this impoundment period. She has also been taking public transportation to and from town.

The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting.

If the Applicant has incurred some financial hardship as a result of the loss of the vehicle, she may pursue compensation from the suspended driver, Allan Duxbury, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

After considering the above requirements, the Tribunal finds that although the Applicant has been inconvenienced by the impoundment, she does have alternatives to the impounded vehicle. Therefore the impact of the loss will not be immediate, significant and lasting as required by section 22(3) of Regulation 574 as amended by Regulation 632/98.

Accordingly, after considering the criteria set out in section 22(3) and (4) of Regulation 340 as amended by Ontario Regulation 632/98, the Tribunal finds the Applicant has not established exceptional hardship as set out in section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: October 22, 2001

1163954 ONTARIO INC. O/A THE ULTIMATE TRAVEL BROKERS

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1163954 ONTARIO INC. O/A THE ULTIMATE TRAVEL BROKERS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: August 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1163954 ONTARIO INC. O/A THE ULTIMATE TRAVEL BROKERS

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1163954 Ontario Inc. o/a The Ultimate Travel Brokers, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 23, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

1163954 ONTARIO INC. O/A THE ULTIMATE TRAVEL BROKERS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1163954 Ontario Inc. o/a The Ultimate Travel Brokers (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 4415899/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since January 30, 1996. The Registrant has a fiscal year end of December 31st.

GROUND FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated November 24, 2000, TICO requested that the Registrant file its financial statements for its fiscal year ending December 31, 2000 by March 31, 2001.

4. By letter dated April 2, 2001, the Registrant's accountants requested an extension to May 21, 2001 to file the Registrant's financial statements.
5. On April 10, 2001, TICO sent a second request for the Registrant's financial statements for its December 31, 2000 year-end, which gave the Registrant a deadline of April 30, 2001.
6. By letter dated May 1, 2001, the Registrar, *Travel Industry Act* informed the Registrant that if it did not provide its financial statements by May 16, 2001, the Registrar would initiate administrative action including a proposal to revoke registration.
7. By facsimile dated May 14, 2001, the Registrant requested an extension to June 8, 2001 to file its financial statements.
8. By facsimile dated June 15, 2001, the Registrant was advised by TICO that its financial statements had not been received and they must be filed by June 19, 2001.
9. By facsimile dated June 19, 2001, the Registrant requested a further extension to June 26, 2001 to file its financial statements.
10. By August 8, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
11. The Registrant filed its financial statements for its fiscal year ended December 31, 2000, which were due by March 31, 2001, on August 15, 2001. The statements, which were prepared under an Auditor's Report, revealed that the Registrant had a deficiency of \$240,639.00 in its trust account as at December 31, 2000. The Registrant apparently transferred \$299,640.00 to correct this deficiency by July 20, 2001.
12. On September 4, 2001, Mr. Jack Foster, an Inspector designated by the Registrar, *Travel Industry Act* conducted an inspection of the Registrant to determine if the Registrant was maintaining sufficient working capital and funds to cover its customer obligations. The inspection revealed that the Registrant had transferred \$105,000 from its trust account to its general account on July 24 and July 25, 2001, without preparing a customer position report to support those transactions. The Registrant was to prepare an interim financial statement by October 15, 2001 to demonstrate that it was maintaining minimum working capital and complying with the trust accounting provisions of the legislation.
13. The Registrant's interim financial statements, as filed on October 19, 2001, revealed that the Registrant was not maintaining minimum working capital as required by section 25 of the Regulation.

14. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated **August 8, 2001**;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (b) The Registrant shall submit a monthly trust account reconciliation with corresponding bank statements to the Registrar beginning with the month of October, 2001, no later than 30 days after the end of each calendar month, for so long as the Registrar shall so require or concluding Dec 31 2002 whichever the registrar so deems most appropriate.
 - (c) The Registrant shall correct any working capital deficiency by fiscal year- end December 31, 2001 and at all times thereafter maintain the minimum working capital as required by section 25 of the Regulation or such subsequent provision as may be in force from time to time;
 - (d) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2001, no later than March 31, 2002;
 - (e) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2002, no later than March 31, 2003;
 - (f) The Registrant shall file quarterly interim financial statements by May 15th, August 15th, and November 15th of year 2002.

(g) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (g) inclusive during the two (2) year period immediately following this order of the Tribunal, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of October, 2001

Mr. William Cockburn
1163954 Ontario Inc.
o/a The Ultimate Travel Brokers
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

NUGGET TRAVEL AND TOURS INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
NUGGET TRAVEL AND TOURS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: August 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NUGGET TRAVEL AND TOURS INC.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Nugget Travel and Tours Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 23, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

NUGGET TRAVEL & TOURS INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Nugget Travel & Tours Inc. (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 5000033/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since July 21, 1999.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.

3. By letter dated November 24, 2000, TICO requested that the Registrant file its financial statements for its fiscal year ending December 31, 2000 by March 31, 2001.
4. On April 10, 2001, TICO sent a second request for the Registrant's financial statements for its December 31, 2000 year-end, which gave the Registrant a deadline of April 30, 2001.
5. By letter dated May 1, 2001, the Registrar, *Travel Industry Act* informed the Registrant that if it did not provide its financial statements by May 16, 2001, the Registrar would initiate administrative action including a proposal to revoke registration.
6. On May 6, 2001, the Registrant telephoned TICO and advised that its financial statements would be submitted by May 31, 2001.
7. On May 30, 2001, the Registrant telephoned TICO and advised that its financial statements would be submitted by June 30, 2001.
8. By August 8, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
9. On August 23, 2001, the Registrant filed its financial statements for its fiscal year ended December 31, 2000, which were due by March 31, 2001.

COMPLIANCE HISTORY – LATE FORM 1 FILING

10. Section 47 of the Regulation states that within forty-five days after the end of the Registrant's fiscal year and fiscal half-year the Registrant shall make payments to the Ontario Travel Industry Compensation Fund and said payment shall be accompanied by a completed return, in the form ("Form 1") provided by the Travel Industry Council of Ontario ("TICO") indicating the sales of the Registrant for the reporting period and the amount owing to TICO.
11. The Registrant filed its Form1 and made the corresponding payment to the Fund for its fiscal year ended September 30, 1999, which were due by November 15, 1999, on December 10, 1999.
12. The Registrant filed its Form1 and made the corresponding payment to the Fund for its fiscal year ended December 31, 1999, which were due by February 15, 2000, on July 4, 2000.
13. The Registrant filed its Form1 and made the corresponding payment to the Fund for its fiscal half-year ended June 30, 2000, which were due by August 15, 2000, on September 8, 2000.

14. The Registrant filed its Form1 and made the corresponding payment to the Fund for its fiscal year ended December 31, 2000, which were due by February 15, 2001, on March 15, 2001.
15. The Registrant filed its Form1 and made the corresponding payment to the Fund for its fiscal half-year ended June 30, 2001, which were due by August 15, 2001, on September 21, 2001.
16. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

5. the Registrar refrain from carrying out the Proposal to Revoke Registration dated August 8, 2001;
6. the Registrant's registration is to be subject to the following terms and conditions:
 - (h) The Registrant shall file its financial statements for its fiscal year ended December 31, 2001 by March 31, 2002 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time;
 - (i) The Registrant shall file its financial statements for its fiscal year ended December 31, 2002 by March 31, 2003 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time
 - (j) The Registrant shall file its Form 1 and make the corresponding payments to TICO for its fiscal year ending December 31, 2001 by February 15, 2002 and in accordance with section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (k) The Registrant shall file its Form 1 and make the corresponding payments to TICO for its fiscal half-year ending June 30, 2002 by August 15, 2002 and in accordance with section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (l) The Registrant shall file its Form 1 and make the corresponding payments to TICO for its fiscal year ending December 31, 2002 by February 15, 2003 and in

accordance with section 47 of the Regulation or such subsequent provision as may be in force from time to time; and

(m) The Registrant shall file its Form 1 and make the corresponding payments to TICO for its fiscal year ending June 30, 2003 by August 15, 2003 and in accordance with section 47 of the Regulation or such subsequent provision as may be in force from time to time;

7. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) through (f) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
8. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of October, 2001

Mr. Hasan Aktar
Nugget Travel and Tours Inc.
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

PICCININ

NILLO PICCININ

APPEAL FROM A DECISION OF THE CORPORATION DESIGNATED FOR
THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

KRISTA CATALANO, Counsel, representing the Applicant
KAREN JONES, Counsel, representing the Ontario New Home Warranty
Program,
DAVID M. McNEVIN, Counsel, representing the Added Party,
Affinity Custom Homes and Contracting Inc.

DATE OF HEARING: October 17, 2001 Windsor

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, as amended, Nillo Piccinin (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated February 23, 2001;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on October 17 and 18, 2001 at Windsor, Ontario;

AND WHEREAS at the commencement of the hearing on October 17, 2001, the parties had come to a settlement and the Applicant confirmed that he was withdrawing his appeal before this Tribunal;

NOW THEREFORE this Tribunal orders, on the consent of the parties, that the Applicant's request for a hearing of this matter is withdrawn and this matter before the Tribunal is hereby concluded.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

RELEASED: October 23, 2001

NOEL PARE

PREHEARING

ANASTASIA NOEL PARE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
DEREK ISRAEL, Vice-Chair, as Member

APPEARANCES:

CHRISTINE LA CASSE, Counsel for Anastasia Noel Pare, (the
"Applicant")

NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program (the "Respondent")

DENIS CAMPEAU, Agent, representing Denis Campeau Construction
Inc., (the "Added Party")

DATE OF

PREHEARING: October 17, 2001

by teleconference

ORDER

FOLLOWING attendances by teleconference on October 17, 2001 at a prehearing before the Tribunal of Christine La Casse, Counsel on behalf of Anastasia Noel Pare, (the "Applicant"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Denis Campeau, Agent on behalf of Denis Campeau Construction Inc. (the "Added Party");

The Tribunal makes the following Order:

1. It was agreed that the parties to the hearing are Anastasia Noel Pare, the Ontario New Home Warranty Program and Denis Campeau Construction Inc.
2. The Parties agree on the following facts:
 - (a) The date upon which Anastasia Noel Pare took possession of the dwelling located at 66 Sandfield Avenue, Alexandria, Ontario was April 25, 1997.
 - (b) The first written notification from Anastasia Noel Pare to the Ontario New Home Warranty Program regarding her claim in this matter was dated February 15, 2001.
3. Other than the agreed facts set forth in paragraphs 2(a) and 2(b) above, no other facts have been agreed upon by the parties.
4. All parties to the hearing shall comply with Rules 6.3 and 6.4 of the Rules of Practice of this Tribunal. Notwithstanding the foregoing, Anastasia Noel Pare undertakes to disclose to the other parties by November 30, 2001, the written report of results of an analysis by Paracel Laboratories of air samples taken by Buchan, Lawton, Parent Ltd. Should however such written report not be received by counsel for Anastasia Noel Pare by November 30, 2001 then she shall immediately on receipt of such report after November 30, 2001, forward same by facsimile to all other parties.
5. The Parties agree that the hearing of this matter shall be conducted in English and the Tribunal shall arrange for a French/English interpreter to translate at the hearing. The cost of the interpreter shall be borne by the Tribunal.
6. The hearing of this matter, that was due to take place on November 21, 22 and 23, 2001, shall now by consent of the parties commence at 9:30 a.m. on January 28, 2002 and to continue if necessary on January 29 and 30, 2002, at Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair as Member

Antoine Aouad, M.D.,
Presiding, Member

RELEASED: October 23, 2001

CANNON

PREHEARING

JOHN CANNON

APPEAL FROM A DECISION OF THE REGISTRAR
OF THE *COLLECTION AGENCIES ACT* R.S.O., 1990
CHAPTER C. 14

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

LEE NEFSKY, Agent representing the Applicant
JEAN C. H. IU, Counsel representing the Registrar,
Collection Agencies Act

DATE OF

PRE-HEARING: October 21, 2001

Toronto

ORDER

FOLLOWING attendances on October 21, 2001 at a prehearing before the Tribunal of Lee Nefsky, Agent on behalf of John Cannon, (the "Applicant") and Jean C.H. Iu, Counsel on behalf of the Registrar, *Collection Agencies Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Tuesday, December 4, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Applicant and the Registrar have agreed that the allegations and statements of fact set forth in section "C. Background" and in section "D. Particulars" of the Registrar's proposal dated June 18, 2001 are correct and have further agreed that the Registrar shall not be required to prove such allegations and facts at the hearing of this matter.

3. The Applicant anticipates calling one witness to testify on the Applicant's behalf at the hearing. The Applicant himself will also testify at the hearing.
4. Both the Applicant and the Registrar shall comply in a timely manner with Rules 6.3 and 6.4 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: October 24, 2001

DOHERTY

PREHEARING

BRANDON DOHERTY

APPEAL FROM A DECISION OF THE REGISTRAR
OF THE *COLLECTION AGENCIES ACT* R.S.O., 1990
CHAPTER C. 14

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

LEE NEFSKY, Agent representing the Applicant
JEAN C. H. IU, Counsel representing the Registrar,
Collection Agencies Act

DATE OF

PRE-HEARING: October 21, 2001

Toronto

ORDER

FOLLOWING attendances on October 21, 2001 at a prehearing before the Tribunal of Lee Nefsky, Agent on behalf of Brandon Doherty, (the "Applicant") and Jean C.H. Iu, Counsel on behalf of the Registrar, *Collection Agencies Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Wednesday, December 5, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:

1. The Parties to the hearing are the Applicant and the Registrar.
2. The Applicant and the Registrar have agreed that allegations and statements of fact set forth in section "C. Background" and in section "D. Particulars" of the Registrar's proposal dated June 18, 2001 are correct and have further agreed that the Registrar shall not be required to prove such allegations and facts at the hearing of this matter.

3. The Applicant anticipates calling one witness to testify on the Applicant's behalf at the hearing. The Applicant himself will also testify at the hearing.
4. Both the Applicant and the Registrar shall comply in a timely manner with Rules 6.3 and 6.4 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: October 24, 2001

FREITAS

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V1607405 OWNED BY: SHABEEROON FREITAS of: 190 Cedar Street, Apartment 512, Cambridge, Ontario N1S 1W5 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: October 6, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

SHABEEROON FREITAS

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Shabeeroon Freitas, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: *October 26, 2001*

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

SHABEEROON FREITAS

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On October 6th, 2001, the motor vehicle described in **Order to Impound #1607405** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The applicant, Shabeeroon Freitas, whose name is shown on the plate portion of the permit for the impounded motor vehicle, jointly with Christiano Freitas, is, for the purposes of the appeal, the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the Highway Traffic Act, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that the said motor vehicle is needed for health and safety reasons for the transportation of a person ordinarily transported by the motor vehicle.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the Highway Traffic Act that the Tribunal set aside the order to impound.

Shabeeroon Freitas

Joanna Tsilikas

(signature of Applicant)

(signature of Registrar)

(date)

(date)

784 - MENTAL

784 - MENTAL

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of the
Registrar of Motor Vehicles pursuant to Section 47(1) of
that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROY MELVIN, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 17, 2001

By teleconference

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

FACTS:

On September 27, 2000 the Applicant was driving to Toronto from Novar, Ontario where she had purchased a home in order to arrange moving her belongings. She was stopped by the O.P.P. and given a ticket for speeding. Later that day on the return trip she was again stopped by the O.P.P. near Huntsville and an altercation took place. The Tribunal is unable to elicit from her exactly what took place but she was restrained and taken to the Huntsville General Hospital, kept overnight and transferred the next day to the North Bay Psychiatric Hospital.

Her 2 children were put into the care of the Children's Aid Society and later released to relatives.

She was in the North Bay Psychiatric Hospital from September 28, 2000 to December 11, 2000 under the care of Physician # 1, a psychiatrist. The Ministry of Transportation received a letter from Physician # 1 dated December 1, 2000 stating that the Applicant was medically unfit to drive, which triggered a letter from the Medical Review Section, asking The Applicant to present a detailed up-to-date psychiatric assessment for review to determine her ongoing privilege to drive.

On January 11, 2001 Physician # 1 wrote to the Ministry of Transportation to confirm his opinion that the Applicant's mental state was inconsistent with the safe operation of a motor vehicle because of her diagnosis of Bipolar disorder and that she was not taking medication as prescribed.

On January 17, 2001 she was notified of her licence suspension with reconsideration of her case upon receipt of detailed psychiatric review and other options such as Administrative Review and/or appeal to the Licence Appeal Tribunal.

Physician # 1 attended the Applicant after her discharge from hospital until December 19, 2000 when by mutual arrangement her case was transferred to Physician # 2 in Toronto who had been her attending psychiatrist for many years. He sent Physician # 2 a letter to this effect on January 9, 2001. Apparently there are no concerns regarding her care of her children but "her status continues to be consistent with an incapacity to consent to decisions regarding the treatment of her mental illness". He also offered a hospital discharge summary upon receipt of proper authorization from the Applicant on the prescribed Form 14.

On June 8, 2001 Physician # 2 sent a brief note to the Ministry of Transportation stating that his patient the Applicant was improving and ready to assume the responsibilities of driving a motor vehicle on psychiatric grounds.

On June 26, 2001 the Medical Review Section notified her that a new detailed psychiatric assessment was required.

On July 10, 2001 Physician # 2 sent a follow-up letter to the Medical Review Section to state that the Applicant has been under his care for more than 10 years with a diagnosis of Paranoid Personality and has not been hospitalised until the recent episode. He has attended her three times since her hospital discharge noting the considerable distance from her present residence. He reports "The patient presently and since discharge has not been prescribed medication. She presents as a functioning mother of twin six year old daughters. She does not appear depressed nor a threat to herself or others. Her memory and concentration are good and she demonstrates emotional stability during my three visits. Assessment of her motor vehicle acumen would be best assessed by your motor vehicle testing department. I expect that the results of such tests would be satisfactory".

On August 3, 2001 The Medical Review Section informed the Applicant that a more up-to-date report was required of the attending psychiatrist to include a discharge summary from the North Bay Psychiatric Hospital and confirmation of her stability for at least six months.

On August 24, 2001 The Medical Review Section repeated the above request.

On September 10, 2001 the Applicant submitted an appeal to the Licence Appeal Tribunal.

On October 17, 2001 the hearing was by electronic means and so it was not possible to get any visual impression of the Applicant's conduct, demeanour or personality. However, she made a number of highly inflammatory derogatory and accusatorial statements about the O.P.P., the doctors at the North Bay Psychiatric Hospital, the legal system, the Mental Health Act and other concerns.

For example she stated several times that lawyers and doctors are intimidated by the police who are mentally ill and thieves. She used the words "blackmail", "coersion" and "robbery" with various undetermined references. She referred to Physician # 1 as a "strange doctor". She referred to the September 27, 2000 incident as "another stick-um-up by the O.P.P. to support the Taxi industry in the area as well as the local thieves" and "that the doctors wish to appear supportive of the local police whom they just might fear".

She has laid a number of complaints against the police at O.P.P. headquarters and also against the doctors of the North Bay Psychiatric Hospital through the College of Physicians and Surgeons of Ontario.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

When the Ministry of Transportation was informed that the Applicant was a patient in the North Bay Psychiatric Hospital suffering from a mental disorder and that the attending doctor recommended that she not drive a motor vehicle after discharge from hospital, her licence was suspended according to Section 47(1) and Regulation 340/94 of the *Highway Traffic Act*. Section 14(a) which states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
-

Reconsideration of her licence would be according to the requirements of the medical review committee – a detailed psychiatric assessment to include history, diagnosis, treatment, with

special reference to judgement, concentration behaviour, emotional stability and current level of function.

The Applicant has not provided accurate information regarding her apprehension by the police on September 27, 2000 or medical information about her hospital stay of ten weeks. A complete hospital discharge summary has not been provided. There appears to be a difference of opinion regarding drug therapy between the hospital psychiatrist and Physician # 2, the current attending psychiatrist. Physician # 1 states that she was discharged from the hospital with prescribed medication. Physician # 2 states that she is not taking medication, but it is not clear whether this is his recommendation or that she refuses drug therapy, as she stated on direct questioning.

From the evidence before this hearing, the Tribunal finds the Registrar correct in deciding that the Applicant is not in complete control of all her judgemental, emotional and mental faculties and to a degree likely to significantly interfere with her ability to drive a motor vehicle safely. This is in contravention of the Ontario *Highway Traffic Act*, Regulation 300/90 Section 14(a).

DECISION:

Upon the application by the Applicant to appeal the decision dated January 27, 2001 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Roy Melvin, M.D., Presiding Member

RELEASED: October 24, 2001

RICHARDS

STEPHEN DOUGLAS RICHARDS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

STEPHEN DOUGLAS RICHARDS, Applicant
unrepresented

DATE OF HEARING: October 22, 2001

DECISION RELEASED: October 24, 2001 Hamilton

REASONS FOR DECISION

A hearing was held on October 22, 2001, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Stephen Douglas Richards (the "Applicant")
Motor Vehicle:	1996 Ford Aspire, plate ABZF 373 (the "vehicle")
Date of Appeal:	October 4, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 22, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I cannot afford to have my car impounded. I haven't enough income at present time to pay for it. I need to have a chance to speak please & Thank you to keep my car financially it will ruin me.

Thank you
Steve D. Richards

Mr. Richards confirmed the information provided with his Notice of Appeal and added the following information:

Mr. Richards explained that he had thought the licence suspension he had received in 2000 was only for one year but he acknowledged he had not contacted anyone to confirm that belief at the end of the one year time frame. He stated his understanding that he should not have been driving but on September 19, 2001, he had no other way to get to work and felt he had to do what was needed so he would not miss work.

He works in the Pearson Airport area and it is his first job in ten years as he has been on disability with spinal problems, he also requires a leg brace and his doctor has frequently told him he should not be working at all.

Without confirming details about his therapy appointment schedule or the frequency of these appointments, Mr. Richards stated he receives heat and vibration therapy at his doctor's office, which is located in Port Dover. Mr. Richards also mentioned he had Hepatitis C.

Mr. Richards explained that even though his home is in Simcoe, he spends weeknights at his mother's home in Brampton and gets a ride back to his home on Fridays with a friend. When he has medical or other appointments, he explained that either his girlfriend or mother use his car to drive him, He stated he did not actually need the vehicle and due to his disability, it was difficult for him to drive. He confirmed to the Tribunal that he had alternate means to meet his transportation needs.

Mr. Richards advised the Tribunal that his vehicle was always parked at his home in Simcoe and that he always spent his week nights at his mother's home in Brampton, so he could easily travel to work during the week days. This was inconsistent with the fact that he was in Simcoe on Wednesday, September 16, 2001. He did not explain this apparent inconsistency.

The Tribunal was advised by Mr. Richards that his hardship was not for the loss of the vehicle but rather about the cost of the impound and that he could not afford the impound fee as he was just starting to work and after the costs of his housing, car loan, day-to-day living costs and child support payment order from a previous relationship, he did not have enough money to get

the car out of the impound facility. He did not provide the details of his income or costs.

Mr. Richards said the impound cost was putting him “this close to losing my house”; he stated he lived alone and that his girlfriend lived in a house right behind his own. In explaining the reference to his girlfriend, Mr. Richards said he helped look after her daughter as his girlfriend was a single parent, and he tried to fill in as a father to the child. His girlfriend, who could not afford her own vehicle, also used his vehicle as she had need.

It was essential for Mr. Richards to have the vehicle returned because his mother had co-signed for the original purchase and it was now worth less than the amount still owed so he could not afford to sell it. He did not provide any supporting background or confirming details.

He advised the Tribunal that he had found out he could take steps to have his license suspension reviewed due to his disability circumstances and the Tribunal was given to understand court or review dates had been set for this purpose.

Evidence for the Registrar

A summary of the Registrar’s evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Stephen Douglas Richards;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle (Exhibit #1);
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver’s licence of the driver was then under suspension until February 1, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

To be successful in this appeal, the Applicant must establish that exceptional hardship, as described in subsection 50.2(3)(d) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act") will result from the order to impound the motor vehicle.

As the Applicant is one and the same as the person who was found to be driving, he therefore does not meet the criteria set out in 22(3)(d)(i)(ii) and the Tribunal is unable to consider any such loss with respect to him.

It should be noted that while this does not prevent the Applicant, subject to certain limitation in the Act, from establishing that the impoundment may result in exceptional hardship to a person other than himself, the evidence presented with respect to the Applicant's girlfriend and mother did not establish exceptional hardship. There was no evidence to show that any loss they suffer would be immediate, significant and lasting.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: October 24, 2001

1059294 ONTARIO INC. AND AL PAWLUK

1059294 ONTARIO INC. AND AL PAWLUK

IN THE MATTER OF the *Highway Traffic Act*,
R.S.O. 1990 Chapter H.8 as amended

AND IN THE MATTER OF an Application by
1059294 Ontario Inc. and Al Pawluk dated August
7, 2001 for a hearing before the Licence Appeal
Tribunal pursuant to Section 95 of the *Highway
Traffic Act* appealing the Notice of the Director of
Vehicle Inspection Standards dated July 3, 2001;

AND IN THE MATTER OF Motor Vehicle
Inspection Station Licence Number 23-36958 in
the name of 1059294 Ontario Inc.;

AND IN THE MATTER OF the registration of
Motor Vehicle Inspection Mechanic, Al Pawluk
holding Trade Certificate Number 310S-124683
and 310T-124683.

PANEL MEMBERS: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE,
Counsel for the Director of Vehicle Inspection Standards

AL PAWLUK, representing himself and 1059294 Ontario Inc.

DATE OF HEARING: October 4, 2001 Hamilton

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal under the *Highway Traffic Act* ("HTA") by the licensee 1059294 Ontario Inc. and the registrant Al Pawluk (the "Applicants") respecting a proposal by the Director of Vehicle Inspection Standards to revoke:

- a) Motor Vehicle Inspection Station Licence No. 23-36958 issued to 1059294 Ontario

Inc., and

- b) the registration of Motor Vehicle Inspection Mechanic, Al Pawluk who holds a Trade Certificate No. 310S-124683 and 310T-124683.

EXHIBITS:

By the Respondent:

- Exhibit #1 Proposal dated July 3rd, 2001, issued by the Director of Vehicle Inspection Standards.
- Exhibit #3 Respondent's Appeal Record book.
- Exhibit #4 Supplementary Respondent's Appeal Record Book.
- Exhibit #5 Photograph #8.
- Exhibit #6A Photograph #1.
- Exhibit #6B Photograph #3.
- Exhibit #6C Photograph #4.
- Exhibit #7A Photograph #5.
- Exhibit #7B Photograph #6.
- Exhibit #7C Photograph #7.
- Exhibit #7D Photograph #10.
- Exhibit #7E Photograph #11.

By the Applicant:

- Exhibit #2 Notice of Appeal form received at the Tribunal August 9th, 2001.
- Exhibit #8 Letter from Sharon Pawluk, dated September 19th, 2001.
- Exhibit #9 Letter from H. Fennema of the Ministry of Finance Retail Sales Tax division, dated August 13th, 2001.

PRELIMINARY MATTERS:

There were no preliminary matters heard at this hearing.

FACTS:

The Director's Grounds for Revocation:

By Notice dated July 3, 2001, the Director of Vehicle Inspection Standards revoked pursuant to subsection 91(8)(a), (b) and (e) and section 93(a), (b) and (c) of the *Highway Traffic Act* R.S.O. 1990, Chap. H8 as amended:

(a) Motor Vehicle Inspection Station Licence No. 23-36958 issued to 1059294 Ontario Inc., and;

(b) the registration of Motor Vehicle Inspection Mechanic, Al Pawluk who holds a Trade Certificate No. 310S-124683 and 310T-124683.

on the grounds that the licensee and registrant have made false statements and failed to comply with the Act and Regulations in the issuance of safety standards certificate as follows:

1. Certificate number 4606268, issued on or about June 23, 1995.
2. Certificate number 1859015, issued on or about January 18, 2001.
3. Certificate Number 1858982, issued on or about February 15, 2001.
4. Certificate Number 1858983, issued on or about February 19, 2001.
5. Certificate Number 1858984, issued on or about February 20, 2001.

And further on the grounds that 1059295 Ontario Inc. failed to produce copies of the safety standards certificates it issued or records of the vehicles inspected at the station when requested by an inspector of the Ministry of Transportation on or about February 27, 2001 contrary to paragraphs 10(a) and 10(b) of Ontario Regulation 601.

And further on the grounds that Certificate number 4606268, dated June 23, 1995, and Certificate number 7732960, dated February 17, 1998 were issued by the station after having been countersigned by Allen Pawluk who was not authorized to do so contrary to section 90(3)(b)(ii) of the *Highway Traffic Act*.

The Director's witnesses were: Provincial Offences Officers and MTO Inspectors Cheryl Flynn, Mark Horton, and Larry Grimaldi, whose evidence follows. All the Director's witnesses were qualified by the Tribunal as Expert Witnesses for this hearing. The Curriculum Vitae for each of these witnesses was submitted by the Respondent, and entered into evidence as Exhibit #4.

Officer Flynn testified that she had dealt with the application for a MVIS licence for the Applicant in 1994. At that time, she attended at the location of the Applicant's place of business for the purpose of inspecting the facility to determine its compliance with the requirements for a licence, which was ultimately granted. At that time Sharon Pawluk, who was then married to the Applicant Al Pawluk, was identified as the President as sole corporate officer of 1059294 Ontario Inc., which was doing business as AP Automotive Specialties (Exhibit #3, tab 2).

Officer Flynn further testified that she had acted on a complaint dated July 18th, 1995 from the owner of a vehicle that had been certified and given a Safety Standards Certificate ("SSC") by the Applicant, and she subsequently initiated an investigation of the Applicant. Her investigation involved a 1984 Mercury Cougar that was found to have eight serious defects, including brake, steering and suspension systems of the vehicle. Each of the defects would have prevented the vehicle from meeting the standards for the issuance of a SSC. Officer Flynn determined that the vehicle did not meet the standards for a SSC at the time of the inspection and the SSC was issued. The Applicant was subsequently issued a caution as per section 90(3)(a) of the HTA for a vehicle that was not in compliance (Exhibit #3, tab 7).

The SSC for the above mentioned 1984 Mercury (Exhibit #3, page 32), bears the signatures of Mr. Al Pawluk on both sides of the bottom of the form, indicating that he was signing as the Inspecting Mechanic and the Licensee/Agent. Upon further inspection, it was discovered that Mr. Pawluk did not have the authority to sign a SSC on behalf of the company (Exhibit #3, tab 7) as his wife Sharon Pawluk was the sole Corporate Officer of the company. Nor had Mrs. Pawluk given Mr. Pawluk the authority to sign on her behalf. Officer Flynn issued a second caution to the Applicant and informed him that his wife must complete the standard MTO form authorizing him to sign the SSC's on her behalf (Exhibit #3, tab 8).

In April of 1998, Officer Flynn attended at the premises of the Applicant further to a notice regarding expired Motor Vehicle Inspection Station ("MVIS") licences. Officer Flynn testified that the Applicant's MVIS licence had expired on December 31st, of 1997, and that the Applicant had continued to issue SSC's even though the MVIS licence had expired. A total of 15 SSC's were issued by the Applicant during this period, and they were dated from January 7th to February 17th, 1998.

Officer Flynn also learned that in spite of the caution issued two years earlier, Mr. Pawluk had yet to obtain signed authorization from his wife to sign the SSC's as an agent of 1059294 Ontario Inc. Furthermore, Mr. Pawluk had signed the MTO List of Signing Authorities for giving another mechanic, a Mr. Bob Hannah authority to sign the SSC's, even though at that time Mr. Pawluk did not have authority to sign them, or the authorization form, himself. Four days after Officer Flynn visited the premises, Mrs. Pawluk signed the form authorizing Mr. Pawluk to sign the SSC's as an agent and licensee (Exhibit #3, tab 9). Officer Flynn subsequently charged the Applicant under section 91(1) of the Act, for issuing SSC's without a valid MVIS licence, and under section 90(3)(b)(ii) for failing to have the proper signing authority.

The second witness for the Director was Officer Mark Horton. Responding to a complaint

dated January 31st, 2001, from the owner of a 1992 Chevrolet that had been issued an SSC by the Applicant (Exhibit #3 tab 10), an Officer Morris Brock of the MTO forwarded his inspection of said vehicle to Officer Horton, and advised that the MVIS that had issued this SSC should be audited. The vehicle was found by Officer Brock to have several defects relating to exhaust, rust perforation, front end, and braking systems rendering the vehicle as unfit, and which were determined by Officer Brock to have been present at the time that the SSC had been issued.

Officer Horton testified that on February 27th 2001, he and Officer Larry Grimaldi performed a Facility Audit on the premises of the Applicant. The officers discovered that the Applicant did not have any completed SSC books or related work orders for SSC's that had been issued. Officer Horton stated that, based upon the serial numbers of the SSC books issued by the MTO to the Applicant, there should have been twenty-seven completed SSC books (with twenty SSC's per book) on the Applicant's premises and over four hundred corresponding work orders covering the previous two years. The officers were informed by the Applicant that the documents had been stored in a room next to the facility, and had been accidentally thrown away.

Officer Horton explained to the Tribunal that the MTO does not currently have any way of determining what vehicles would have been issued SSC's by the serial numbers of the SSC's alone. Even though the MTO knew the serial numbers of the SSC's of the books that were missing, this information was insufficient in determining what vehicles each of those SSC's would have been issued to. Therefore, the only vehicles that could be identified and subsequently inspected, were those five vehicles that happened to have had SSC's issued to them from the one book of SSC's that was on the premises of the Applicant at the time of the facility inspection.

Officer Horton was able to locate a single SSC book on the premises that had five SSC's issued from it, though there were no corresponding work orders for these vehicles. The vehicle owners of three of the five vehicles for which these SSC's were issued were subsequently located, and their vehicles inspected. These vehicles were located in Fort Erie, London and Brantford, which are jurisdictions that are relatively far away from the Applicant's premises. (Exhibit #3 tabs 11,12,13).

On March 3rd, 2001, Officer Horton eventually met with both Al and Sharon Pawluk at the Applicant's premises. He testified that Mrs. Pawluk told him that as part of the divorce arrangement between Al Pawluk and her, she believed that she was no longer with the company and provided letters from her legal counsel to support this (Exhibit #3 tab 4 page 11,12). She also indicated to Officer Horton that the signature on file at the Applicant's premises giving Al Pawluk the authority to sign the SSC's as an agent on behalf of 1059294 Ontario Inc. was not her signature.

Officer Horton stated that he sent the file on one of the three vehicles, a 1987 Chevrolet, to Officer Bob Lickers who performed the inspection, since it was currently located in Officer Licker's jurisdiction. It had been issued an SSC by the Applicant on February 15th, 2001, and the vehicle was found to have several defects relating to its windshield, brakes, fuel lines, front end, steering components, and suspension. Any one of these defects would have rendered the vehicle unfit, and ineligible for an SSC. These defects appeared to Officer Lickers to have been present on the vehicle when it had been inspected for its SSC by the Applicant 15 days earlier (Exhibit #3 tab 11).

Officer Horton further testified that he sent the file on another of the three vehicles, a 1988 Ford, to Officer Brock who subsequently attended at the owner's residence to inspect the vehicle. Officer Brock reported that the vehicle had several defects relating to brakes, rust perforation and exhaust. Each of these defects should have prevented the vehicle from passing a safety inspection and receiving an SSC, as these defects were undoubtedly present at the time the SSC had been issued by the Applicant (Exhibit #3 tab 13).

As a result of these incidents, the Applicant was charged for certifying a vehicle that was not to standards as required by section 90(3)(a) of the Act, failure to keep work orders on the premises for one year as required by Regulation 601 10.(b), and failure to keep SSC records on the premises for one year as required by Regulation 601 10.(a). The Applicant pleaded no contest, and was convicted on all counts (Exhibit #3 pages 24,25)

The final witness for the Director was Officer Larry Grimaldi. He testified that he inspected a 1978 Ford that had been issued an SSC by the Applicant on February 19th, 2001. Officer Grimaldi stated that he found the vehicle to have several defects relating to brakes, exhaust, and severe corrosion damage. Each of the defects should have prevented the vehicle from qualifying for an SSC, and they were present at the time that the SSC was issued by the Applicant (Exhibit #3 tab 12).

Each of the vehicles inspected by the Officers had been issued SSC's by the Applicant that were signed solely by Al Pawluk. Photographs showed the extent of defects (Exhibits 6 and 7), and it appeared that the defective components, such as the brakes, exhaust, body and frame, had been in a condition of disrepair for a considerable length of time. Furthermore, Officer Grimaldi testified that when he attended at the premises of the Applicant, he asked Mr. Pawluk what was the colour of the 1978 Ford that he had issued an SSC for two weeks earlier. Mr. Pawluk did not recall that the vehicle was bright red in colour.

The Applicant's witness was Mr. Al Pawluk. His evidence follows.

At the hearing, Mr. Pawluk presented the Tribunal with two additional documents that he wished to be considered as evidence at this hearing. The first document was a letter dated September 19th, 2001 from his former wife, Sharon Pawluk. The second document was a letter dated August 13th, 2001 from H. Fennema of the Ministry of Finance Retail Sales Tax office. With the consent of the Respondent, both of these documents were entered into evidence as Exhibits #8 and #9 respectively.

Mr. Pawluk testified that from the years of 1986 until 1993 (when he formed 1059294 Ontario Inc. with his wife), he had operated another automotive repair business in which he was the sole proprietor. He stated that he had always been in control of the business and as such, had been accustomed to signing as the mechanic and as an agent for the MVIS. He argued that since the form giving him authorization to sign on behalf of the MVIS remained on the premises and was not required to be filed with the MTO, he did not feel it was of consequence to have his wife sign it, as it could have been signed by her at any time.

Mr. Pawluk further testified that he has other employment activities besides 1059294 Ontario Inc., including commercial snow plow operations and heavy equipment repairs for Domtar. As a result of these obligations outside of his shop, he hired Mr. Todd Allen to perform mechanical repairs on vehicles at the Applicant's facilities. Mr. Pawluk stated that Mr. Allen was not a licenced mechanic, however he assigned him the task of performing safety inspections on vehicles on his behalf. Mr. Pawluk also stated that it was Mr. Allen who actually did the safety inspections on the vehicles mentioned in the MTO officers Facility Audit reports. Mr. Pawluk indicated to the Tribunal that Mr. Allen turned out to be incompetent, and that he takes full responsibility for Mr. Allen's mistakes.

Mr. Pawluk challenged the testimony of the MTO officers by stating that in his opinion, several of the defects related to rust scaling on brake lines of the vehicles in question, did not constitute a condition that would have made them unfit for a SSC. Mr. Pawluk also stated that he later corrected the defective components of several of the vehicles when they were later returned to his garage by their owners. The Applicant did not challenge any other testimony from the Director's witnesses at this hearing.

Mr. Pawluk explained that the missing completed SSC books that had been issued to him but were not on the premises at the time of Officer Horton and Grimaldi's Facility Audit had been stored in a unit next to his garage. The unit had been rented to a restaurant operation, and it was they that had inadvertently thrown out the Applicant's records.

The Tribunal finds the following facts to be proven on the evidence:

1. 1059294 Ontario Inc. d/b/a AP Automotive Specialties (the "Applicant") was registered as a motor vehicle inspection station under the *Highway Traffic Act* and Regulations to issue Safety Standard Certificates in respect of motor vehicle's.
2. Al Pawluk (the "Applicant") was at all relevant times employed as an Inspecting Mechanic under the *Highway Traffic Act* and Regulations and was authorized to inspect motor vehicles prior to the issue of SSC's and to sign and complete such certificates.

3. The aforementioned vehicles as described by the Notice of the Director of Vehicle Inspection Standards (Exhibit #1) and listed herein, were issued Safety Standard Certificates by the Applicant, and contained various safety defects relating to key mechanical and structural components of those vehicles that were present at the time of the issuance of their respective SSC's. Each of these defects should have precluded the related vehicles from being issued an SSC.
4. The Applicant, after repeated cautions through the course of several contacts with MTO officers, was found to have consistently lacked the necessary authority to sign SSC's as an agent on behalf of 1006525 Ontario Limited.
5. Through the course of a facility Audit, the Applicant was found to be missing records of operation for the MVIS, including books of completed SSC's and corresponding vehicle work orders.

ISSUES:

The issues in this case may be summarized as follows.

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station licence be carried out?

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Mechanic licence be carried out?

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chap H.8 as amended, provides as follows:

Motor Vehicle Inspection Station Licence:

- 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- 91(2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence

Revocation of a Licence

- 91(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence

where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (b) any inspection authorized by the licence is incompetently performed;
- (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
- (d) there is a breach of condition of the licence;
- (e) the licensee does not comply with this Act or the regulations;
- (f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or
- (g) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3)(a)

Motor Vehicle Inspection Mechanic:

92(1) No person shall sign a vehicle inspection record as mechanic or certify in a safety standards certificate that a vehicle complies with the standards of equipment and performance prescribed by the regulations unless the person is registered by the Director as a motor vehicle inspection mechanic in a motor vehicle inspection station and the Director may so register any person for whom application is made under subsection (2).

- (2) Where a licensee or an applicant for a motor vehicle inspection station applies for the registration as a motor vehicle inspection mechanic in the motor vehicle inspection station of the licensee or in the proposed motor vehicle inspection station of the applicant for a licence, as the case may be, of any person who meets the requirements of this Act and the regulations, the person is entitled to be registered as a motor vehicle inspection mechanic in the motor vehicle inspection station.

93 The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;

- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this Act or the regulation.

Appeal before the Licence Appeal Tribunal:

95(1) Where the Director proposes,

- (a) to refuse to issue or renew a licence;
- (b) to refuse to make a registration; or
- (c) to revoke a licence or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

(2) A notice under subsection (1) shall inform the person who is the applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the [Tribunal] if the person mails or delivers, within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the [Tribunal] requiring a hearing by the [Tribunal] and the person may so require the hearing.

(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the [Tribunal] in accordance with subsection (2), the [Tribunal] shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal and to take the action that the [Tribunal] considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the [Tribunal] may substitute its opinion for that of the Director.

APPLICATION OF THE LAW TO THE FACTS:

Under the HTA, the relevant sections dealing with revocation state:

91 (8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (e) the licensee does not comply with this Act or the regulations;

93. The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) *any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or*
- (b) the registrant does not comply with this act or the regulations.

As to the revocation of the motor vehicle inspection licence, the evidence has established that the Applicant's facilities lacked the required authorizations, records and documentation necessary under the regulations for the performance of safety inspections.

As to the revocation of the registration of the motor vehicle inspection mechanic, the evidence has established that the vehicles that have been shown to have had SSC's issued by the Applicant all had safety defects present at the time of their inspections and SSC issuance. Furthermore, the veracity of the testimony of the MTO inspectors has been well supported by photographic evidence of the subject vehicles. These defects were of a very serious nature and include defects in braking and control systems, as well as vehicle structural integrity. In the Tribunal's opinion, these defects constitute an immediate safety hazard to both the vehicle owners and the motoring public.

The Tribunal is unimpressed with the explanations of the Applicant, who has placed the blame for these unsafe vehicles being issued with SSC's on an unqualified employee. Though the Tribunal recognizes the Applicant's efforts to accept responsibility for the situation, it finds that the Applicant abandoned his responsibilities as a licenced mechanic when he entrusted duties of inspecting vehicles to Mr. Allen, who the Applicant refers to as incompetent.

Furthermore, the Tribunal rejects the Applicant's contention that the authorization forms giving him the authority to sign as an agent on behalf of 1059294 Ontario Inc. were not of major significance since they remained on the Applicant's premises and could have been signed by his wife at any time. On these facts, it would have taken little effort for the Applicant to have had the authorizations properly signed; it should not have taken two years following repeated interventions from the MTO to do so. The failure of the Applicant to perform this relatively simple task, which is a requirement under the Act, does not give the Tribunal any substantial confidence in the willingness of the Applicant to operate an MVIS in accordance with the Act.

The Tribunal finds that the Director has shown the Applicant to have acted in a manner that defeats the integrity of the MVIS system. The Tribunal rejects the notion as presented by the Applicant, that some of the defects described as present on the vehicles at the time of inspections were insufficiently serious to make them unfit during a safety inspection. The Tribunal accepts the evidence contrary to this.

Each SSC bears the statement above the Applicant's signature: *"We hereby certify that the above described motor vehicle has been inspected in accordance with the provisions of Sections 88 to 100 of the Highway Traffic Act and Regulations issued thereunder, and that the items inspected met the prescribed standards on the Date of Inspection."*

In this case, the Director has shown that the Applicant, in signing SSC's for vehicles which have been shown to have had numerous and serious safety defects at the time of issuance, has made a false statement on each of the SSC's that Al Pawluk and 1059294 Ontario Inc. issued. This gives the Director the necessary grounds for the revocation of the MVIS Licence of the Applicant under sections 91(8)(a) and 93(a) and (c) of the *Highway Traffic Act*.

Furthermore, as Mr. Pawluk is currently both the licenced mechanic for 1059294 Ontario Inc. as well as its sole corporate officer, the Tribunal finds that the Director has demonstrated justification for his Order on the grounds that the actions of the Applicant have clearly shown that *"the past conduct of the applicant or, where the applicant is a corporation, is of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity;"* as described by section 91(3)(a).

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to confirm the Order of the Director to revoke the MVIS License issued to 1059294 Ontario Inc, and to revoke the Motor Vehicle Inspection Mechanic registration issued to Al Pawluk.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: October 23, 2001

757- FINAL

757- FINAL

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
CLARKE WALLACE, Member

APPEARANCES: Applicant,
representing himself

DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

DATES OF HEARING: September 5, 14 and 26, 2001 and
October 1, 3 and 4, 2001 Toronto

A hearing was held on September 5, 14 and 26, 2001 and October 1, 3 and 4, 2001 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Clarke Wallace, Member

RELEASED: October 5, 2001

757 - FINAL

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
CLARKE WALLACE, Member

APPEARANCES: DAVID MILNER,
Counsel for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARINGS: September 5, 14, 26, October 1, 3, 4, 2001

DECISION
RELEASED: October 5, 2001 Toronto

REASONS FOR DECISION

A hearing was held on September 5, 14, and 26, and October 1, 3 and 4, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on October 5, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 17, 2001, and was received by the Tribunal on August 17, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters and Remarks

The facts set out hereinafter are a summary of the evidence. The Tribunal will refrain from making any comments on the conduct of the parties to this hearing, and will not transcribe any of the Applicant's complaints about the Respondent and the staff of this Tribunal, which could be deemed to be of a personal nature, or construed as threats of further legal proceedings against all involved in this matter.

The Tribunal recognizes that several issues were raised more than once. In the interest of simplification and clarification, the Tribunal will endeavour to present the arguments in the order in which they were heard, avoiding repetitions.

The Tribunal has reviewed all the material submitted by both parties, but will refer herein only to the material relevant to this appeal.

Throughout the course of these proceedings, as well in his written submissions, the Applicant made a plea for his costs in making his appeal and compensatory damages. The Applicant was advised and this Tribunal emphasizes that it has no jurisdiction to award such costs or damages.

On the first day of hearing on September 5th 2001, the panel hearing this matter consisted of Mr. David Hunt, who presided as panel chair, Dr. Antoine Aouad and Mr. Clarke Wallace. Mr. Hunt later withdrew from the panel due to illness.

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Informing the Tribunal that he was a member of “*two Bars*”, the Applicant represented himself.

The Applicant introduced several Motions with respect to the *Constitution of Canada*, the *Ontario Magna Carta*, as well as allegations of misconduct on the part of the Tribunal, Ministry of Transportation, the Ontario Provincial Police and the Respondent. As these matters are not germane to the grounds for appeal under section 50.1, the Tribunal will deal with these issues under Preliminary Matters.

The Applicant objected to receiving the Respondent’s disclosure package on the morning of the hearing. Mr. David Milner, the solicitor for the Registrar, pointed out that the Applicant had stated “*No fixed address*” on his Notice of Appeal and therefore the Registrar had no way of delivering the documents and the videotape of the breathalyser session.

The Applicant also requested, and recommended, that the Tribunal proceed with a two member panel, consisting of Mr. Hunt and Mr. Wallace, as he believed that given the shortage of physicians in the province of Ontario, Dr. Antoine Aouad’s time would be better spent exercising the duties of a physician. The panel rejected this request.

While discussing the lack of jurisdiction of the Tribunal, the Applicant pointed out that he had not been charged with any offence, and the Promise to Appear previously signed by him, was “...*null and void*...”

An attempt was made by an OPP Constable to serve the Applicant with a document while the Applicant was in the body of the Tribunal. Although, a quasi-judicial body and not a Court of Law, the Tribunal must adhere to certain rules of decorum, thus the Constable was advised that service upon the Applicant would have to be effected outside the hearing room.

The Tribunal heard arguments from both the Applicant and the Respondent on the introduction and admissibility of the Applicant’s Driver’s Abstract as an Exhibit in the proceedings.

The Applicant argued that given the fact that the Ministry of Transportation Driver Record Search showed previous convictions for which the Applicant was pardoned in 1995, said record was inadmissible. The Applicant also alluded to Exhibit 2, his draft Notice of Action in the Ontario Superior Court of Justice relating to a Class Action Suit being commenced by the Applicant on behalf of the “Pardonee Class”.

As a reply, and throughout the course of the proceedings, the Respondent's solicitor countered that there was no evidence, other than the Applicant's word, that the Applicant had been pardoned. The solicitor for the Respondent further attempted to have the record admitted as a means of establishing the identity of the Applicant, at the time, and the fact that he was the holder of a valid Ontario driver's licence.

With respect to the admissibility of the Applicant's Driver's Record, the Tribunal ruled the abstract inadmissible. The Tribunal concurred with the Respondent's solicitor that there is no evidence that the Applicant has been pardoned. Nonetheless, at issue is not the Applicant's previous record, but the possibility of an existing medical condition which may have prevented the Applicant from failing or complying with the demand for a breath sample. The Applicant's Driver's Record is thus irrelevant to the proceedings.

On the matter of the Applicant's request for a number of blank subpoenas to be given to him, Section 12(2)(b) of the *Statutory Powers Procedures Act* prescribes that:

"A summons issued under subsection (1) shall be in the prescribed form (in English or French) and,

(b) where the tribunal consists of more than one person, shall be signed by the chair of the tribunal or in such other manner as documents on behalf of the tribunal may be signed under statute constituting the tribunal."

The Applicant requested a summons for:

1. Tom Long
2. Paul Rhodes
3. Five (5) blank Summons for members of the so-called "CENTRE" of the Ontario PC Government, also sometimes called the "Harris Government"
4. Michael Harris, Premier of Ontario
5. Chris Hodgson, member of PPC of the Ontario Cabinet
6. Robert (aka "Red Neck Rob") Runciman, MPP
7. David Yong, Attorney General
8. James Flaherty, former Attorney General, now Minister of Finance
9. Rob Sampson, Minister of Correctional Services
10. Elizabeth Witmer, former Minister of Health
11. Tony Clement, former Minister of Transportation, now Minister of Health
12. David Turnebull, Solicitor General

13. Brad Clark, Minister of Transport
14. Clerk of the Cabinet
15. Registrar of Motor Vehicles
16. All Members of the Licence Appeal Tribunal of Ontario
17. Commissioner of the Ontario Provincial Police
18. Constable (?given name?) Watt (spelling) of the OPP
19. Blank Summons for five (5) other members of the OPP
20. Blank Summons for ten (10) Driver Examination Centre Supervisors
21. Blank Summons for ten (10) legally qualified medical practitioners.

The Tribunal stated that it would consider the relevance of the requested witnesses prior to the issuance of any summons to attend.

By fax received by the Tribunal on September the 10, 2001, the Applicant provided the Tribunal with copies of letters addressed to the Attorney General for Canada and Attorney General for Ontario, serving notice of Constitutional issues to be raised, as required by Rule 8 of the Licence Appeal Tribunal's *Rules of Practice*.

In his written submissions, the Applicant alleges that *"The legal basis for the Federal Constitutional questions include, but are not limited to (1) Provincial encroachment into areas of exclusive Federal Criminal Law powers; and (2) The following Charter provisions: Preamble, sections 1, 2, 6, 7, 8, 9, 10, 11, 12, 15, 14, 25, 26, 28 and such other provisions as counsel may advise. The legal basis for the Provincial constitutional and human rights questions include but are not limited to various and sundry provisions of the Statutory Powers and Procedures Act, Human Rights Code, and other relevant provisions, laws, regulations of the province of Ontario"*.

The Applicant's September 10, 2001 facsimile transmission entered as Exhibit 8 also contains the following:

- a letter addressed to Mr. David Milner, solicitor for the Ministry of Transportation requesting disclosure of information
- notice of issues to be raised, i.e.
 - "1. Loss of Jurisdiction,
 - 2. Breach of Privacy,
 - 3. Prosecutorial Misconduct
 - 4. Unreasonable Delay;
- a dissertation entitled "Part 1 – Provincial Constitutional Issues;
- a letter addressed to the Applicant signed by "Michael D. Harris, MPP"

The Tribunal resumed on September 14, 2001. Due to illness, Mr. David Hunt withdrew from the panel. The panel continued with Dr. Antoine Aouad and Mr. Clarke Wallace. Dr. Antoine Aouad presided as panel chair.

In his opening remarks, the presiding Member informed the parties that due to personal medical reasons Mr. David Hunt was unable to continue with the hearing. Section 4.4 of the *Statutory Powers Procedure Act* dealing with the issue of "*Incapacity of Member*" was read into the record: "*If a member of a tribunal who has participated in a hearing becomes unable, for any reason to complete the hearing or to participate in the decision, the remaining member or members may complete the hearing and give a decision.*"

The hearing proceeded and new documents filed with the Tribunal were entered as Exhibits.

In reviewing the documents submitted by the Applicant in the facsimile transmission of September 10, 2001, filed as Exhibit 8, the Applicant noted that the letter from Mr. Harris to the Applicant had been stapled in error, and asked that the Tribunal remove said letter as part of the Exhibits.

The Tribunal considered the Applicant's Motion requesting that the Respondent disclose documents in the Applicant's list in Exhibit 8. The Tribunal noted that pursuant to the provisions of Rule 6.5 (1)(a) of the Licence Appeal Tribunal's *Rules of Practice*, the Respondent is required to disclose only those documents which the Respondent intends to rely upon or enter as evidence. The documents listed by the Applicant were not documents the Respondent intended to rely on or enter as evidence. Thus, the Respondent was not required to disclose the documents as requested by the Applicant.

The Tribunal addressed the Applicant's concerns regarding his allegation of Tribunal bias, constitutional challenge, and prosecutorial misconduct.

The Applicant objected to the order of presentation of issues stipulated by the Tribunal, insisting that the panel deal first with the Constitutional issue, then with the Prosecutorial Misconduct and lastly bias.

The Respondent's solicitor argued, that the issue of bias clearly needed to be addressed first, as the Tribunal would be relieved of jurisdiction were the Applicant successful in his argument.

The Tribunal agreed with the Respondent's view and directed the Applicant to present his evidence and submissions respecting his allegation of bias.

The Applicant proceeded by arguing that the suspension of his driver's licence was contrary to the *Canadian Charter of Rights and Freedoms* (the "Charter") and the provisions referred to by the Applicant as the *Ontario Great Charter*, or *Ontario Charter* or the *Constitution of Ontario*, or *Ontario Magna Carta*. Given that his fundamental rights were violated, the Applicant intends to initiate a Class Action Suit against the Respondent and the Tribunal, and

“...expose the Board Members for disobeying the Charter...”. Thus, the Applicant argued, due to the personal liability of the panel members as they are “being sued personally”, they could not hear this matter as they would be “...deciding their own case...”

The Respondent countered by highlighting that the “...test for the apprehension of bias must be reasonable...” The Applicant’s suggestion that he has sued, or may sue the Tribunal and its members is insufficient. Besides, the Statutory Powers Procedures Act renders the members of a Tribunal immune from liability.

Both the Respondent and the Applicant referred to several case law references to substantiate their positions.

This Tribunal considered the submissions of both parties respecting the Applicant’s allegation of bias on the part of the Tribunal based on the Applicant’s indication that he will be suing a number of people including the Tribunal and the Tribunal’s members individually. The panel did not agree with the Applicant’s submission that they are biased in this matter or that there is any reasonable apprehension of bias. The Tribunal asked the Applicant to continue.

Exhibits 8 and 9 specify the Applicant’s argument with respect to the *Ontario Magna Carta*.

At the hearing, the Applicant detailed the history of the *Ontario Magna Carta*, tracing it back to England and the “...governing Crown in 1215...” to Lord Simcoe, who agreed to incorporate parts of the *Magna Carta* into the *Ontario Charter*, and the fact that this law never having been repealed is “still on the books”.

The Applicant interprets the *Magna Carta* as granting the right for every individual to have a hearing prior to a privilege being denied. The Applicant pointed out that such hearing was denied him prior to his driving privileges being suspended under the *Highway Traffic Act*.

In concluding his argument, the Applicant asked that the Tribunal “...declare the licence suspension programme illegal and null and void ...and re-instate the licence...”

The Respondent asked that the Tribunal dismiss the Applicant’s claim on the following bases: the legislation in the Revised Statutes of Ontario to which the Applicant referred is general and did not contemplate driving privileges, there were no driver’s license in 1897 or 1902, the *Highway Traffic Act* specifically deals with the issue of licences, and later statutes supersede older ones.

The Tribunal heard and considered the Applicant’s position that the *Ontario Magna Carta* prohibits the taking of a franchise without a hearing and that this prohibition would apply to a suspension under section 48.3 of the *Highway Traffic Act*.

The Tribunal appreciates the thoughtful argument of the Applicant. However, the Tribunal ruled that the *Magna Carta* does not apply to this matter.

The franchise referred to by the *Magna Carta* and a driver's licence are not one and the same. The franchise referred to in the *Magna Carta* is a higher bundle of legal rights than a driver's licence, thus the *Magna Carta*'s prohibitions do not apply.

Further, the taking of a franchise has a finality that is not present in this matter. In this matter, the licence is not taken permanently; it is not cancelled, but simply suspended for a period of time, under section 48.3 of the *Highway Traffic Act*. The degree of finality not being the same, the *Magna Carta* provisions, therefore, do not apply.

The Applicant raised an objection, under Rule 7 of the Tribunal's *Rules of Practice* regarding spectators sitting in the body of the Tribunal. The Applicant contended that in the course of the hearing he had dealt with and would be dealing with personal issues.

Although the Applicant later withdrew his objection to members of the public attending the hearing, the Tribunal noted the Applicant's objection and referred to Rule 7.2 of the Licence Appeal Tribunal's *Rules of Practice* which states that:

"An oral hearing shall be open to the public... unless

(2) intimate financial or personal matters or other matters may be disclosed ...of such nature ...that the desirability of avoiding disclosure thereof ...in the interests of any person affected ...outweighs the desirability of adhering to the principle that the hearings be open to the public."

The Applicant had ample opportunity to raise his concerns at the beginning of the hearing, but he chose not to do so until well after he had testified in the public hearing and provided the details of his medical condition. Thus, the Tribunal ruled that the hearing would remain open to the public.

Prior to making his submission on the applicability of various sections of *Canadian Charter of Rights and Freedoms* to this hearing, the Applicant requested that a ruling be made after each submission.

The Respondent objected and submitted that a ruling on each section should be made only after the entire argument was heard.

The Tribunal ruled that the complete argument on the Charter should be presented, and that there would be one ruling, referring to each section at the end of both arguments.

The first clause of the *Canadian Charter of Rights and Freedoms* argued by the Applicant was "S.8 – SEARCH AND SEIZURE – Everyone has the right to be secure against unreasonable seizure".

The Applicant condemned the 90 day suspension as illegal because there is no relationship between the suspension and the “evil” it is trying to prevent, there is no proof the Applicant would be driving impaired for 90 days, and there is “...no iota of evidence of alcohol consumption”. The Applicant concluded that the “seizure” of the driver’s license was “unreasonable” because it was totally “arbitrary”.

The Applicant suggested that alcohol detectors available today could be installed in all motor vehicles to prevent impaired driving. This technology costing under \$100.00 would eliminate, in the Applicant’s view, the need for the suspension of licences.

The Applicant next referred to the application of Section 12 of the Charter, dealing with “*TREATMENT OR PUNISHMENT - Everyone has the right not to be subjected to any cruel and unusual treatment or punishment*”. The Applicant’s contention that due to the technology available to prevent impaired driving, the suspension of a driver’s licence is “...unusual punishment...”. Referring to his own situation, the Applicant called attention to the fact that a vehicle is necessary for “...professional continuity...” and that he has been forced to hire a driver at considerable expense, and thus, was subject to unusual punishment.

Section 15 of the Charter relates to “*Equality Rights*” granting “*EQUALITY BEFORE AND UNDER THE LAW AND EQUAL PROTECTION AND BENEFIT OF LAW.*” The Applicant pointed out that section 15 is supported by section 28 which ensures “*RIGHTS GUARANTEED TO BOTH SEXES - Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.*”

To substantiate his position, the Applicant introduced a document entitled “Drinking and Driving in Ontario Statistical Yearbook 1997. (Exhibit # 11).

According to the Applicant, “...90% of the persons charged with impaired driving are males ...only 10% are females...” The Applicant claimed that these statistics demonstrate that the Police Force definitely discriminates against males.

The Applicant went on to allege that because most officers in the R.I.D.E. program are males, women who are stopped have an unfair advantage over males. The Applicant posits that when women are placed in squad cars with young virile male officers, certain favours may be exchanged, i.e. “...women give blow jobs to officers instead of blowing into the machine...”

The Applicant closed his dissertation on the Charter by underlining the reason for his challenge. The Applicant desires only to “...protect society...” and believes that “... one cop off the streets puts 2 teachers in the classroom...”

In his reply, Mr Milner, commented that the “...issues raised by the Applicant are inappropriate ...onus on Applicant to prove case ...Charter arguments fail for lack of evidence.”

Regarding Section 8, the Respondent stated that Section 48.3 of the *Highway Traffic Act* provides for the suspension of driver's licences and "...once the conditions exist the Registrar has no discretion..." The Respondent's counsel further submitted that this situation does not fall within search and seizure.

The suspension of a driver's licence is a sanction resulting from an offence, thus, according to the Respondent's counsel, section 12 dealing with unusual treatment or punishment does not apply.

The Respondent's counsel submitted that the Applicant's argument that he is discriminated against because he is male is invalid. Inequality of balance is not enough to support the argument that someone has been denied his rights. The Respondent's counsel maintained that Section 15 has not been proven.

The Tribunal considered the submissions of the parties respecting the Applicant's position that section 48.3 of the *Highway Traffic Act*, contravenes the *Canadian Charter of Rights and Freedoms*, particularly sections 8,12,15.

During his arguments, the Applicant made reference to the fact that on the night the breath test demand was made, the officers had absolutely no evidence of alcohol consumption on his part. The Tribunal notes that this appeal does not pertain to the issue of concentration of alcohol in the blood, but rather to suspension of a driver's licence under section 48.3(2) which allows the Registrar of Motor Vehicles to suspend a driver's licence in the event a "...person failed or refused to provide a breath or blood sample made under section 254 of the *Criminal Code (Canada)*."

Also, the Tribunal appreciates the Applicant's desire to "...protect society..." However, the issue this Tribunal must adjudicate is whether the Applicant had a medical reason for refusing or failing to provide a breath sample. The determination of that is not advanced by the Applicant's argument that impaired driving detector technology can be installed in all motor vehicles.

Section 8 of the Charter provides that everyone has the right to be secure against search and seizure, and the Applicant argued that the suspension of his driver's license is a seizure which violates section 8. The Tribunal does not share this view. The Tribunal finds that the suspension of the Applicant's driver's licence under section 48.3 is not an unjustified state intrusion upon the Applicant's private property or domain as contemplated by section 8, and section 8 of the Charter does not apply.

Section 12 of the Charter provides that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. The Tribunal finds that the suspension of a driver's license for failure to provide a breath sample as provided by section 48.3 of the *Highway Traffic Act* is not a punishment so excessive as to be grossly disproportionate to what is appropriate and is not such a punishment as to outrage standards of decency. Accordingly,

section 12 of the Charter does not apply.

Section 15 of the Charter provides that every individual is equal before the law and is entitled to equal protection and equal benefit of the law, without discrimination. The Applicant argues that suspension of driver's licences is disproportionately against men and therefore is discriminatory. There is no evidence before the Tribunal of discrimination or that being male is the basis of such suspension. The statistics introduced by the Applicant reflect an average based on the number of people driving on highways which could be presumed to be predominantly male. In any event, such data does not establish that there is a contravention of the right to be equal before the law.

With respect to the Applicant's request for the Tribunal to issue a number of summons to attend this hearing, the Applicant quoted Rule 6.2 of the Licence Appeal Tribunal's Rules of Practice, which pertain to "*Character, Conduct or Competence Issues*", to substantiate his request for several summons to attend.

According to the Applicant, it was his intention to serve several medical experts to testify as to the symptoms found in a person afflicted with his condition. The Applicant also wanted to ensure that the police officers and individuals involved in the incidents of July 25th, that led to the suspension of the Applicant's driver's licence, would be present at the hearing.

The Respondent pointed out that the Tribunal has no jurisdiction to issue a summons to attend to witnesses outside the Province, as requested by the Applicant, and further that the Tribunal has a duty to summons only those witnesses that are immediately relevant to the matter.

The Applicant was instructed to provide the Tribunal with the name and address of all possible witnesses by noon on Monday, September 17, 2001. Should he choose to do so, the requested subpoenas would be available by Tuesday, September 18th, and could be picked up at his convenience.

A formal Interim Order with respect to the Applicant's request for summons to attend was issued and released by the Tribunal on September 17, 2001.

A third day of hearing convened on September 26, 2001. The presiding Member, Dr. Antoine Aouad, was unable to attend due a medical emergency and after documents filed by the Applicant were entered as Exhibits 14 and 15, the matter was adjourned on consent of the parties by the panel member, Mr. Clarke Wallace to 9:30 a.m. October 3, 2001.

Following the attendance of the parties before the Tribunal on September 26, 2001, the Respondent requested that the Tribunal postpone the start of the hearing on October 3, 2001 from 9:30 a.m. to 11:30 a.m.

On September 28th, 2001, at approximately 2:15 p.m., a member of the Tribunal's staff, Ms. Stacy Murphy left a voicemail for the Applicant informing him that a Teleconference was scheduled for 11:00 a.m. on October 1st, 2001 and that the Tribunal was to consider the

request of the Respondent to change the commencement time from 9:30 a.m. to 11:30 a.m. on October 3rd, 2001 (Exhibit #12). This means of notice was chosen by the Applicant who would not give his address for service. With the Respondent in attendance by teleconference, a telephone call was placed by the Tribunal to the Applicant at 11:00 a.m. on October 1st, 2001. The Applicant's answering machine picked up, but the Applicant did not come to the phone. After hearing submissions from the Respondent's counsel, the Tribunal issued an Interim Order changing the commencement time of the hearing from 9:30 a.m. to 11:30 a.m. on October 3, 2001. The order was issued by the Tribunal and released on October 2nd, 2001.

On October 3, 2001, the hearing resumed, with the two panel members, Dr. Antoine Aouad and Mr. Clarke Wallace, Dr. Antoine Aouad presiding. The Tribunal asked the Applicant to address the panel respecting his complaints as stated in Exhibits 8 and 14:

1. Loss of Jurisdiction,
2. Breach of Privacy,
3. Prosecutorial Misconduct
4. Unreasonable Delay;

Prior to commencing his arguments, the Applicant requested that Exhibit #15, an Affidavit from the Applicant containing several attachments, be considered as an omnibus Motion. The Tribunal asked the Applicant to proceed.

For the record, the Applicant asked that copies of his driving record, attached to the Respondent's submissions, filed as Exhibit 16, be destroyed. The Tribunal re-iterated its ruling that his driving record was inadmissible and would not be considered by the Tribunal in these proceedings.

At this time, the Applicant submitted further documents, which on consent were entered as Exhibits. The Applicant offered to provide the Tribunal with a 107-page research paper, written by a Speaker of the Ontario Legislation outlining the *Ontario Magna Carta*, as the first legislation. As the matter of the *Magna Carta* was already ruled on, the document in question was not entered as an Exhibit.

Referring to Rules 7 and 7.2 of the Licence Appeal Tribunal's *Rules of Practice*, the Applicant requested that the Tribunal's record be sealed after the hearing, as it contained private information regarding his medical condition.

The Respondent's counsel objected to the Applicant's request. He pointed out that no one is forced to provide private medical information and that the Applicant voluntarily submitted the documents in question, knowing that hearings were public.

The Tribunal ruled that Exhibit #15, due to the personal nature of the contents, would be marked confidential.

With respect to “*Loss of Jurisdiction*”, the Applicant reiterated the points made in Exhibits 8 and 14, asserting that the Tribunal has no jurisdiction as “...*at the commencement of the ...proceedings, no criminal charges (impaired, failure to blow or fail to stop) whatsoever were outstanding in relation to the appellant ...null and void Promise to Appear...* “. Further, according to the Applicant as there was no previous record the officers had “...*no reason to make the demand in the first place...*”

To substantiate his position, the Applicant introduced case law regarding loss of jurisdiction by the Courts.

The Respondent's counsel noted that the Applicant was “...*confused as to forum.*” The Tribunal deals with suspension for failing to provide a breath sample, not drinking and driving. Further, there is no connection in law between a previous record and a Ministry suspension for failing to provide a breath sample.

The Tribunal noted that this appeal was initiated by the Applicant, as is his right pursuant to section 50.1 of the *Highway Traffic Act*, and that he now argues that the Tribunal has no jurisdiction. Whether or not criminal charges were laid against the Applicant is of no relevance to the issue before this Tribunal. That is a matter for a court of law to decide. The Tribunal is clearly mandated to deal with the issue of the suspension of his driver's licence under section 48.1, which is the matter brought to this Tribunal under section 50.1 of the *Highway Traffic Act* by the Applicant. The Tribunal ruled that it has the jurisdiction to proceed.

The Applicant offered no arguments with respect to his allegation of “*Breach of Privacy and Unreasonable Seizure*”, as the Tribunal ruled his Driver's Record inadmissible.

The Applicant made his submission respecting “*Prosecutorial Misconduct*”. The Applicant's complaint dealt with the failure to provide information and the untimely provision of information, as required by Rule 6 of the Licence Appeal Tribunal's *Rules of Practice*. The Applicant referred specifically to the 16 items listed in Exhibits 4 and 8, and to the fact that the Respondent's original submissions were received late.

Mr. Milner, the Respondent's counsel, responded that these are civil proceedings, the Applicant will not be convicted of anything, there is no prosecution, and that there is not the same obligation, regarding disclosure, as in criminal proceedings.

The Respondent's counsel continued by stating that where an Applicant steps forwards and appeals, the onus is on him to prove his case. There is no obligation on the Respondent towards the Applicant respecting disclosure, other than to disclose information directly pertinent to the issue. In this case the issue is straightforward: “...*did he blow or not...*”

The Tribunal considered the submissions of the parties. There can be no doubt that this is a civil law Tribunal. The Applicant is not being prosecuted and consequently there is no “Prosecutor”. This matter has been brought forward by the Applicant, and the onus is on him to prove the merits of his appeal. Disclosure, as previously stated, by the Respondent to the Applicant is only mandatory in so far as the Respondent must provide the Applicant with information which the Respondent will be relying on or introducing as evidence. Rule 6.5 of the Licence Appeal Tribunal's *Rules of Practice*, was complied with and the Tribunal found no basis in the Prosecutorial Misconduct argument put forth by the Applicant and dismissed that argument.

“Unreasonable Delay” was the next and final argument raised by the Applicant prior to dealing with the grounds for appeal under section 50.1.

The Applicant maintains that his “...right to fundamental justice has been infringed by way of unreasonable delay...” The Applicant bases his claim on four points: “... (i) July 25th, 2001 to about August 20th, 2001...could not find LAT; (ii) August 20th, 2001...denied ...of right and ability to issue summons to witness in order to prepare ...full answer and defence; (iii) August 20th, 2001 – September 5th, 2001 ...awaits hearing; (iv) September 5th, 2001 – Prosecutor ...not made any timely or meaningful disclosure ...necessitating an adjournment...”

The Applicant reiterated his position that his rights under the Charter were infringed due to delays, and requested the Tribunal order the issuance of a temporary licence.

In summary the Applicant concluded that there were three main reasons for the delays: “lack of information on the Tribunal ...lack of expedited hearing ...delays due to health...”

In order to prove his argument, the Applicant requested Mr. Kent McClure, Chair of the Tribunal be called as witness.

The Respondent's solicitor, Mr. Milner, denounced the Applicant's request to call Mr. McClure as a witness as a “...dilatatory tactic ...another attempt to delay...” The Respondent accentuated that the reason for the delays were the Applicant's failure to deal with grounds for appeal.

The Tribunal noted that usually hearings of this nature are heard in one day of proceedings. This matter has taken longer in order to accommodate the Applicant and allow fair and proper hearing time for all motions brought forth by the Applicant.

As for the Applicant's request to have Mr. Kent McClure testify as a witness, Section 12(1) of the Statutory Powers Procedures Act states that:

“ A tribunal may require any person, including a party, by summons,

- (a) *to give evidence oath or affirmation at an oral or electronic hearing...*
...relevant to the subject matter of the proceedings..."

The Tribunal found that Mr. McClure testimony was not relevant to the reason for appeal, being the suspension of the Applicant's driver license pursuant to section 48.3 of the *Highway Traffic Act*.

The Applicant protested that he was unable to contact the Licence Appeal Tribunal due to "...false, out dated, and incorrect phone number information..." Information on the Licence Appeal Tribunal can be easily obtained by calling the Province of Ontario Information number and by accessing the Government of Ontario website on the internet. Thus, the Applicant's argument that "*unreasonable delay*" was caused due to lack of information about the Tribunal is dismissed.

The Applicant moved to exclude witnesses which the Tribunal granted.

The Applicant then introduced the issue of tampering of the police videotape of the breathalyser session.

The Applicant filed a website page headed "OWL Investigations, Inc." which the Tribunal entered as Exhibit #23. The Applicant indicated that he had "*...not had the time to spend the \$5,000.00 fee to get the video properly analysed...*" Nonetheless, the Applicant pointed out that he has experience in matters of tampering of audio-visual tapes. In his opinion, a preliminary review of the videotape of the breathalyser session indicates that said tape has been tampered with.

According to the Applicant, had it not been for an illegal search of his driver's record, which indicted previous convictions, the tape would not have been made. Further, as the evidence exonerated the Applicant, "*...the officer turned on other instruments to cause static interference so that the appellant's voice does not come through...*"

In conclusion, the Applicant maintained that the videotape should not be viewed as it "*...destroys the credibility*" of the Applicant, is "*...highly prejudicial*" and is "*...fabricated evidence...*" Instead, the Applicant argued that a transcript of audio portion of the video tape should be made and admitted, as it would make clear that the Applicant informed the officers that he was refusing to blow for medical reasons.

The Respondent's solicitor argued that the Applicant's demeanour came through in the video and it is an essential piece of evidence to determine the Applicant's state at the time.

The Tribunal considered all the arguments. At issue is whether or not the Applicant had any medical reasons that would preclude him from complying with the breath demand. The onus is

on the Applicant to provide medical grounds to corroborate his grounds for Appeal. Unless the Applicant was struggling for breath, or having a seizure, it would be difficult for the Tribunal to assess, from the videotape, the Applicant's state of health at the time of the demand and the video would not be determinative of that question. The Applicant believes that the video tape was tampered with, which, if true, does not support its audio component's veracity. In any event, no transcript of the audio portion has been made available to this Tribunal. Little turns on the evidence that could be provided to the Tribunal by the tape, either video or audio. Thus, the Tribunal ruled that the videotape be excluded as evidence and refused the Applicant's request that a transcript of the videotape be made and be entered as evidence.

Exhibit #13, previously submitted by the Applicant, is a photocopy of what appears to be newspaper articles regarding hospital lists and higher medical salaries leading to delays in medical care. The Applicant referred to this Exhibit to support his argument that Applicants *"...are in an awkward position because it is impossible ... to come up with medical reports because it takes thirteen weeks. Thus ...rights denied due to lack of ability to obtain reports ...provisions limiting rights are contrary to Charter..."*

The Applicant also pointed out that Section 15 of the Charter prohibits discrimination based on medical reasons. The *Highway Traffic Act*, discriminates because *"...disabled people automatically lose their licences..."*

The Applicant asked the Tribunal to review and acknowledge paragraph #34 of Exhibit #15. The Applicant raised an objection to a member of the panel making a determination in this matter, as it is *"...conduct unbecoming of a physician to discriminate against the disabled..."*

After the lunch break, the Applicant informed the Tribunal that he had observed a member of the panel, Mr. Clarke Wallace, speaking to the police officers involved in this matter. The Applicant enquired as to the subject matter of the conversation. The panel member, Mr. Clarke Wallace made a statement for the record confirming that he *"did walk along St. Clair with the officers, talked about the weather, former job and out of town hearings."*

The Applicant reiterated his request to have the file sealed after completion of the procedures. The Respondent's solicitor renewed his objection to the Applicant's request.

The Tribunal notes that the Interim Order released by the Tribunal incorrectly stated that counsel for the Respondent had no objection to the Applicant's request, and that typographical error is hereby corrected.

The Tribunal having already ruled on the confidentiality of Exhibit #15 now added Exhibit #28, to its Interim Order released October the 5th, 2001. Exhibit # 28 contains originals of documents in Exhibit # 15.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal Form received August 17, 2001.
- b) Exhibit # 2 Notice of Action Claim.
- c) Exhibit # 3 Notice of Constitutional issue.
- d) Exhibit # 4 Request for Summons to Witness.
- e) Exhibit # 5 Request for Pardon.
- f) Exhibit # 6 Notice to Registrar.
- g) Exhibit # 7 Vehicle Registrant Search.
- h) Exhibit # 8 Constitutional questions.
- i) Exhibit # 9 Ontario Magna Carta – relevant provisions.
- j) Exhibit # 10 Transcription of Notes.
- k) Exhibit # 11 Drinking and Driving in Ontario – Statistical Yearbook.
- l) Exhibit # 12 Motion heard October 1, 2001.
- m) Exhibit # 13 Hospital waiting lists – by the National Post.
- n) Exhibit # 14 Loss of Jurisdiction.
- o) Exhibit # 15 Affidavit of the Applicant.
- p) Exhibit # 17 Motor Vehicle Accident Report.
- q) Exhibit # 18 Administrative Driver's Licence Suspension booklet.
- r) Exhibit # 19 Brochure – Break the Law.
- s) Exhibit # 20 Reverse side of Notice to Registrar.
- t) Exhibit # 21 Promise to Appear.

- u) Exhibit # 22 Summons to a Person Charged with an Offence.
- v) Exhibit # 23 OWL Investigations, Inc.
- w) Exhibit # 24 Alcohol Influence Report.
- x) Exhibit # 25 Bach Flower Remedies.
- y) Exhibit # 26 Prisoner Report.
- z) Exhibit # 27 Dental record.
- aa) Exhibit # 28 Original Affidavit of the Applicant.
- ab) Exhibit # 29 Gamma-Dynacare Medical Laboratories Report.
- ac) Exhibit # 30 Adderall Medication guide.

By the Respondent:

- a) Exhibit # 16 Ministry of Transportation submissions – received August 29, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

50.1 (1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver’s licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant's Driver's Licence was suspended "July 25/01" and noted in the Applicant's Notice of Appeal (Exhibit # 1)

Page 2 of the Notice of Appeal requiring a "History of Diagnosis" and "Type of Measurements or recent test taken " which could be filled in by the Applicant's physician, has been left blank except for the Applicant's remarks: "Contrary to Charter".

The Applicant attached to the Notice of Appeal a typewritten sheet, entitled "SUMMARY OF MEDICAL ISSUES – THE APPLICANT" setting out the "Diagnosis" and "Treatment" of the Applicant's medical grounds for appeal:

"Diagnosis:

1. Hypothyroidism (Secondary – Pituitary)
2. Narcolepsy
3. Consequential Bio-based Major Depression

Treatment (respectively)

1. 75 to 300 mg Syntroid daily
2. 10 to 60 mg of Adderall daily
3. 75 to 150 mg of Effexor daily."

The Applicant also tendered in evidence two Gamma Dynacare laboratory results. (Three Gamma Dynacare are attached to the Notice of Appeal, however the last sheet is a duplicate of the first.) The Service Date is "2001/01/08". Physician # 1 made the request from the Patient Centred Clinic, 72 Main Street, Waterdown, Ontario. The laboratory results appear to be addressed to the Applicant at the same address as that of Physician # 1.

Several receipts for prescriptions made out to the Applicant are attached to the Notice of Appeal, together with hard copies of Internet downloads containing information on the prescriptions taken by the Applicant and on "Rescue Remedy".

In an Affidavit sworn September 25th, 2001, received by the Tribunal on September 26th, 2001, the Applicant details his medical history and medications (Exhibit #15). Exhibit 15 is confidential.

Under the Heading "Diagnosis and Medications Prior to July 25th, 2001", the Applicant states his information as to his diagnosis.

Attached to the Applicant's Affidavit are copies of recent prescriptions and receipts for medication, copies of drug manufacturer's information from Knoll Pharmaceutical Company and Wyeth-Ayerst Canada Inc. and Shire Pharmaceuticals.

In paragraph 12 of his Affidavit, the Applicant refers to a quote from the notes of Police Officer # 1.

Paragraph 17, states that as a result of the motor vehicle collision he suffers a number of injuries and lists them.

The Applicant alleges, in paragraph 18 that due to Police Officer # 1's refusal to allow the Appellant medication or medical attention after the collision, the Applicant immediately consumed 2 full 2 ounce bottles of **an aroma therapy, referring to it by name.**

The Applicant lists various subsequent treatments he sought and/or received.

The Applicant declares that the first reason for his referral to give a breath sample was medical inability which he summarizes. Further, the Applicant refers to a number of post-collision medical services he required.

The Applicant provided photocopies of bills from dental practitioners. (Exhibit # 27)

The Respondent provided the following Documents:

1. Notice to the Registrar.
2. Driving Record of the Applicant.
3. Vehicle Record of plate ADRR051

The portion of the hearing dealing with the grounds for appeal under Section 50.1 commenced in the afternoon of October 3rd and continued through October 4th, 2001.

The Applicant called Police Officer # 2 as his witness.

Prior to questioning his witness, the Applicant insisted on verifying the documents brought by the officer, that is, to confirm that the police officer's notes were the same as those already in the possession of the Applicant.

The Applicant, by leading questions to the witness and by stating the facts according to his view, attempted to establish that it was clear his inability to provide a breath sample was due to three reasons: "*1. trauma due to the collision; 2. thyroid/adrenal deficiency; 3. torture*".

The Applicant also alluded to the fact that he had broken several gold inlays in his mouth, and that this was causing him quite a bit of discomfort, at the time.

In reply to questions posed by the Applicant in examination in chief and in cross-examination by the Respondent's solicitor, Police Officer # 2 testified that he is an experienced breathalyser technician.

Police Officer # 2 recalled being told by the Applicant that his reasons for refusing a breathalyser test were medical, but at no time did the Constable observe the Applicant in dire need of medical assistance, nor did the Applicant request medical assistance. There are strict guidelines that need to be adhered to in order to obtain a blood sample, instead of a breath sample. Police Officer # 2 saw no need to request a blood sample of the Applicant as there was no indication that he would not be able to provide a breath sample.

Police Officer # 2 is trained in first aid and testified to being able to recognize the symptoms of a person in shock; he noticed no such symptoms in the Applicant. Police Officer # 2 observed no breathing difficulties on the part of the Applicant, and obtained no reply from the Applicant when he posed the question of whether the Applicant "...could form a tight seal over the mouthpiece..."

Police Officer # 2 testified that when asked to provide a breath sample the Applicant replied, *"How do I know you will not torture me as you did with the handcuffs."*

The Applicant called Police Officer # 1 to testify, who gave evidence as to the incidents that led to the breathalyser session.

At no time did Police Officer # 1 observe the Applicant suffering any type of physical discomfort, nor did the Applicant advise him he was in pain, or request medical attention. The Applicant did inform Police Officer # 1 that he was late in taking his medication.

Police Officer # 1 had stood nearby while Police Officer # 2 made the demand for a breath sample from the Applicant. Police Officer # 1 testified that he heard the Applicant reply to Police Officer # 2 that he was refusing to provide a breath sample because he had been *"tortured by the handcuffs"*

The Applicant took the stand to testify on his own behalf. Having suggested that the Tribunal adopt his omnibus motion as statements of fact, the Applicant proceeded to offer the Tribunal a "background" to his Affidavit.

The Respondent's solicitor objected, saying that the Applicant could not *"...have it both ways ...make a choice ...provide Affidavit or give evidence..."*

On the basis that the Tribunal is a somewhat informal forum, the Tribunal allowed the Applicant leeway to articulate his position.

The Applicant gave a synopsis of his medical condition since childhood.

The Applicant explained, “...*as the pituitary does not communicate with the thyroid ...medication is prescribed...*”. The symptoms of hypothyroidism are “...*degeneration of the nerves and a higher pain threshold than other people...*” This, the Applicant suggested, is the reason for his demeanour on the night of in question, and the fact that he demonstrated no pain.

The Applicant referred to the dental bills pointing out that this evidence is relevant as the Applicant has “...\$25,000.00 worth of gold inlays in his mouth”.

As a consequence of the collision, the Applicant “...*gritted his teeth and broke the seals of overlays and inlays exposing nerves to air and causing pain...*”.

As he began his cross-examination, the Respondent's solicitor, Mr. Milner, asked if the Applicant had “...*the original stapled version of the Affidavit filed as Exhibit 15,*” and whether the copies made available to the Tribunal were true copies of the original. Mr. Milner referred to and questioned the Applicant with respect to the correction of the lettering of the order of exhibits attached to his Affidavit. “*Exhibit 'K'*”, appeared to be a correction, but was not initialled by the commissioner, as required, for the proper swearing of documents.

The Applicant replied that he did show the Commissioner a complete stapled document, but he was unable to provide this version to the Tribunal.

Mr. Milner took this opportunity to impugn the Applicant's credibility by noting that the copies the Applicant claimed had been originally stapled together “...*had no staple holes...*”

Under questioning by Mr. Milner, the Applicant testified that he was “...*fit to drive at the time but would not have been very much longer...*” and that “...*when medication is withdrawn ...shows signs of fatigue ...systems begin to shut down ...lethargic in speech ...may become comatose...*”. The Applicant further stated that medication needs to be constantly adjusted, and that his was changed approximately one month after the accident.

In his closing submissions, the Applicant repeated his request that the rulings concerning his challenges to the Charter be made in writing, and reminded the Tribunal that it had not ruled on the Section 15 dealing with discrimination of disabled individuals.

With respect to the medical reasons for the refusal to provide a breath sample, the Applicant restated the three reasons offered during his viva voce evidence: “...*trauma after injury; severe hypo and adrenal deficiencies, was without life sustaining medication for some time ...improper treatment by the officer who excessively failed to push the button of the handcuffs causing nerve and tissue damage of the hands...*”

The Applicant remarked that it was important that the Tribunal realize there had been a long-standing illness and that he needs at least two “...*life sustaining medications...*”

Referring to previous decisions of the Tribunal, the Applicant noted that everything from panic disorders to nose and palate problems have been accepted by the Tribunal as grounds for reinstatement.

The Applicant clarified that he refrained from serving the physicians with the Tribunal's summons to attend to give evidence at this hearing, although he had originally intended to do so, as he did not “...*wish to deprive a young person or an older person of medical services.*”

The Applicant asserted that there is sufficient evidence to warrant the return of his driver's licence.

The Respondent offered no viva voce evidence at the hearing but relied upon the evidence given by the witnesses at this hearing and the documentation filed during the hearing.

Mr. Milner, counsel for the Respondent, in his closing remarks, submitted that despite the length of the hearing, the matter “...*was not complex...*”. There is no connection with most of the issues raised by the Applicant and his ability to provide a breath sample.

Mr. Milner said the issue was whether there was a medical reason for the Applicant's refusal to provide a breath sample. According to Mr. Milner, there is no relation between the Applicant's long-standing illness and his reasons for refusing to provide a breath sample when it was requested. The Applicant has been on medication for years, and it is “*too far fetched*” to believe that a few hours delay would cause the effect claimed by the Applicant. In fact, if one is to accept that the Applicant's condition was as severe as he describes, then one has to agree that he would have been incapable of operating a motor vehicle.

During the course of the evening, when the Applicant was asked by the police for a breath sample, the Applicant talked normally, behaved normally, did not appear to be in physical distress or shock and did not ask for medical assistance. Both officers testified that the primary reason by the Applicant for refusing the breathalyser test was “*torture*”.

Mr. Milner asked that the Registrar's decision to suspend the Applicant's driver's licence be upheld by the Tribunal.

APPLICATION OF THE LAW TO FACTS:

Throughout the presentation of evidence with respect to the grounds for appeal under Section 50.1 (2) (b), the Applicant veered off course several times, reiterating his previous arguments of unfair treatment, “*torture*” and incompetence on the part of all involved in this matter. The Applicant also renewed his attempts to have a transcript of the audio part of the videotape produced and read into testimony. The Applicant stated that the video was tampered with. The Tribunal ruled that the videotape would not be introduced into evidence.

In assessing the evidence before this Tribunal, where there is any conflict between the Applicant and the two police officers called as witnesses, the Tribunal accepts that of the two police officers.

As to the Applicant's argument on section 15 of the Charter, introduced late in the course of the hearing, that section 48.3 of the *Highway Traffic Act* discriminates against the disabled, the Tribunal finds that it does not, in that it offers all members of the public the same rights.

The issue to be determined by this Tribunal is whether the Applicant had a medical condition that caused the Applicant to fail or not to comply with the breath demand within section 50.1 (2) (b) of the *Highway Traffic Act*.

As emphasized by this Tribunal several times throughout the hearing, the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

Section 50 (2) (b) of the *Highway Traffic Act*, allows an appeal on the grounds:

“... person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason...”

The Applicant admits to refusing to provide a breath sample but asserts that he refused, as he knew that his medical condition would prevent him from providing an adequate sample.

An Affidavit outlining the Applicant's medical condition, together with several attachments detailing the effects of prescribed and homeopathic medications was provided by the Applicant. Yet, the Applicant did not support his Affidavit with corroborating medical reports. No medical expert was called by the Applicant to give evidence. The Applicant did request blank summons for the physicians, but did not provide the Tribunal with any names and addresses although given a specified date to do so.

The Applicant explained that the reason for his inability to provide medical reports to support his appeal was due to the delays in obtaining appointments to consult with a physician. The Tribunal understands and accepts the notion that there are delays involved in obtaining

appointments with specialists. Nonetheless, the Applicant's contention for not providing medical reports is vague and unconvincing. By the Applicant's own admission, his condition requires constant monitoring and modification of medication. In fact, the Applicant testified that his dosage was changed a month or so after the accident. As prescribed medication can only be altered with the consent of a physician, it would appear the Applicant had occasion to see a physician around that time. Thus, there is no basis to accept the Applicant's justification for not providing supporting medical reports.

The appointment card with the neurologist Physician # 2 indicates that the Applicant had an appointment on August 9 (Exhibit # 15). This contradicts the Applicant's argument that he had difficulty in seeing a physician.

The Applicant introduced a letter from N.G., from Physician # 2's office. The Tribunal questions the substance and pertinence of this letter, in light of the fact that, as previously stated, the Applicant had an appointment scheduled with Physician # 2 on the 9th of August (Exhibit # 15).

The Applicant testified that he had been without "life sustaining medication" for some time and was suffering some of the effects of lack of medication at the time of the incident. Mr. Milner retorted that if the condition was as severe as described, the Applicant would have demonstrated the need for immediate medical assistance. The Tribunal concurs. There is no evidence that the Applicant requested assistance or went to an Emergency facility after being released.

Further, in the absence of supporting medical reports the Tribunal is forced to rely on the eye witness observations of the two officers involved. Neither officer observed the Applicant afflicted with any particular physical or traumatic distress which would prevent him from providing a breath sample.

The Applicant argues that the powers of section 48.3 of the *Highway Traffic Act*, allow the officers to obtain a blood sample. Obtaining a blood sample is a discretionary measure. Police Officer # 2, testified that he saw no reason as to why the Applicant would not be able to provide a breath sample. In fact, Police Officer # 2 asked the Applicant if he was able to form a tight seal over the mouth piece. The Applicant opted not to reply.

The Tribunal does not dispute the fact the Applicant has long standing illnesses requiring medication on a regular basis, but sees no relation between the Applicant's health difficulties and his refusal to comply with the breath sample demand.

The Tribunal finds that the Applicant has failed to establish the merit of his appeal. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample when it was demanded of him.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 25, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Clarke Wallace,
Member

RELEASED: October 26, 2001

REDPARK HOMES LTD.

PREHEARING

REDPARK HOMES LTD.

APPEAL FROM A PROPOSAL OF REGISTRAR OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES: JOSEPH LANNO AND GIOVANNI TELLARICO, Agents, representing
the Applicant
NETANUS RUTHERFORD, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
PRE-HEARING: October 10, 2001 Toronto

ORDER

Following attendances on October 10, 2001 at a prehearing before the Licence Appeal Tribunal of Joseph Lanno and Giovanni Tellarico, Agents representing Redpark Homes Ltd. (the "Applicant"), and Netanus Rutherford, Counsel representing the Registrar, Ontario New Home Warranty Program (the "Respondent");

The Tribunal makes the following Order:

- 1) The Parties to the hearing are the Applicant and the Registrar.
- 2) Particulars set out as items 1(a), 1(b), 3(a), 3(c), 3(d) and 4(b) on the Notice of Proposal to refuse to renew the registration of Redpark Homes Ltd., the Applicant, issued by the Registrar of the Ontario New Home Warranty Program, the Respondent, are hereby withdrawn, on consent.
- 3) The parties agreed that the Registration until November 5, 2002 under the *Ontario New Home Warranties Plan Act* of Redpark Homes Ltd. would be subject to terms and conditions set out and attached hereto as Schedule "A".

- 4) There was no resolution of any other issues between the parties.
- 5) The parties shall comply fully and in a timely manner with the disclosure requirements as required by Rule 6 of the Tribunal's Rules of Practice.
- 6) The hearing will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Tuesday, February 5, 2002 and continue February 6, 7 and 8, 2002 and to further continue Monday, February 18, 2002 and continue February 19, 20 and 21, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

John Ort, Member

RELEASED: October 30, 2001

1018369 ONTARIO LTD. O/A TRAVEL MART

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1018369 ONTARIO LTD. O/A TRAVEL MART
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: August 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1018369 ONTARIO LTD. O/A TRAVEL MART

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1018369 Ontario Ltd. o/a Travel Mart, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 30, 2001

LICENCE APPEAL TRIBUNAL

BETWEEN:

1018369 ONTARIO INC. O/A TRAVEL MART

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. 1018369 Ontario Inc. o/a Travel Mart (hereinafter referred to as the "Registrant") has been registered as a travel agent (registration number 4163275/R) and travel wholesaler (registration number 4163267/W) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since May 31, 1993.

FINANCIAL STATEMENTS – GROUNDS FOR THE PROPOSAL

2. Subsection 24(2) of the Regulation states that if a registrant had sales of less than \$10 million during the previous fiscal year, the registrant shall file within three months of the end of the fiscal year annual financial statements with a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
3. By letter dated November 24, 2000, TICO requested that the Registrant file its financial statements for its fiscal year ending December 31, 2000 by March 31, 2001.
4. On April 10, 2001, TICO sent a second request for the Registrant's financial statements for its December 31, 2000 year-end, which gave the Registrant a deadline of April 30, 2001.
5. By letter dated May 1, 2001, the Registrar, *Travel Industry Act* informed the Registrant that if it did not provide its financial statements by May 16, 2001, the Registrar would initiate administrative action including a proposal to revoke registration.
6. By letter dated May 11, 2001, the Registrant requested an extension to file its financial statements by May 30, 2001.

7. By letter dated May 14, 2001, TICO reminded the Registrant of its obligation to file its financial statements and noted that the Registrant had been late filing its 1998 and 1999 financial statements.
8. By facsimile dated June 15, 2001, TICO again reminded the Registrant that its financial statements were due.
9. By August 8, 2001, the Registrant had failed to submit its financial statements. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
10. On August 24, 2001, the Registrant filed its financial statements for its fiscal year ended December 31, 2000. The statements, as filed, were unacceptable, because they were not prepared under a Review Engagement Report as required by the Regulation.
11. By letter dated August 28, 2001, TICO advised the Registrant that its financial statements were deficient.
12. On October 15, 2001, the Registrant filed its financial statements for its fiscal year ended December 31, 2000, which were due by March 31, 2001.

COMPLIANCE HISTORY – LATE FILING

13. The Registrant has a history of late filing as summarized by paragraphs 14 through 16.
14. The Registrant's financial statements for its fiscal year ended December 31, 1995, which were due by March 31, 1996, were filed on May 27, 1996
15. The Registrant's financial statements for its fiscal year ended December 31, 1998, which were due by March 31, 1999, were filed on May 10, 1999.
16. The Registrant's financial statements for its fiscal year ended December 31, 1999, which were due by March 31, 2000, were filed on June 12, 2000.
17. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

9. the Registrar refrain from carrying out the Proposal to Revoke Registration dated August 8, 2001;
10. the Registrant's registration is to be subject to the following terms and conditions:
 - (n) The Registrant shall file its financial statements for its fiscal year ended December 31, 2001 by March 31, 2002 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time;
 - (o) The Registrant shall file its financial statements for its fiscal year ended December 31, 2002 by March 31, 2003 and in accordance with section 24 of the Regulation or such subsequent provision as may be in force from time to time; and

(p) If the above-noted financial statements as filed are incomplete, the Registrant will have 14 days from the date of notice of the deficiency to fully and completely address the deficiency and produce proof of such correction to the Registrar. Notice of the deficiency, if any, shall be sent by registered mail to the Registrant.

11. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) through (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.

12. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED this ____ day of October, 2001

Mr. Emanuel N. Nacario
1018369 Ontario Inc. o/a Travel Mart
I have authority to bind the company

Mr. Michael Pepper
Registrar, *Travel Industry Act*

YANG and TSUI

PREHEARING

MIAN YUN YANG AND KUEN KUEN TSUI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MIAN YUN YANG and KUEN KUEN TSUI, appearing on their own behalf
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
RICHARD COSTIGAN, Agent, representing Eastpine Kennedy Steeles
Limited Partnership, Added Party

DATE OF

PREHEARING: October 29, 2001

Toronto

ORDER

FOLLOWING attendances on October 29, 2001 at a prehearing before this Tribunal of Mian Yun Yang and Kuen Kuen Tsui, appearing on their own behalf (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Richard Costigan, Agent on behalf of Eastpine Kennedy Steeles Limited Partnership (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, February 25, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on February 26 and 27, 2002 and to further continue April 8, 9 and 10, 2002 at 9:30 a.m. at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.
2. The Parties shall meet at the Applicants' home at 47 Eastpine Drive, Markham, Ontario at 9:00 a.m. on Thursday, November 1, 2001 when an inspection of the Applicants' home shall be conducted by the Program. The Program's representative shall be given access to all parts of the Applicants' home for the purposes of carrying out the reinspection of the home in order to ascertain what repairs are necessary and the nature and extent of such repairs.
3. The Applicants, following the inspection in paragraph 2, shall grant the Added Party, its servants, agents and subtrades access to the Applicants' home to enable the Added Party to effect repairs. The Added Party, prior to entry to the Applicants' home to effect repairs shall communicate with the Applicant Mian Yun Yang by telephone at the Applicants' home to arrange a date(s) and time(s) for entry to the Applicants' home and shall immediately after having arranged such date(s) and time(s) confirm same by way of fax which shall be sent to the Applicants.
4. The Program's warranty representative shall be entitled to reasonable access to the Applicants' home for the purpose of inspection of items in dispute and for the further purpose of inspection of any repairs that may be carried out by the Added Party or its subtrades. Upon being granted access by the Applicants to their home, the Program shall confirm the agreed date(s) and time(s) of access by way of fax addressed to the Applicants.
5. The parties to the prehearing recorded the following in regard to the issues that have been disposed of at the prehearing and those issues that remain to be decided at the hearing.
 - A. The following issues dealt with in the Program's conciliation reinspection report dated January 29, 2001 under the heading "Items covered under warranty" have been abandoned by the Applicants and are no longer issues that require determination by the Tribunal at the hearing of this matter:

COMPLAINT

Number 2
Number 3
Number 5
Number 8
Number 10
Number 11
Number 12
Number 13
Number 15

The remaining six items of complaint in the conciliation reinspection report of January 29, 2001 under the heading "Items covered under warranty" have not been abandoned by the Applicants and remain as issues to be dealt with at the hearing.

- B. The following issues dealt with in the Program's conciliation reinspection report dated January 29, 2001 under the heading "Items not covered under warranty" have been abandoned by the Applicants and are no longer issues that require determination by the Tribunal at the hearing of this matter.

COMPLAINT

Number 5
Number 6
Number 7
Number 8
Number 9
Number 11
Number 12
Number 13
Number 15
Number 17
Number 18
Number 19
Number 21
Number 22
Number 23
Number 24
Number 25
Number 26
Number 27
Number 28
Number 29
Number 32
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Number 60
Number 61
Number 62
Number 63
Number 64
Number 65
Number 69
Number 70
Number 72
Number 75
Number 76
Number 77
Number 79
Number 80
Number 81

The remaining twenty-three items of complaint in the conciliation reinspection report of January 29, 2001 under the heading "Items not covered under warranty" have not been abandoned by the Applicants and remain as issues to be dealt with at the hearing.

6. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 31, 2001

SMITH, L.I.

LAURIE IRENE SMITH

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

LAURIE IRENE SMITH, Applicant
unrepresented

DATE OF HEARING: October 29, 2001

DECISION RELEASED: October 31, 2001

By Teleconference

REASONS FOR DECISION

A hearing was held on October 29, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Laurie Irene Smith, (the “Applicant”)
Motor Vehicle:	1990 Ford Aerostar, plate no. 618Z0R (the “vehicle”)
Date of Appeal:	October 11, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 29, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of her appeal states:

I am writing this appeal under the exceptional hardship claim for the impoundment of my only vehicle. I am the soul owner and driver of a 1990 Aerostar Van. I purchased the vehicle for use of transportation for our four children to and from school, this is my only means of transportation to my employment and to drive my husband to and from work. We have been supporting ourselves with my only means of finance which is my employment of 22 years at a Nursing home in our home town of Chatham. My husband was recently hired at a factory in nearby Ridgetown, which is approximately 30 minutes away, after he had been unemployed with no income for 8 months. In the past 2 months I have paid a great amount of money out in repairs to my van to keep it running which has added to my financial situation. Since my husbands license suspension I drive him to and from his employment. The day my vehicle was impounded I was ill in bed and was willing to attempt to drive my husband to work, because of his new employment he could not afford to miss anytime in fear of loosing his job. My husband knew I was too ill to drive that far and there was no other way of him getting to work, so he took it upon himself to take my van and leave for work. He left without me knowing or permission. Since my vehicle has been impounded I have no transportation for my four children or myself to get to work. We are currently seeking residents in Ridgetown therefore my husband can walk to work, but I need my vehicle to drive to and from work and transportation for my children. The officer involved was very helpful and came to my home the next day to explain how I could retrieve my vehicle sooner out of impound because of my financial situation and hardship for getting to my job. I spoke to the company where my van was taken and it will cost \$900 to retrieve my van after 45 days. She also explained because of the situation in which the van was impounded I should definitely send in an appeal as soon as possible. If I cannot get my vehicle released as soon as possible I am in fear of loosing my job and my husband will also loose his.

I must also request a telephone hearing appeal because I have no type of transportation to another city for an oral hearing. Myself and the driver at the time of impoundment (Mark Smith) can be present for a telephone hearing.

Any decision made or documents can be faxed to the O.P.P. station in Chatham Kent at 519-352-3573. After I (Laurie Smith) have been notified of the station receiving any documents they will allow me to pick them up, as to not delay the impoundment.

Telephone hearing number 519-358-7491 which is my address in Chatham. I have enclosed my sales receipt from a few years ago as my ownership has been lost in the process of towing and impoundment it cannot be found. I will purchase another ownership from the MTO office as soon as I can.

Oct. 11/01
Laurie Smith

After reading her original statement the Applicant went on to explain that her husband worked from 1530 to 0200 or 10.50 hours per day. Most shift periods are from 1600 to 2400 or 8.00 hours and no explanation was offered for this departure from the "norm". Apparently, bus service locally does not begin until 0700 hrs and as a result she must walk to work which takes her 40 minutes. No distance in kilometres was offered. The Applicant could not explain her husband's refusal to sign the Notice to the Registrar but suggested he was very frustrated by the police officer and his predicament. She was well aware of the driver's licence suspension and poor driving history of her husband Mark Joseph Smith who has had a series of driving convictions dating back to 1978 and whose licence is currently under suspension until May 2,

2002.

She stated that taxi fare to her job was \$8.00 each way. Her children take the school bus but for the older child who is involved with after school activity and has no apparent means of getting home but her mother's van. Without a credit card she did not attempt to rent a car nor get someone else to rent it for her.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Mark J. Smith;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Fail to Provide Breath or Blood Sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 2, 2002.

The Respondent questioned the Applicant respecting her efforts to find a substitute vehicle at which time the Applicant disclosed that she had been driving her father's car since the suspension but he will need it himself after November 7, 2001. It was at this point that the Respondent disclosed that the Applicant's driver's licence expired in June 2001 and had not yet been renewed. The Respondent also pursued the unexplored options for substitute transportation. The Applicant had sought few alternatives with any conviction, particularly fellow employees and neighbors.

The Respondent also reviewed with the Applicant the necessary evidence that must be presented or disclosures that must be made to support her application for appeal under the section 50.2(3)(d) of the Act.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(d) of the Act on the basis that the impoundment of her vehicle will and has resulted in exceptional hardship and has caused her difficulty in getting to her job and other family needs. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish exceptional hardship as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

Under section 22(2) of Regulation 632/98, the Tribunal cannot consider financial or economic loss or loss of employment or employment opportunity unless the Applicant demonstrates that all the criteria set out in section 22(3) apply. One of those criteria is that no alternative to the impounded vehicle is available.

Furthermore section 22(4) of the Regulation requires the Applicant to demonstrate that every reasonable option has been explored including an alternative vehicle.

In this case, the Applicant has not shown that she has explored every reasonable alternative to the impounded vehicle. In any event, exceptional hardship can not be established as a result of the impoundment if the Applicant has an alternative and here the Applicant has been using her father's car to this date and will continue until November 7, 2001 at least.

Also, the Applicant has established that the impoundment of her vehicle is very inconvenient, but she has not presented the Tribunal with any evidence that would support exceptional hardship, which is her ground for her appeal under section 50.2(3)(d) of the Act. The burden to provide evidence to support her appeal under the Act is that of the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: October 31, 2001

MAHADEO

STEVEN MAHADEO

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE MOTOR VEHICLE DEALERS
COMPENSATION FUND

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: STEVEN MAHADEO, representing himself
AVIVA R. HARARI, Counsel, representing the Board of Trustees,
Ontario Motor Vehicle Dealers Compensation Fund

DATE OF
HEARING: September 10, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund (the "Board") issued a decision letter on May 11, 2000 refusing the Applicant's claim on the basis that it was a loan as a commercial creditor, that at the time of the transaction the Applicant was registered as a salesperson, and that the dealership in question was taking steps to have the judgment set aside. The Applicant by his Notice of Appeal dated May 15, 2000 requested a hearing before the Tribunal. The matter came before the Tribunal at a hearing on August 1, 2000, but the Tribunal in its decision dated August 2, 2000 declined jurisdiction because the judgment was not final.

The Board issued a second decision on June 6, 2001. It denied the Applicant's claim because the claim arose from a loan as a commercial creditor and at the time of the transaction the Applicant was a registered salesperson. The Applicant appealed by Notice of Appeal dated June 20, 2001.

The Tribunal scheduled a hearing date for August 7, 2001. By motion heard on July 31, 2001 the Tribunal granted an adjournment of the hearing date to September 10, 2001.

At the beginning of the hearing on September 10, 2001, Counsel for the Board withdrew the allegation that the Applicant was not a salesperson at the relevant time. Accordingly, the only issue before the Tribunal was whether or not the transaction would be considered a commercial loan.

ISSUE:

Is the Applicant entitled to recover his claim from the Motor Vehicle Dealers Compensation Fund or is his claim to be denied on the basis that the Applicant was a commercial creditor of the motor vehicle dealer?

EVIDENCE:Testimony of Steven Mahadeo:

The Applicant, Steven Mahadeo, testified that his claim is based on a retail sale set out in a Bill of Sale for a 1991 Bonneville motor vehicle with B & J Auto Sales. Although the registration of the dealer is that of a wholesale dealer, the Applicant stated that B & J Auto Sales was nonetheless representing itself as a retail dealer and had its name on a sign outside its offices.

The Applicant stated that he paid a \$10,000.00 deposit to B & J Auto Sales, but he did not get a car. The dealer had said the car was not coming off lease in October, 1997 as expected, and he needed to get another car for the Applicant. The dealer suggested that the Applicant come to a motor vehicle auction. To do that, however, the Applicant had to be registered. The Applicant stated that the dealer sent in an application for him to be registered as a salesperson in late October, 1997, and the Applicant was subsequently registered as a motor vehicle salesperson.

After being registered, the Applicant said that he went to an auction in Oshawa at least two and maybe three times, but he did not buy a car during those visits. He asked for his money back from the dealer. The dealer said he did not have to give it back for ninety days, but after that time had expired the dealer did not return the Applicant's deposit.

The Applicant further testified that he worked as a salesperson for the dealer from October, 1997 to May, 1998. He received a commission on sales during this time.

The Applicant obtained a judgment in Small Claims Court in February, 1999 in the amount of six thousand dollars plus costs. The dealer filed an appeal. On appeal, the judgment was reduced to three thousand dollars. The Applicant explained that on appeal there were witnesses who testified that the Applicant did not work for the dealer. As well, the judge looked at the accounting prepared by the dealer and found that the dealer had already paid him about seven thousand dollars of the debt, leaving a debt of three thousand dollars. The Applicant stated that he had not appealed this decision nor to his knowledge had the dealer.

The Applicant referred to a cheque for \$1698.00 (Exhibit 4, Tab 5) which had written on it, "return of investment". The Applicant alleged that the words "return of investment" were written on the cheque after the cheque had been cashed.

Regarding a cheque dated April 4, 1998 (Exhibit 4, Tab 4, page 4) the Applicant alleged that the cheque was forged and that it was for the amount of two hundred dollars and not forty-two hundred dollars.

Regarding a receipt dated March 23, 1998 (Exhibit 4, Tab 4, page 3) the Applicant stated that he had not signed it, it was not his signature and he did not obtain the four thousand dollars.

The Applicant stated that he knew Mr. Darling, the owner of B & J Auto Sales. Mr. Darling was in business with the Applicant's brother in a business called Bud and Roy's. This business operated from the same location as B & J Auto Sales. It was a mechanic shop.

The Applicant stated that his payment of \$10,000.00 to B & J Auto Sales was not a commercial loan. The Bill of Sale had no interest rate or maturity date.

The Applicant testified that he saw the 1991 Bonneville, referred to in the Bill of Sale, in the dealer's parking lot. He did a test drive of the car. He testified that at that time the dealer had not obtained the VIN number for the car.

The Applicant reiterated that a receipt for four thousand dollars was not a separate receipt but just a poor copy of the March 23, 1998 receipt.

Under cross-examination, the Applicant stated it was not his responsibility to take down the VIN number. The mileage of the car was on the dealer's computer so it became part of the agreement. The full VIN number was not on the computer.

The Applicant testified that he had found the car to be in excellent condition. The Bill of Sale is dated October 16, 1997 after he had test driven the car. He stated that he asked the dealer many times for his deposit and sent the dealer one letter. The Applicant does not have a copy of that letter.

The Applicant made his first claim to the Compensation Fund in October, 1999. He had obtained a judgment in Whitby Small Claims Court on September, 1999 for \$6,160.00.

The Board of Trustees of the Motor Vehicle Dealers Compensation Fund refused his claim by letter of May 11, 2000. Their reasons were: 1. It was a business venture; 2. He was a registered salesperson for the dealership at the time of the transaction; 3. The dealership was moving to set aside the Small Claims Court judgment.

The Applicant testified that he had been reassured by the dealer that he would get his deposit back. However, as he thought there were problems getting his deposit, he decided to work for the dealership. He started working for B & J Auto Sales as of October 27, 1997. The Applicant did not know why a 1989 Jetta was registered in his name after being transferred from B & J Auto Sales in September 16, 1998.

Testimony of Buddy Ray Darling:

Mr. Darling testified that he was the owner of B & J Auto Sales. In October, 1997 he was the only registered salesperson. He stated that he did not sell Mr. Mahadeo a 1991 Bonneville.

Mr. Darling stated that he had a business with Mr. Mahadeo's brother. It was an auto mechanic business. Mr. Mahadeo suggested that they do a fake bill of sale so that there was some way of showing the loan by Mr. Mahadeo to Mr. Darling of \$10,000.

Mr. Darling testified that the December 17, 1997 cheque in the amount of \$1800.00 was a payment on the loan. There was also a receipt dated March 23, 1998 for \$4000.00 and a receipt dated April 4, 1998 for \$4200.00.

Mr. Darling stated that the 1991 Bonneville SSE motor vehicle never existed. There is no RIN history in his dealership of such a car.

Under cross-examination, Mr. Darling stated that the RIN history of his dealership shows every car that was in the name of B & J Auto Sales. Every car that is serviced is entered into his computer. Mr. Darling stated that he never sold this car to Mr. Mahadeo, but he did sign a retail bill of sale listing this car.

Mr. Darling stated that he had not changed anything on the cheque. He does not remember if the receipts were for cash payments. The listing of transactions for Steve Mahadeo include a variety of matters including the payment to Mr. Mahadeo for commissions on the sale of cars.

Testimony of Sonya Martina Shanks

Ms. Shanks testified that she was employed as the office manager of B & J Auto Sales for five years, from 1995 to 2000. The brother of Mr. Mahadeo has an auto mechanics shop there. She also worked for that business. Steve Mahadeo wanted to get into the sales business.

Ms. Shanks stated that to her knowledge Steve had wanted to put money into B & J Auto Sales, and the bill of sale was evidence of it in writing.

Under cross-examination, Ms. Shanks stated that the April 4, 1998 receipt had the words "B & J Auto Sales" and two hundred in her handwriting. She cannot say if this is an original or an imprint. The receipt books had the carbon copy with them. The March 23, 1998 receipt was in the handwriting of Mr. Darling. He would normally keep large amounts of cash at the dealership.

Ms. Shanks remember being at the dealership when the Bill of Sale was made for the 1991 Bonneville. She saw Mr. Darling and Mr. Mahadeo talking. Then Mr. Darling explained to her about the intent of the retail purchase agreement for the 1991 Bonneville as being a loan agreement.

CLOSING STATEMENTS:

By the Applicant:

Mr. Mahadeo stated that he put a deposit of ten thousand dollars on a 1991 Bonneville. He understood it was coming off a lease. He had difficulty in recovering this money. He then worked for that dealership.

Mr. Mahadeo stated that the receipts have been altered. He would not have started the claim and gone to this hearing if he had got the money. There is no documentation to show this is a loan.

Mr. Mahadeo stated that Ms. Shanks was not in the room when the deal was made with Mr. Darling. He stated that Mr. Darling has made up a story, told that story to OMVIC, and that OMVIC has believed Mr. Darling's story and not what he told them. Mr. Mahadeo stated that he never received his money and the money was not a loan.

By the Respondent:

Counsel stated that the judgment by itself does not mean that Mr. Mahadeo gets money from the Compensation Fund. The applicable section under Regulation 801 is section 12(4)(b), and that the Applicant is a commercial creditor of the dealer.

Counsel stated that Mr. Darling is no longer a registrant. He and Ms. Shanks have no interest in these proceedings. They both testified that the retail purchase agreement was security for Mr. Mahadeo's investment in the dealership. The bill of sale was created by Mr. Mahadeo to support his loan to B & J Auto Sales. It does not make sense that someone as experienced as Mr. Mahadeo would sign a bill of sale for a vehicle without having the vehicle's VIN number on that bill of sale.

Counsel stated that the Anvari (Re) (2000) O.C.R.A.T.D.no. 32 case found that the facts supported the decision of the Board of Trustees that the relationship between the Applicant and the dealer was a commercial relationship. Accordingly the Applicant was excluded under the legislation.

LEGISLATION:

The relevant legislation was the *Motor Vehicles Dealers Act* RSO 1990 as amended, and in particular Regulation 801.

Regulation 801

12 (3) a customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay; and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim for payment of the unsatisfied portion of the judgment and costs as assessed.

.....

4. The customer has made payment by way of deposit, down payment or otherwise to a participant with respect to an undelivered motor vehicle and the customer has not received the motor vehicle contracted for or an alternative motor vehicle that is acceptable to the customer and the claim is for a refund of the payment made to the participant where the customer has made a demand for payment from the participant and the participant has refused without legal justification to make the payment or is unable to pay by reason of bankruptcy or insolvency, but is not a claim for a refund of money paid by the customer to a participant where the customer has been provided with the motor vehicle contracted for and the demand for a refund is based on the cost, value or quality of the vehicle provided.

.....

(4) No person shall have a claim against the Fund where the claim is based on a judgment in favour of a person who,

(a) is a motor vehicle salesperson;

(b) is a commercial creditor of the motor vehicle dealer;

.....

15(1) Where the Board determines that a claim or any part of it made under section 12 of this Schedule is not a proper claim, it shall serve notice of its decision, together with written reasons, on the claimant and the notice shall inform the claimant that the claimant is entitled to a hearing by the Tribunal if the claimant mails or delivers to the Registrar and the Tribunal within fifteen days after the notice is served on the claimant, notice in writing requiring a hearing.

.....

(3) Where a claimant requires a hearing before the Tribunal under subsection (1) the Tribunal shall appoint a time and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of the claim and direct the Trustee to pay the amount determined by the Tribunal.

.....

ANALYSIS OF FACTS AND DECISION:

This is a claim by Steve Mahadeo under Regulation 801, section 12, for compensation under the Compensation Fund under the *Motor Vehicle Dealers Act*. The onus of proof is on the Applicant to establish his claim against the Fund.

Initially, Mr. Mahadeo wished to have \$10,000.00 from the Fund, but after two Small Claims Court actions the judgment he finally received was for \$3,000.00. He put his revised claim before the Board of Trustees in June, 2001 and it was rejected on the basis that the transaction was that of a commercial creditor. If that is the case, Mr. Mahadeo's claim can not be made against the fund under section 12(4)(b).

All parties have agreed that at the time of the transaction, Mr. Mahadeo was not a motor vehicle salesperson.

Mr. Mahadeo characterizes the transaction as that of a deposit on a car where he has not received the car and not received a refund of the deposit.

The Tribunal found a number of difficulties with Mr. Mahadeo's characterization of the transaction. Credibility plays a major part in this matter. When there were differences between the account by Mr. Mahadeo and that of the other witnesses, Mr. Darling and Ms. Shanks, the Tribunal favoured the account of the other witnesses.

Mr. Mahadeo presented a retail bill of sale for the purchase of a 1991 Bonneville. There was no VIN number for this car. Throughout the testimony of the witnesses and Mr. Mahadeo, no one was able to present a RIN history for this vehicle. The Tribunal accepts the explanation of Mr. Darling that no such vehicle ever existed. Mr. Darling, with verification by Ms. Shanks, stated that the retail bill of sale was a sham, a device by Mr. Mahadeo to put in writing that he had given ten thousand dollars to B & J Auto Sales. Mr. Darling stated that the money was an investment by Mr. Mahadeo in the dealership. This explanation of the documents must be weighed against the Applicant's.

Mr. Mahadeo states that he worked at the dealership in order to protect his chances of receiving back the deposit for the purchase of a motor vehicle. But the explanation by Mr. Darling that Mr. Mahadeo had invested in the dealership is a more satisfactory answer to why Mr. Mahadeo had worked at the dealership. By working at the dealership, Mr. Mahadeo hoped to improve the dealership's profitability, which in turn would allow Mr. Darling to repay Mr. Mahadeo's investment. That is a more sensible explanation of why someone would work for another person after paying a large sum of money to that person. Also, the Tribunal finds it incredulous that someone like Mr. Mahadeo with his depth of experience in the motor vehicle industry would pay ten thousand dollars for a car without having its VIN number. It is obvious the car is a fabrication.

The Tribunal was told by Mr. Mahadeo that a number of the receipts and cheques were fraudulent. Either words like "return on investment" had been written on them or numbers had been added to the amount of the receipt or cheques. Mr. Mahadeo was unable to offer any details on how and when such alterations occurred. He did not provide any expert evidence on this point. The Tribunal does not give any weight to these unproven allegations by Mr. Mahadeo.

It is significant that at the second Small Claims Court action, the only one in which any evidence was presented *vive voca* to the court, the judge found against Mr. Mahadeo's version of events and found that he had received significant amounts of money back on his investment. That was when the award was reduced to three thousand dollars. The award was against the dealership, B & J Auto Sales. That business has not been registered with the Registrar's office since January 17, 2001. It is likely that the Compensation Fund is the only viable means by which Mr. Mahadeo can collect whatever he feels is owed to him by Mr. Darling.

The Tribunal does not find the evidence of Mr. Mahadeo credible. The explanation offered by the Registrar fits the facts and is collaborated by two witnesses. There is no demand in writing by Mr. Mahadeo to the dealership for the return of his deposit. Mr. Mahadeo waited fifteen

months after the date on the Bill of Sale and nine months after his last date of employment with B & J Auto Sales before he started his first Small Claims Court action in February, 1999. That time frame does not fit with someone who wants a car and has lost a substantial deposit. Nor did Mr. Mahadeo ask for help from OMVIC over the loss of this large deposit. The Tribunal finds this transaction to be in the nature of a commercial creditor transaction. As such it is not eligible for reimbursement under the Motor Vehicle Compensation Fund.

ORDER:

Accordingly under the authority given to the Tribunal by section 15(3) of Regulation 801 of the *Motor Vehicle Dealers Act*, the Tribunal confirms the decision of the Board of Trustees of the Ontario Motor Vehicle Dealers Compensation Fund dated May 11, 2000 and June 6, 2001 to deny the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: November 7, 2001

TANDON

HEMANT TANDON

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF THE
REAL ESTATE AND BUSINESS BROKERS ACT
R.S.O. 1990, CHAPTER R.4 AS AMENDED

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:
MITCHELL GOLDBLOOM, counsel, representing the Applicant
GEORGE DRAMETU, counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
HEARING: November 1, 2001 Toronto

ORDER

WHEREAS the Registrar, *Real Estate and Business Brokers Act* by proposal dated July 4, 2001 has proposed to refuse to grant registration of Hemant Tandon (the "Applicant") under the *Real Estate and Business Brokers Act*;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on November 1 and to proceed on November 2, 2001, if necessary at the Tribunal's Chambers;

AND WHEREAS there was a prehearing conducted by the Tribunal and attended by the parties on September 28, 2001;

AND WHEREAS at the commencement of the hearing on November 1, 2001, there was a preliminary motion before the Tribunal, a request by the Applicant for an adjournment of 60 days to permit the Applicant to find a sponsoring broker. This adjournment request was contested by the Registrar, *Real Estate and Business Brokers Act*. The Tribunal ruled that the adjournment request was denied and the hearing was to proceed;

AND WHEREAS following the ruling, the Applicant by his counsel stated on the record that his appeal before this Tribunal was withdrawn;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: November 1, 2001

THARMATHURAI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
LOGATHASAN AND CELIA THARMATHURAI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

LOGATHASAN AND CELIA THARMATHURAI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

ROSEHAVEN HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on November 6 and 7, 2001;

AND WHEREAS upon consent of the parties the hearing was adjourned to November 5 and 6, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, November 26, 2001 and to continue November 28, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 2, 2001

BALDASSARRE, L.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LUISA MARY ROSE BALDASSARRE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 28, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LUISA MARY ROSE BALDASSARRE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 22 and 23, 2001;

AND WHEREAS upon consent of the parties, the hearing was adjourned to November 5 and 6, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Monday, January 28, 2002 and to continue Tuesday, January 29, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 2, 2001

LOOBY

DALE E. LOOBY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: WILLIAM WARBURTON,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

GEORGE THOMSON,
CRAWFORD ADJUSTERS CANADA,
Agent for the Applicant

DATE OF HEARING: October 9, 2001

DECISION RELEASED: November 6, 2001 Toronto

REASONS FOR DECISION

A hearing by teleconference was held on October 9, 2001, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 as amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Dale E. Looby (the "Applicant")
Motor Vehicle:	1999 Chevrolet Silverado, plate no. 9467A5 (the "vehicle")
Date of Appeal:	September 14, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on October 9, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- Vehicle was stolen
- Police report is attached
- Ownership copy "
- Signed proof of loss regarding settlement paid to owner by the insurer
- Impound order
- Insurance appraisers "information of total loss"

Sometime prior to the impoundment, Mr. Justin Best was released on bond while awaiting trial on unknown charges. He was released under the supervision of his uncle and aunt, the Applicant and his wife. The Applicant lives with his family in Caledon East, Ontario.

Sometime prior to August 11, 2001, the Applicant and his family went to their cottage somewhere near Barrie, Ontario. Mr. Best accompanied them. At approximately 11:00 p.m. on August 10, 2001, the Applicant noticed that Mr. Best was still awake in his room. The Applicant suggested to him that it was time to go to sleep, and the Applicant and others soon retired for the night. Sometime later, Mr. Best left the cottage and drove away in the Applicant's pickup truck. The vehicle was subsequently involved in a traffic accident on Highway 400 when Mr. Best apparently fell asleep at the wheel. The truck rolled over and was irreparably damaged.

Mr. Best was subsequently charged under sections 259(4) and 335(1) of the Criminal Code of Canada. He is currently incarcerated awaiting trial.

The Applicant subsequently filed an insurance claim with Dufferin Mutual Insurance Co. of Shelburne, Ontario. On August 27, 2001, the insurance claim was settled and the Applicant received \$30,240. The amount slightly exceeds the 1999 purchase price of the vehicle. Thereupon, Dufferin Mutual took ownership of the impounded vehicle.

Dufferin Mutual retained Crawford Adjusters Canada to settle this claim. Mr. George Thomson is employed by Crawford Adjusters and appeared before the Tribunal acting as the agent for the Applicant with the consent of the Applicant and Dufferin Mutual.

The Applicant was not present at the hearing and provided no direct evidence. All of the oral evidence for the Applicant was rendered by his representative. Unfortunately, the Applicant's representative was not present at the cottage on the night of the impoundment, thereby limiting his understanding of the events surrounding the impoundment.

In particular, when asked by the Tribunal if he knew the intended destination of the driver at the time of the impoundment, the Applicant's representative said that he did not know. He stated that he had not spoken with Mr. Best.

The Applicant's representative's contention was that the police had charged the driver with stealing the vehicle. When the Registrar's representative noted that the driver had been charged with "taking motor vehicle...without consent", he asserted that "stealing", "theft" and "taking without consent" are all the same. He stated that the circumstances in this case met the insurance industry's definition of theft and that the insurance claim had been paid as a "theft claim."

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

- 1) Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
- 2) Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Justin W. Best;
- 3) Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
- 4) Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was placed under suspension until December 1, 2002.

The Registrar's agent asserted that a charge under Section 335(1) of the Criminal Code, "Taking Motor Vehicle...Without Consent" does not imply that the vehicle was stolen. Relying on Black's Law Dictionary's definition of "stolen" as cited below, she contended that the Applicant had failed to establish that the vehicle was taken "with the intent to deprive the owner of the benefit of ownership (or possession) permanently."

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed the impoundment of his vehicle on the grounds that it was stolen.

The *Highway Traffic Act* does not define the term stolen used in section 50.2(3)(a). However, the Criminal Code of Canada and Black's Law Dictionary with the case law cited above do provide definitions.

The evidence before the Tribunal clearly suggests that the vehicle was being driven without the knowledge or consent of the owner by a driver who's licence was under suspension at the time of the impoundment.

Therefore, the question before the Tribunal in this case is:

Was the impounded vehicle borrowed without the owner's consent OR was the vehicle "stolen"?

The Applicant contended that the fact that the driver was charged under the Criminal Code of Canada (CCC) established that the truck was stolen. While the laying of charges under the CCC is noteworthy, the laying of a charge of taking without consent does not ipso facto constitute a legally binding finding that the vehicle was stolen.

Section 2 of the Criminal Code of Canada ("CCC") reads, in part: "steal" means to commit theft. Theft is rigorously defined in section 322 of the CCC.

Here the driver was charged under section 335(1) of the CCC. Section 335(1) is "Taking Motor Vehicle or Vessel Without Consent." He was not charged with the more serious offence of theft under section 322(1). Therefore, it appears that the police did not believe that the evidence in this case supported a charge of theft, under the CCC or that the vehicle was stolen.

Black's Law Dictionary's definition of stolen highlights the vital distinction between borrowed without consent and stolen. A stolen item is "acquired...with the intent to deprive the owner of the benefit of ownership (or possession) permanently." By contrast, the Funk & Wagnalls Standard College Dictionary (Canadian Edition, 1978) defines borrow as "to take or obtain (something) with the promise or understanding that one will return it or its equivalent."

In other words, the question before the Tribunal is: Did the Applicant's nephew take the vehicle with the intent to deprive the Applicant of the benefit of ownership or possession permanently or was he intending to return to the cottage with the vehicle after taking a motorized journey?

No evidence regarding the suspended driver's motives or intentions is available to the Tribunal. When asked by the Tribunal if he knew the intended destination of the driver at the time of the impoundment, the Applicant's representative said that he did not know.

Therefore, the Applicant's representative was unable to establish that the vehicle was taken with the intent to deprive the Applicant of the benefit of ownership or possession permanently. Since the onus to establish the fact that the vehicle was stolen rests with the Applicant, the Tribunal must conclude that the allegation that the vehicle was stolen is unproven.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

William Warburton, Presiding Member

RELEASED: November 6, 2001

HASSAN

HASSAN KASSEM HASSAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DOUGLAS C. MACKINTOSH, Vice-Chair

APPEARANCES:

FREDERICK A. YACK, Counsel representing the Applicant
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING

October 25, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by the Applicant, Hassan Kassem Hassan, to the Licence Appeal Tribunal from a proposal dated July 7, 2000 by the Registrar under the *Motor Vehicles Dealers Act* ("the Act") to refuse registration as a motor vehicle salesperson under the Act.

The Applicant, Hassan Kassem Hassan, whose forbears were Iranian, was born in Iraq in 1964. He finished high school and first year engineering at university but was expelled from Iraq because of his Iranian family roots. He was allowed into Iran and stayed there until the authorities refused to renew his visa and so, stateless, he came to Canada as a refugee in 1987. He obtained his Canadian citizenship in 1995. He has a wife and three children under the age of five. His wife works in a jewellery store.

Two years after his arrival in Canada in 1989 he became registered as a motor vehicle salesperson under the *Motor Vehicle Dealers Act* (the "Act"). For about one year after that he worked for a dealer known as The Auto Clinic and then left for other work.

Although he claims he was not fluent in English in 1995, he was able to obtain registration as a motor vehicle dealer at that time. The name he used for his business was I-Deal Wheels Wholesales.

Within the next year, in June 1996, the Registrar proposed to revoke his registration. He appealed the proposal without the assistance of counsel, to the Commercial Registration Appeal Tribunal ("CRAT"), this Tribunal's predecessor. CRAT gave its decision on September 25, 1997 and confirmed the revocation.

Mr. Hassan bought and sold vehicles from January to August 1996 which led to 31 charges which were laid in March 1997 under the MVDA and the *Business Practices Act* (for odometer tampering). There were five other co-accused on some of the charges. In particular, one of them was the Applicant's step brother, Abdul Kareem Hassan, with whom the Applicant was later implicated in the present proposal issued by the Registrar.

All the 31 charges were disposed of in January 1999 when, with the assistance of counsel, the Applicant pleaded guilty to four of the charges. The total of the fines was \$3,500 and he was ordered in addition to pay \$8,000 restitution.

Mr. Hassan re-applied for registration as a dealer under the Act in November 1999, using the name of "The Car Store". The Registrar returned his application without issuing a proposal. The Registrar considered there was no new or other evidence or clear change in material circumstances as required by section 8 of the Act in any further application for registration.

A lengthy process ensued which ended up in the Ontario Court of Appeal. The Court's decision was that the Registrar could not just refuse to process Mr. Hassan's application on the basis of section 8 but had to advise Mr. Hassan that he was entitled to a hearing by the Tribunal. But before the Court's decision, the Registrar had already issued the present proposal.

THE ISSUES:

There are two issues to be determined in this appeal. The first question is whether the Applicant has satisfied the requirements of section 8 of the Act for a further application for registration. To do so, he has to show that there is new or other evidence or that material circumstances have changed.

The second issue is whether the Applicant's past conduct affords reasonable grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

THE FACTS:

On the first issue, Mr. Hassan claims that there is new evidence and a change in material circumstances. The essence of his claim relates to two improvements. He has successfully taken the Ontario Motor Vehicle Industry Council (OMVIC) course and has received a certificate to that effect. This course was only instigated in the last few years so he could not have taken it before. It is given for dealers and salespersons to instruct them on the law and their obligations under the Act. Mr. Hassan says as a result of completing this course he now understands the requirements of the law which he did not before.

In addition, Mr. Hassan said that until recently his command of English was lacking but he can now read and write. He says he has matured and gained experience when he was working as a bookkeeper with a clothing store Khad-Oh Direct. He believes he is now familiar with running a business but had not been so previously.

That is the plus side he presented. But there is another side. The Tribunal has to look at the whole situation after his revocation by CRAT, as set out in its decision released on September 25, 1997.

The first event after the CRAT decision was confirmation in a final notice from the Registrar dated 30th September 1997 which was sent to Mr. Hassan. It reads as follows:

... TAKE NOTICE THAT PURSUANT TO SECTION 7(4) OF THE ACT, THE REGISTRAR IS CARRYING OUT THE PROPOSAL TO REVOKE THE REGISTRATION OF HASSAN KESSEM HASSAN O/A IDEAL WHEELS WHOLESALAS AS A MOTOR VEHICLE DEALER UNDER THE ACT

AND FURTHER TAKE NOTICE THAT section 3 of the Act provides that no person shall carry on business as a motor vehicle dealer unless he or she is registered under the Act and any person operating without such registration is liable to prosecution and on conviction is liable to a fine and/or imprisonment.

In addition, a letter from the Ontario Motor Vehicle Industry Council ("OMVIC") accompanied this notice. It reads as follows;

You are cautioned that as you are not currently registered, you are prohibited from carrying on the business of buying or selling motor vehicles either directly or indirectly as a motor vehicle dealer or salesperson.

Yet within eight months, in May 1998, the Applicant began buying cars in Quebec using the name of his revoked registration, I-Deal Wheels Wholesales and an obsolete address.

Mr. Hassan in his testimony said as he was only selling wholesale and not selling to the public, he believed he was entitled to do so. This is far-fetched particularly as he never checked this with OMVIC or with legal counsel. Making every allowance for his background, Mr. Hassan's conduct amounts at least to willful blindness.

In spite of the notice from OMVIC, he continued to conduct a significant amount of business. From May to November 1998 he bought 29 cars at auctions in Quebec, paying over \$170,000 for them. Of these cars, 27 were bought at car auctions held by Adesa Montreal Inc. The other two were bought elsewhere in Quebec. He used the Adesa computer card issued to I-Deal Wheels Wholesales by Adesa before the revocation of his registration. The Adesa card had not been cancelled because OMVIC did not notify Adesa of the revocation until nearly the end of 1998, and Mr. Hassan took advantage of that.

Mr. Hassan gave no reason why he only bought vehicles in Quebec although evidence was given that there are a number of car auctioneers in Ontario. Perhaps he felt he was less likely to be discovered doing so in Quebec, which is supported by his application for registration dated February 1, 2000. Although he was buying vehicles in Quebec, under the application's caption, "Employment or other activities for the last three years", he indicated "out of a job since 1997". The 1998 activities at Adesa were also not declared in an affidavit he made. The relevant part of the affidavit reads:

"Since leaving the motor vehicle industry, I have been employed by a clothing store known as Kad-Oh Direct"

There also is an interesting pattern to his buying in Quebec. Only one car was purchased in May. Only one was purchased in June. Only one was purchased in July. But when this escaped attention, he purchased ten cars in August, seven in September and eight in October ending abruptly with one in November, presumably when the revocation came to the attention of Adesa.

The Applicant sold these cars, with a couple of exceptions, to Ramada Fine Cars Inc. owned and operated by his step brother, Abdul Kareem Hassan (his co-accused on three of the counts of unfair practices for odometer tampering). These vehicles were resold by Ramada with a number of them having the odometers rolled back. Mr. Hassan denies he had anything to do with that. But one bill of re-sale with odometer tampering appears to bear the distinctive writing of the Applicant and the Applicant's initials, "KH". This, his counsel pointed out is at odds with his initials "HK" marked on the application form. However, the evidence in the police report submitted shows he uses two names:

Hassan KASSEM
aka: Kassem HASSAN

So it may well be he writes his initials two ways. In any event, he admitted he was not honest with Adesa.

Of deep concern is that during this hearing Mr. Hassan never produced his records covering his dealings at Adesa although he testified that he had them. His excuse, which is not accepted, is that he was never asked for them. This is curious as it is his appeal.

The Registrar was reduced to obtaining records from Abdul Hassan, the step brother, because there is no jurisdiction to order the Applicant to hand over his bills of sale at the time when he was no longer registered.

The second issue the Tribunal considers is whether the past conduct of the Applicant affords reasonable grounds for the Registrar to believe that the Applicant will not carry on business in accordance with law and with integrity and honesty. The whole conduct of Mr. Hassan has to be reviewed to decide this issue.

In addition to the above facts relating to section 8, there is other evidence that has to be considered. Of considerable significance are the findings made by CRAT in September 1997. In its decision CRAT stated that "Mr. Hassan shows a total disregard for the Motor Vehicle Dealers Act and its regulations and on a cumulative basis one must conclude that he cannot play by the rules". In the decision it was noted that in Mr. Hassan's 1992 application for registration he indicated that he had no criminal record. Yet as a result of a CPIC check it was shown that he had been convicted of theft under \$1000 in 1990.

Following the CRAT decision, Mr. Hassan pleaded guilty in January 1999 as follows:

Failing to identify the name under which he was registered and the address from which he was authorized to operate	fined	\$500
Retaining the services of a salesperson, Abdul Hassan, who was not registered under the MVDA	fined	\$500
Inviting the public to deal at a place other than that authorized with respect to the sale of a motor vehicle	fined	\$500
Unfair practice with respect to the sale of a motor vehicle	fined	\$2,000

The significance of the fines was explained by the Deputy Registrar, Mary Jane South. She reviewed Mr. Hassan's guilty pleas and noted that the usual high water mark for fines on these counts is a maximum of \$500 each. Three of the counts were of that calibre, and one count was four times the maximum high water mark. She stressed the importance of the charge of unfair practice related to winding back an odometer. She said the average vehicle is driven

20,000 Km a year making the charge carrying the \$2,000 fine particularly significant and a more serious breach of the requirements under section 5 the Act (for honesty and integrity).

Moreover, as already related, these fines were also combined with an order for \$8,000 restitution.

On the subject of the deals in Quebec, Ms. South was quite clear. Wholesale dealers have to be registered. Once a registration is revoked, wholesale operations, as well as retail operations, are forbidden.

To counter all this evidence, Mr. Hassan says he will accept any conditions to become registered again. He brought forward a witness, Mr. Moheballi, who is a dealer and was prepared to supervise Mr. Hassan and would put up a \$50,000 bond for him. But Mr. Moheballi would not be a particularly desirable supervisor as he too has a significant criminal record. Mr. Hassan says this is the only thing he can do, although he presently operates two different businesses, a car rental and an employment agency.

THE LAW:

The relevant sections of the *Motor Vehicles Dealers Act* to this appeal are as follows:

3. (1) No person shall,
 - (a) carry on the business of a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act
 - (3) a registered motor vehicle dealer shall not carry on business in a name other than the name in which it is registered or invite the public to deal in a place other than that authorized by the registration
4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this act.
- 5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where, ...

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty

8. A further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

APPLICATION OF THE LAW TO THE FACTS:

The recent Ontario Court of Appeal case on the Applicant's rights under section 8 of the Act was dated 5th February 2001. The relevant portions state as follows:

[1] The issue in this appeal is the process to be followed by the Registrar, Motor Vehicles Dealers Act, when an application is made under the Act for registration following a prior rejection or the suspension or revocation of a registration by the Registrar.

[8] The issue... is not whether the respondent has satisfied the requirements of section 8 in requiring "new or other evidence" or a change in the respondent's circumstances. It does not mandate the procedure. The process must be in accordance with the procedure stipulate under the Act, and that, in turn, requires procedural compliance with section seven

[11] The Registrar cannot therefore refuse to process the respondent's application. He is, of course free to propose to reject it on the basis that the criteria in s. 8 have not been met, but if he does so, he must, in accordance with s. 7. advise the respondent that he is entitled to a hearing by the Tribunal to review the Registrar's decision.

Respecting section 8, Mr. Hassan is asking for a second chance. He politely stressed the improvements he has made. His able counsel argued that Mr. Hassan has overcome the onus upon him in this section. But the Tribunal has a duty to balance the pros and the cons. The devious conduct of Mr. Hassan has a cumulative effect and has to be set against the modest reforms he has made in comparison. His perception of honesty and integrity are seriously lacking. Also of some concern is his choice of business associates. Consequently, Mr. Hassan's new evidence has failed to persuade the Tribunal on that issue.

The Tribunal has considered the second issue, under section 5 of the Act, relating to the past conduct of Mr. Hassan. He is obviously a pleasant person, easy to be sympathetic with. But that, unfortunately, does not overcome his difficulties or help discharge his onus in this appeal.

The leading case is Brenner v Registrar of Motor Vehicles and Salesmen 1983 19 CRAT Divisional Court which confirms how the Act should apply:

"The effect of s. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question. Instead the Board seems to have been pre-occupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

After putting sympathetic concern to one side the evidence against Mr. Hassan is serious and shows a continuous sequence of inappropriate behaviour. The Registrar has a duty to the industry to ensure consumer protection and confidence and that is a remedial function for consumer protection. The Registrar is not a supervisor and is not set up to be so. On the evidence before it, the Tribunal finds no error with the decision of the Registrar to refuse the Applicant registration under the Act.

ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the Act, the Tribunal directs the Registrar to carry out his proposal dated July 7, 2000 to deny Mr. Hassan registration as a salesperson under the *Motor Vehicle Dealers Act*.

LICENCE APPEAL TRIBUNAL

Douglas C. Mackintosh,
Vice-Chair

Released: November 9, 2001

ADIYAMAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SULEYMAN ADIYAMAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SULEYMAN ADIYAMAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 17, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, February 5, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 7, 2001

SANTOS

CARLOS M. SANTOS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF HEARING: November 8, 2001

DECISION RELEASED: November 8, 2001 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended, Carlos M. Santos (the "Applicant"), appealed a decision of the Registrar of Motor Vehicles (the "Registrar") as set out in the Order to Impound, dated October 9, 2001;

WHEREAS the Tribunal set a hearing for November 8, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 1:30 p.m., which did proceed;

AND WHEREAS the Applicant was duly notified by Notice of Hearing, dated October 24, 2001, was delivered by courier to the Applicant on October 24, 2001, and proof of service filed. At 1:30 p.m., the hearing was adjourned until 2:30 p.m. to allow the Applicant more time to arrive or make contact by telephone if they wished to participate.

AND WHEREAS the evidence was given by Ms. Stacy Murphy, the Tribunal's Group Leader, Hearings Supervisor, that the Applicant telephoned her to advise that he may not attend the hearing;

AND WHEREAS at 2:30 p.m. there being no communication from the Applicant, the hearing commenced in the Applicant's absence.

AND WHEREAS KIM BEINTEMA, representing the Registrar of Motor Vehicles was present at the hearing on November 8, 2001 and no one appeared on behalf of the Applicant;

AND WHEREAS ON READING the Applicant's Notice of Appeal, Owner's Position, Ministry of Transportation's submissions, no one appearing for the Applicant although properly served as appears from proof of service filed, this Tribunal finds that due to non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings;

THIS TRIBUNAL ORDERS that the appeal by the Applicant is dismissed and pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, the Tribunal confirms the Registrar's Order to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: November 8, 2001

BATCHELOR

DAVID BATCHELOR

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NEIL J. MACPHEE, Q.C.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

DAVID BATCHELOR, Applicant
unrepresented

DATE OF HEARING: November 6, 2001

DECISION RELEASED: November 9, 2001 Written

REASONS FOR DECISION

A written hearing was held on November 6, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	David Batchelor (the “Applicant”)
Motor Vehicle:	1991 Chevrolet Cavalier, plate no. AHDZ 948 (the “vehicle”)
Date of Appeal:	October 12, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 6, 2001 and proceeded as a written hearing.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I HAVE ENCLOSED A BRIEF LETTER WRITTEN BY MY COMMON-LAW WIFE CONNIE ROFFEY. I WAS IN CUSTODY FOR CHARGES INCURRED DUE TO ACCIDENT UNTIL OCT 9/01.

THEREFORE I AM FILING THIS APPEAL A.S.A.P. WITHIN THE 15 DAYS MY APPEAL IS BASED SOLELY ON HARDSHIPS FINANCIALL, & EMOTIONALY DUE TO HAVING NO USE OF ANY VEHICLE BY HER TO SUPPORT ME.

Oct 11- 2001

By not having the car has caused undo hardship for our family.
Dave lives at the south end of Oshawa and has to commute to his job in Whitby every day (sometimes six days a wk). Each day it costs \$15.00 cab fare one way.

He has counselling meetings to attend at Pinewood twice a week.

He has to attend "A"- "A" meetings twice a week.

He has Community Service once a week.

I have chronic asthma and sometimes I have to get to the hospital immediately.
My mother lives in Minden, Ont. and she has heart problems and I cannot get there when I need to.

We are not within walking distance to the Banks- Doctors- Hospital- Grocery Stores- Drug Stores. Where we live we are not on an accessable bus route.

We are undergoing financial hardships now having Lawyer's costs and T.A.P. costs in order for Dave to get to work.

If the car remains impounded for the full 45 days that is another financial hardship we will have to deal with, not to mention the repairs to the car to get it road worthy again.

The car will be sold to me Connie Roffey (Commonlaw Wife) and be insured in my name.

Thank you.
Connie Roffey.

(As per owner) David Batchelor

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David Batchelor;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 9, 2005.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and

- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal notes that according to the Ministry of Transportation Plate Search, the Applicant is the sole legal entity responsible for the vehicle under the Plate Number AHDZ 948.

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Applicant and his common-law wife reside in the City of Oshawa which is a large metropolitan area with public transportation and availability of taxi service.

As the driver's licence of the Applicant was under suspension, much of the expenses detailed by the Applicant would ordinarily be incurred had the vehicle not been impounded.

The submissions of the Applicant state that the loss would be upon his common-law wife who has submitted her own letter containing reasons which are flimsy and do not support the allegations of loss. Therefore the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

After assessing the evidence presented, the Tribunal finds that the Applicant has not demonstrated exceptional hardship as circumscribed by section 22 of Ontario Regulation 632/98 amending Ontario Regulation 574 under the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Neil J. MacPhee, Q.C.,
Presiding Member

RELEASED: November 9, 2001

ADLS – 799 – MANIC DEP

ADLS – 799 – MANIC DEP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 31, 2001

Toronto

DECISION AND ORDER

A hearing was held on October 31, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated September 6, 2001 imposed by the Registrar pursuant to Section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to Section 50.1(5).

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: November 1, 2001

799 – MANIC DEP

ADLS – 799 – MANIC DEP

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 31, 2001

DECISION
RELEASED: November 1, 2001 Toronto

REASONS FOR DECISION

A hearing was held on October 31, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 1, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 2, 2001, and was received by the Tribunal on October 2, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the hearing proceeded. The following documents were entered into evidence with the consent of both parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal dated October 2, 2001.
- b) Exhibit # 2 Medical Letter from Physician # 1, received October 31, 2001.

By the Respondent:

- a) Exhibit # 3 MTO Submissions, 23 pages received October 26, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant took the stand and was sworn in. He testified that on September 6, 2001 he was going to see his daughter in Goderich, Ontario. He testified that he had just retired from his work and believed that this was the reason why he was feeling very elated. He testified that he had not eaten that day and had consumed 1/3 of a bottle of beer but did not drink any more than that as he was not feeling himself. At that time he was taking medication called Effexor which is an antianxiolytic.

The Applicant testified that he was at a R.I.D.E. spot check and was asked to perform a breathalyser test. According to the Applicant, he had previous experience with providing a breath sample which caused him pain and did not want to go through it again. He claims to have periodontal disease and did not want to put the mouthpiece into his mouth. The Applicant also testified that he did not relay this information to the police officers. As well, The Applicant testified that in retrospect he believed that he was in a manic state the time, which was heightened by the combination of medication and alcohol. The Applicant had poor recollection of events as detailed in the affidavits submitted by the representative for the Respondent. The Applicant concluded his testimony by adding that he was taken to his daughter's home in the early morning hours of September 6, 2001. His daughter realizing that her father was not in normal state, she took him to the Alexandra Marine and General Hospital where he was immediately admitted and received treatment over the next 3 week period. He was diagnosed as having bipolar disorder. His current medications are Lithium and Risperidone. The report provided from Physician # 1, Chief of Psychiatry outlined the details of his medical condition and confirmed the current stability of the Applicant. The Applicant had nothing further to add and was excused from the stand.

The representative for the Respondent asked the Tribunal to give great weight to the affidavits submitted by Police Officers' #1 and # 2. Both of the affidavits confirmed that the Applicant refused to provide a breath sample when a demand for breath was made. Neither officer stated that they observed any medical reason why he could not provide a sample. However, neither officer asked the Applicant if he suffered from any medical conditions. Police Officer # 2 did elude to a medical condition which was reported to him by the Applicant's daughter who told the officer that her father was a manic depressive. As neither officers have medical training, they may not have been aware that perhaps the Applicant was in a manic state and may have required medical attention.

The Tribunal after very careful review and deliberation has accepted the testimony of the Applicant and believes that he was in fact suffering from a medical condition at the time that the demand for a breath sample was made. This condition was confirmed by Physician # 1. The Tribunal accepts the evidence of Physician # 1.

APPLICATION OF THE LAW TO FACTS:

The Applicant has appealed the suspension under Section 50.1(2)(b) whereby he stated that he had a medical condition which prevented him from providing a sample of breath. The report from Physician # 1 provided the Tribunal with a diagnosis of Bipolar Disorder. The Applicant was hospitalized from September 6, 2001 until his release some three weeks later. Physician # 1 indicated that the Applicant had been treated successfully and his last visit of October 23, 2001 confirmed his stability. According to Physician # 1, the Applicant was very compliant with taking his medications as well as recommendations for follow up care.

On the basis of this medical evidence, the Tribunal finds that the Applicant was in a disoriented state and did not understand the demand made on him to provide a breath sample when the demand was made by the police officer.

The Respondent expressed concern with the observations of both police officers and the statements of both officers that the Applicant simply refused to provide a breath sample on the grounds that he did not have to because he was a citizen. Neither officer expressed the possibility that the Applicant was ill as both of the officers stated that they did not observe any illness. However, the Tribunal accepts the diagnosis of bipolar disorder which in fact does not present readily as a more traditional "acute illness" i.e. acute asthmatic attack and would be easily missed to the untrained medical personnel.

Based on the evidence before the Tribunal, the Tribunal finds on a balance of probabilities that the Applicant meets the criteria of Section 50.1(2)(b) in that he was able to demonstrate that he suffered from a medical condition which prevented him from providing a breath sample when requested.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 6, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension set aside.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: November 7, 2001

ADLS – 813 – NOMC

ADLS – 813 - NOMC

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: November 2, 2001

Toronto

DECISION

A hearing was held on November 2, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: November 5, 2001

813 - NOMC

ADLS – 813 - NOMC

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: November 2, 2001

DECISION
RELEASED: November 5, 2001 Toronto

REASONS FOR DECISION

A hearing was held on November 2, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 5, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 15, 2001, and was received by the Tribunal on October 16, 2001, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The documents presented before the Tribunal were entered as exhibits with the consent of both parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal received by the Tribunal on 16 October 2001 consisting of 5 pages.

By the Respondent:

- a) Exhibit #2 MTO Submissions.
- b) Exhibit #3 Report of Police Officer # 1.
- c) Exhibit #4 Report of Police Officer # 2.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant took the stand and was sworn. He testified that on the 24th of September 2001 he had finished work and stopped by a friends to have a drink. He testified that he left his garage at 12:30 a.m. He testified that he stayed at his friends for about 1 to 1 1/2 hours. He left his friends to go home. He testified that at around 2:00 a.m. he believed someone he knew was following him in a police car. According to the Applicant, there was a movie being filmed around his garage, and he believed that it was one of the movie crew that was playing a joke on him. He stated he drove around and eventually pulled his car into a lane and tried to leave the scene. According to the Applicant, there were seven police officers, who arrested him. He testified that he was handcuffed, and while on the ground, the officers kicked him in the ribs, broke his nose and broke his leg.

The Applicant testified that after he was placed in the police vehicle, he requested to be taken to the Hospital. The Applicant was transported to St. Joseph's Hospital. The Applicant testified that while at the hospital, he was x-rayed and treated for broken ribs. The Applicant also testified that he tried to provide a breath sample to another officer, Police Officer # 2. The Applicant stated that he tried to blow and was given only one chance to blow. The Applicant claimed that the officer told him to blow for eight to twelve seconds. The Applicant continued that when he got a reading after 3 seconds, he stopped blowing. According to the testimony of the Applicant, the police would not give him another chance.

The Applicant then testified that he signed the promise to appear notice as well as the notice to Registrar and was released from police custody.

The Applicant also testified that he saw Physician # 1 on September 26, 2001. Physician # 1 provided a letter dated September 28, 2001 which was transposed onto the Notice of Appeal form. According to the letter, it stated that "The Applicant suffered contusions (bruises) to his ribs in an altercation on September 23, 2001. This would create pain with any attempts to take deep breaths and would therefore impair his ability to blow into a breathalyser".

The Respondent provided the occurrence reports from Police Officer # 1 and Police Officer # 2. The Report of Police Officer # 1 gave a chronological report of the events that led to the issuance of the Administrative Drivers Licence Suspension. On Monday, September 24, 2001 at approximately 2:23 a.m. The Applicant was observed by the arresting officer operating a motor vehicle, a 1985 GMC 927 7DW. The Applicant was southbound on Royal York Road in the City of Toronto. At this time the officer observed that the Applicant was travelling slow, 20km/hr, and weaving for no apparent reason. The officer then observed the Applicant make an improper right turn (wide and no indication) and continued westbound in the eastbound lanes of Judson Street. The officer activated his roof lights. The Applicant continued westbound in the eastbound lane, still driving slowly. He then approached the intersection of Harold Street and suddenly accelerated made a wide right turn northbound on Harold Street and accelerated to approximately 60km/hr. The officer activated his siren and came up on the left side of Mr. Kennedy, who made eye contact with the officer. The officer then signalled the Applicant's vehicle to stop. The Applicant refused and then made a right turn onto Newcastle Street. The Applicant continued to Royal York Road where he slowed but proceeded into the intersection disobeying the red traffic signal at approximately 40km/hr and then made a left turn northbound on Royal York Road and then made a left turn onto Portland Street. He then made a right turn southbound on Windsor Street and approached the intersection at approximately 40km/hr. The Applicant disobeyed a stop sign, failing to stop and continued westbound on Newcastle Street to Royal York Road where he again disobeyed a red traffic signal at approximately 30km/hr. The Applicant continued to Portland Street where he made a right turn. The Applicant was going around the block, and he did this three times, disobeying stop signs and traffic signals (same stop and same traffic signal). The fourth time the Applicant proceeded southbound on Windsor Street, he suddenly turned into a private lane driving between two factories. He travelled south in the lane as he approached Newcastle Street. He turned off the motor, jumped out of the vehicle and fled on foot.

The Applicant was apprehended a short distance from the scene. The Applicant and the arresting officer suffered what appeared to be minor injuries. The officer suffered a knee injury. The Applicant suffered minor fascial cuts on his face. The arresting officer observed that the Applicant's eyes were red and glassy, speech slurred incoherent, very unsteady on his feet (fell twice while trying to run away). The officer detected an obvious odour of an alcoholic beverage on the Applicant's breath. At 2:45 a.m. the Applicant was transported to St.

Joseph's Hospital at request of Applicant. At 3:03 a.m. Applicant was asked to provide a breath sample. An attempt was made, however the Applicant had the mouth piece up in his lips but was not blowing into it. He was told to blow harder, blew but then quit. After being cautioned as to a refusal, the Applicant said he was trying but would not supply a proper sample. At 3:41a.m. the Applicant refused to provide a sample of breath.

APPLICATION OF THE LAW TO FACTS:

The Applicant has appealed the suspension under Section 50.1(2)(b) whereby he stated that he had a medical condition which prevented him from providing a sample of breath. The report provided from Physician # 1 falls short in addressing the Applicants' condition and her patient's ability to provide a breath sample. Physician # 1's report has provided the Tribunal no insight into what the Applicant's medical condition is and how that medical condition would have precluded the Applicant from providing that breath sample. In testimony provided by the Applicant to the Tribunal the Applicant led this Tribunal, to believe that he suffered fractured ribs. However, the report of Physician # 1 indicates no fracture but only bruises to his ribs. Physician # 1's report provides no report of physical examination findings and no supporting lab or xray reports.

Physician # 1's report does not establish why the Applicant was precluded from providing a breath or blood sample. The Applicant has the onus of establishing the merit of his appeal as set out in Section 13 of Regulation 574. The Tribunal finds that the medical evidence present is not sufficient to meet that onus and the Applicant has not established the merits of his appeal.

The Tribunal believes that the evidence leads to the conclusion that the Applicant was able to provide a suitable sample of breath but did not provide one due to lack of effort and concern about possible recrimination from the results of providing a proper sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 24, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: November 8, 2001

ADLS – 809- CHRON BRONCH

ADLS – 809- CHRON BRONCH

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: November 2, 2001

Sudbury

DECISION

A hearing was held on November 2, 2001, at Sudbury, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: November 5, 2001

809- CHRON BRONCH

ADLS – 809- CHRON BRONCH

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: November 2, 2001

DECISION
RELEASED: November 5, 2001

Sudbury

REASONS FOR DECISION

A hearing was held on November 2, 2001, at Sudbury, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 5, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 12, 2001, and was received by the Tribunal on October 15, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal- received October 15, 2001.

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation submissions – received October 30, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant’s Driver’s Licence was suspended “September 15, 2001” as per Notice of Appeal (Exhibit # 1)

Applicant’s Evidence

Page 2 of the Notice of Appeal, was prepared on October 12th, 2001, by Physician # 1, who has been the Applicant’s family physician for “8 years 2 months.

Physician # 1 indicates under the category requiring information as to the “Details and Diagnosis of the patient’s present condition” that the Applicant suffers from “...*Bronchitis – Acute, June 19/01.*” As to the “History of condition”, although Physician # 1’s writing is quite illegible, “*Chronic Bronchitis*” is noted. Under the Heading “Type of Measurement or recent tests taken...”, Physician # 1 answers “*Pulmonary Function Tests ...140 l/min. 21/09/01 in office test*”. As far as the “Relevant details of last visit and when ...patient was last seen” the reply from Physician # 1 is “*reassessed Oct 15/01 ...mild bronchitis...*” (Exhibit # 1).

A short note, handwritten on a prescription pad, signed by Physician # 1, dated “02/10/01” forms part of the Notice of Appeal. Under the heading of Blind River Family Medical Clinic, the physician reiterates the Applicant’s diagnosis as “...*a medical condition, which prevents ...adequately completing a breathalyser test.*” (Exhibit # 2)

At the hearing the Applicant was represented by counsel. He called the Applicant to take the stand and she gave her answers under oath.

During the examination-in-chief, the Applicant testified as to the events leading up to the demand for a breath sample.

The Applicant stated that after working all day at the car lot, owned by her, she went home to make supper, and that after putting the children to bed and calling a baby sitter, she went to the "...Iron Horse for a couple of beers..."

At the pub, the Applicant met her friend, who had been drinking and playing pool. At approximately ten o'clock the Applicant and her friend left the pub and noticed that the lights on his car were "...going on and off...". The Applicant suggested to her friend that she should go ahead of him and give him a lift in case anything happened to his car.

Looking back in her rear view mirror, the Applicant noticed that her friend had stopped. Thinking that he might be in need of assistance, she stopped as well. Shortly, thereafter an Ontario Provincial Police Officer, approached her and demanded a breath sample.

The Applicant was walked back to the police cruiser and told to "blow", but was not given any instructions, on how to do so.

Each attempt to provide a breath sample became increasingly more difficult as the Applicant began to feel "...*light headed and dizzy...*".

After the sixth attempt, the Applicant told the officers she did not want to try again. When informed that she would be placed under arrest for "failure to provide, the Applicant agreed to try again. During the 7th attempt, the mouthpiece fell to the ground; she tried again, but was still unable to provide an adequate breath sample.

The Applicant testified that she has a hard time breathing because she smokes "...*2 packs a day*".... In June of this year she went to emergency and was diagnosed with chronic bronchitis. At that time the Applicant was advised to "...*stop smoking or the bronchitis would turn into emphysema.*" For that reason, she could not blow for "*15 seconds*" as the officer suggested was required.

The Applicant was prescribed Ventolin in June but had been using her son's for about one year, as she felt she needed it. The Applicant told the officers that she had "*asthma*", but did not request medication, medical assistance, nor did she inform the officers that she was feeling "...*light headed and dizzy...*".

The Applicant's first visit to her physician after the incident was about one week later, because no appointment could be had earlier. Physician # 1 recommended that the Applicant consult a respiratologist. Since there was no appointment available at the time of the specialist's quarter-yearly visit to Blind River, the Applicant was advised to stay home "...on stand by..." in case of a cancellation. The Applicant was unable to consult with the specialist as no appointment became available.

In cross-examination, in reply to questions posed by the Respondent the Applicant confirmed that was prescribed a "puffer" in June of this year.

The Applicant also testified that after the sixth attempt the Applicant walked back to her car to get her keys and her purse but not the "Ventolin", which was on the seat of the car. The Applicant explained that she is only allowed to use the inhaler four times a day and that she had used it, two hours prior, at the bar.

The Applicant admitted that she was still "*light headed*" while she was being transported to the station, but she was neither "...*coughing nor wheezing*..." nor did she ask to be taken to emergency.

When asked by the Respondent why she did not go to emergency or to a walk-in clinic, since her own physician was too busy to see her, the Applicant replied: "*Why would I want to do that?*"

At the time the Applicant also required 2 pills a day for severe headaches. Upon arriving at home, the Applicant took the headache pills but did not need to use the "puffer."

The Applicant detailed that it took seven attempts to provide the three samples required for the Pulmonary Function Tests. The nurse administered the test, and the Applicant is not aware if in fact a specialist interpreted the results. As to the meaning of the results, the Applicant was not told what the normal volume should be, or how her own results measured up.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed October 18, 2001.
2. Certified Copy of Driving Record of the Applicant, sealed October 18, 2001.
3. Certified Copy of Vehicle Record as of occurrence date, sealed October 18, 2001.
4. Affidavit of Police Officer # 1, Ontario Provincial Police, sworn October 22, 2001.

5. Medical Report Review, Physician # 2, MB, ChB, FRCP (UK) FRCP(C) FCCP (C) FCCP.

An Affidavit sworn by Police Officer # 1, of the Ontario Provincial Police states:

- 1." I observed the female attempt to blow into the apparatus but she would stop blowing before a sample registered (point 13)
2. I observed the female continue to be uncooperative and was still not providing a suitable sample. (Point 17)
3. After the eight attempt I heard the female say " I am not doing it anymore, I refuse to blow into that thing again" and started to walk away again. (Point 18)
4. During my investigation of the female I observed nothing to suggest any medical problem. (Point 26)
5. The female was never short of breath or had trouble breathing that I observed.... (Point 27)"

In a report dated October 29 2001, Physician # 2, MB,ChB,FRCP (UK)FRCP(C) FCCP (C), Director of Program in Respiratory Rehabilitation - University of Toronto, states that he has "...been the medical advisor to the pulmonary function laboratories for over 16 years..." and is "...familiar with the Alcotest and the Intoxilyzer 5000C..."

Dr. Goldstein concludes that the "...pulmonary function ...test ...does not provide support of a lung condition of such severity that the subject would be unable to complete a breathalyser test..."

The Respondent called Ontario Provincial Police Officer # 2 as a witness.

Police Officer # 2 testified that he instructed the Applicant on how to blow into the breathalyser machine, but she informed that she "*used it before*".

The Applicant had the capability to provide an adequate breath sample, but, according to the officer, she "...purposely chose not too...". She would blow for "...five or ten seconds ...another 2 seconds and a sample would have been obtained....". The Applicant was able to blow strongly enough for the machine to register. Then she would "...purposely removed the mouthpiece out of her mouth with her breath...". This was reason that the mouthpiece fell to the ground during one of the attempts.

Police Officer # 2 testified that the Applicant was extremely “...irate, angry and swearing ...had lots of energy ...no respiratory distress at all ...at all ...at all...” The Applicant informed Police Officer # 2 that she had asthma. Police Officer # 2 stated that his experience and knowledge has proven that the breathalyser is designed to accommodate people with breathing difficulties “...even with one lung...”

Police Officer # 2 has been a Registered Nurse for ten years. As such he has come across individuals with respiratory conditions. At no time did the officer observe the Applicant with any symptoms of breathing difficulties, i.e. “...coughing ...wheezing...”

In cross-examination, Counsel for the Applicant asked the officer whether this information was all in his notes. Police Officer # 2 replied that the “...night in question was vivid in his mind...”.

The Applicant's counsel, asked Police Officer # 2 if he remembered the Applicant offering to provide a urine sample. Police Officer # 2 answered that he did, but explained that to the best of his knowledge alcohol is not processed by the kidneys and therefore cannot be obtained in a urine sample. The Highway Traffic Act does allow for a blood sample to be obtained. However, this was not a situation requiring a blood sample to be taken. In order to warrant drawing blood from a suspect, there needs to be serious physical incapacity.

In closing, the counsel for the Applicant, stressed that Ventolin is not an over the counter medication, but can only be obtained by prescription. Counsel for the Applicant remarked that he has ascertained that the normal lung capacity volume is 300 ml, the Applicant registered 142. Even after three weeks the Applicant continued to be diagnosed with mild bronchitis.

In conclusion, Counsel for the Applicant noted that the Applicant has had a driver's licence since she was sixteen, and has only had two speeding infractions. As the Applicant is the owner of a car lot, she knows better than anyone the consequences of drinking and driving. Further, Counsel for the Applicant pointed out, the Applicant was not stopped; she stopped voluntarily to assist her friend.

The Respondent opened closing remarks by noting the Applicant's demeanour at the time. The Applicant was belligerent, swearing and uncooperative. According to the Respondent, this behaviour indicates that the Applicant had no intention of providing a breath sample. The Applicant had enough breath to walk away shouting obscenities, she had enough energy to resist arrest, and it is unlikely that she did not have enough breath to provide a breath sample. Police Officer # 2 is a Registered nurse, and at no time did he see observe the Applicant exhibiting any of the usual symptoms.

The Respondent suggested that Physician #1's report be given "little weight ", not only because it is mostly illegible, but also because there is no interpretation for the Pulmonary Function Test results. There is no history of referrals to a specialist.

While it is true that Physician # 2 did not examine the Applicant, he is quite cognizant of the rates and was able to conclude that according to the Applicant's reading, there is no medical reason as to why the Applicant failed to provide an adequate breath sample.

In conclusion, the Respondent reminded the Tribunal that the onus is on the Applicant to prove the grounds for appeal. In this matter, it is the Respondent's contention that the Applicant failed to prove that her medical condition prevented her from providing an adequate breath sample, and asked the Tribunal to uphold the suspension.

APPLICATION OF THE LAW TO FACTS:

Section 50.1 (2) (b) of the *Highway Traffic Act*, states:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

Thus, at issue is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Tribunal does not dispute that the Applicant suffers from periodic bouts of bronchitis. This finding is substantiated by Physician # 1: "...*Bronchitis – Acute, June 19/01 ...reassessed Oct 15/01 ...mild bronchitis...*" (Exhibit # 1).

The question remains, how does the medical condition preclude the Applicant from providing an adequate breath sample.

The medical evidence available to the Tribunal is contained on page 2 of the Notice of Appeal, the brief handwritten note prepared by Physician # 1, and Physician # 2's expert report.

The Applicant's counsel, suggests more credence be awarded to Physician # 1's report as Physician # 2 did not examine the Applicant. Counsel for the Applicant, further emphasizes that since Ventolin is not an over the counter medication, the Applicant's condition must be severe enough to merit the doctor issuing a prescription for this type of inhaler. The Respondent contests the Applicant's counsel's premise and adopts the opposite position. The Tribunal was requested to give more weight to Physician # 2's respiratologist report, as

Physician # 1's report is mostly illegible and does not interpret the results of the Pulmonary function Tests.

The Tribunal concurs with the Respondent. According to Physician # 1 the Pulmonary Function Tests results "...140 l/min..." constitute "...a medical condition, which prevents ...adequately completing a breathalyser test.", Physician # 2 disagrees. With all due respect to Physician # 1, she is not a specialist in the field of pulmonary disorders, Physician # 2 is, and his credentials are impeccable: "...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years..."

Further, Physician # 2 is "...familiar with the Alcotest and the Intoxilyzer 5000C...". After reviewing the results of the Applicant's Pulmonary Functions Tests as described by Physician # 1 and Physician # 2 concludes that the "...pulmonary function ...test ...does not provide support of a lung condition of such severity that the subject would be unable to complete a breathalyser test..."

The Tribunal accepts Physician # 2's expert conclusion, that the Applicant's Pulmonary Function Tests results were not significant to prevent the Applicant from complying with the demand for a breath sample.

To corroborate its decision, the Tribunal also relies on the visual observations of the officers and on the testimony of the Applicant.

Police Officer # 1' in her sworn Affidavit asserts:

"During my investigation of the female I observed nothing to suggest any medical problem. (Point 26) ... The female was never short of breath or had trouble breathing that I observed... (Point 27)"

Police Officer # 2 a Registered Nurse, familiar with situations of respiratory distress, remembers the Applicant as having "...lots of energy..." and in "...no respiratory distress at all... at all... at all..."

The Applicant, by her own admission, established that she manifested none of the expected visible physical symptoms of asthma or bronchitis, but did feel "...light headed ...dizzy...". The Applicant testified that she did not feel it was necessary to inform the officers of her state of health at the time.

Further, the Tribunal notes that the Applicant's condition was not severe enough to warrant seeking medical assistance within the next few days. In response to the Respondent's question as to why she did not attend emergency or a walk-in clinic while waiting one week to see her physician, the Applicant replied: "*Why would I want to do that?*"

Mention was made by the Applicant and her counsel of the possibility of determining the alcohol level in the blood through a urine sample. Subsection 48.3(3)1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken...", not urine. Nonetheless, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant showed no visible signs of respiratory impairment, such as wheezing, coughing or choking. Thus, the issue of a blood sample is not an issue requiring determination by this Tribunal.

The onus being on the Applicant to establish the merit of the appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that she was not able to demonstrate that she suffers from a medical condition, which would prevent her from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 15, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: November 7, 2001

YANG and TSUI

PREHEARING

MIAN YUN YANG AND KUEN KUEN TSUI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MIAN YUN YANG and KUEN KUEN TSUI, appearing on their own behalf
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
RICHARD COSTIGAN, Agent, representing Eastpine Kennedy Steeles
Limited Partnership, Added Party

DATE OF
PREHEARING: October 29, 2001 Toronto

REVISED ORDER

FOLLOWING attendances on October 29, 2001 at a prehearing before this Tribunal of Mian Yun Yang and Kuen Kuen Tsui, appearing on their own behalf (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Richard Costigan, Agent on behalf of Eastpine Kennedy Steeles Limited Partnership (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on Monday, February 25, 2002 at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary on February 26 and 27, 2002 and to further continue April 8, 9 and 10, 2002 at 9:30 a.m. at the Tribunal's above chambers;

1. The Parties to the hearing are the Applicants, the Program and the Added Party.

2. The Parties shall meet at the Applicants' home at 47 Eastpine Drive, Markham, Ontario at 9:00 a.m. on Thursday, November 1, 2001 when an inspection of the Applicants' home shall be conducted by the Program. The Program's representative shall be given access to all parts of the Applicants' home for the purposes of carrying out the reinspection of the home in order to ascertain what repairs are necessary and the nature and extent of such repairs.
3. The Applicants, following the inspection in paragraph 2, shall grant the Added Party, its servants, agents and subtrades access to the Applicants' home to enable the Added Party to effect repairs. The Added Party, prior to entry to the Applicants' home to effect repairs shall communicate with the Applicant Mian Yun Yang by telephone at the Applicants' home to arrange a date(s) and time(s) for entry to the Applicants' home and shall immediately after having arranged such date(s) and time(s) confirm same by way of fax which shall be sent to the Applicants.
4. The Program's warranty representative shall be entitled to reasonable access to the Applicants' home for the purpose of inspection of items in dispute and for the further purpose of inspection of any repairs that may be carried out by the Added Party or its subtrades. Upon being granted access by the Applicants to their home, the Program shall confirm the agreed date(s) and time(s) of access by way of fax addressed to the Applicants.
5. The parties to the prehearing recorded the following in regard to the issues that have been disposed of at the prehearing and those issues that remain to be decided at the hearing.
 - A. The following issues dealt with in the Program's conciliation reinspection report dated January 29, 2001 under the heading "Items covered under warranty" have been abandoned by the Applicants and are no longer issues that require determination by the Tribunal at the hearing of this matter:

COMPLAINT

Number 2
Number 3
Number 5
Number 8
Number 10
Number 12
Number 13
Number 15

Item 11 dealt with in the Program's conciliation reinspection report dated January 29, 2001 under the heading "Items covered under warranty" was settled between the parties and is no longer an issue that requires determination by the Tribunal at the hearing of this matter.

The remaining six items of complaint in the conciliation reinspection report of January 29, 2001 under the heading "Items covered under warranty" have not been abandoned by the Applicants and remain as issues to be dealt with at the hearing.

- B. The following issues dealt with in the Program's conciliation reinspection report dated January 29, 2001 under the heading "Items not covered under warranty" have been abandoned by the Applicants and are no longer issues that require determination by the Tribunal at the hearing of this matter.

COMPLAINT

Number 5
Number 6
Number 7
Number 8
Number 9
Number 11
Number 12
Number 13
Number 15
Number 17
Number 18
Number 19
Number 21
Number 22
Number 23
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Number 72
Number 75
Number 76
Number 77
Number 79
Number 80
Number 81

Items 45, 55, 60 and 64 dealt with in the Program's conciliation reinspection report dated January 29, 2001 under the heading "Items not covered under warranty" were settled between the parties and are no longer issues that require determination by the Tribunal at the hearing of this matter.

The remaining twenty-three items of complaint in the conciliation reinspection report of January 29, 2001 under the heading "Items not covered under warranty" have not been abandoned by the Applicants and remain as issues to be dealt with at the hearing.

6. All parties to the hearing shall fully comply with the requirements of disclosure of documents or things as set forth in Rule 6.3 of the Rules of Practice of the Tribunal. All parties shall also fully comply with the disclosure requirements set forth in Rule 6.4 of the Rules of Practice of the Tribunal dealing with expert witnesses.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: November 14, 2001

PROFIT AUTO SALES LTD., PROVINCIAL USED CAR SALES LTD. AND
BRIJ LAL BADHAN

PROFIT AUTO SALES LTD., PROVINCIAL USED CAR SALES LTD. AND
BRIJ LAL BADHAN

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MICHAEL DERUBEIS, Counsel for Applicants
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 14, 2001 Toronto

ORDER

Following attendances on November 14, 2001 at a hearing before the Licence Appeal Tribunal of Michael DeRubeis, Counsel for Profit Auto Sales Ltd., Provincial Used Car Sales Ltd., and Brij Lal Badhan (the "Applicants") and A. Michael Rothe, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

AND WHEREAS at the hearing on November 14, 2001, the Tribunal was advised that the parties had come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A" hereto;

AND WHEREAS having reviewed the written settlement signed by the Applicants and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: November 14, 2001

WOOLSEY

WILLIAM WOOLSEY

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NORMAN MEALING,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

WILLIAM WOOLSEY, Applicant
GERALD JACKSON, Witness

DATE OF HEARING: November 9, 2001

DECISION RELEASED: November 15, 2001 Toronto

REASONS FOR DECISION

A hearing was held on November 9, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	William Woolsey (the "Applicant")
Motor Vehicle:	1997 GMC Sierra, plate no. 8910CS (the "vehicle")
Date of Appeal:	October 25, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on November 9, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

A request was made for a ruling with respect to (a) hearing the testimony of a witness, namely Gerald Jackson, an employee of Brookside Roofing Limited, and (b) introducing additional material into evidence, namely Profit and Loss Statements for Brookside Roofing Limited for the periods October 2000, and October 2001, and payroll and time records for the period October 14, 2001 to November 8, 2001 for Mr. Jackson.

The Tribunal made its ruling on the preliminary issues which follows:

With the concurrence of the Representative of the Registrar of Motor Vehicles, it was ruled that (a) Mr. Jackson would be allowed to testify following the opening statements by the Applicant and the Respondent, and would be excluded from the hearing until called to testify, and (b) the additional material offered by the Applicant would be entered into evidence as Exhibits 3 through 6, inclusive.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

BROOKSIDE ROOFING LIMITED

October 25, 2001

Licence Appeal Tribunal

To Whom It May Concern:

Re Impoundment # 1506305

On Sunday, October 14, 2001, my brother Richard Woolsey requested that he use one of my company trucks to assist in his personal move of residence.

Upon asking him about his driver's license, he assured me that it was valid. Therefore trusting that he was telling the truth, I allowed him the usage of my company vehicle to make his move. Our normal practice is to screen all employees who will have access to any Company Vehicle.

My brother Rick informed me, on the evening of Sunday, October 14, 2001, that there had been a problem and that the truck had been impounded.

Arriving at work on Monday morning there was a message from **Constable Vaness (#8141)** from Metropolitan Toronto Police **Divisions 55**, informing us, of the altercation and the impounding of the vehicle.

On October 18, 2001, we pulled a Drivers Abstract on Richard Woolsey, and at this point could understand why his licence was suspended and he believed that his licence was not suspended. On 00/01/24 his licence was reinstated and probably returned to him, at which time it was never removed from his person. Constable Vaness, as mentioned above, did inform me that he physically removed Rick's Driver's Licence from his possession on the night of October 14, 2001. Therefore giving everyone the belief that his licence was still active.

We cannot get a Police Report in regards to the incident as it must be gotten by Richard Woolsey, the person involved. This we were informed by the police & records department. Even though it is a company vehicle and owned by myself, we are not entitled to the incident report.

At this time, we have an address of **1691 Gerrard St., E., Apartment # 1691, Toronto, Ontario, M4L 2B1** and his drivers licence number as **W6494 50176 40620**, as given to us by the impoundment company, Abrams/S&V at 30 Ashwarren Rd. We were also able to obtain a phone number of **416-778-9863** for Bell Canada Information (411). This is the last known address and phone number on record.

I would like to put forth and request that the company vehicle be released from impoundment as soon as possible, as the business of Brookside Roofing Limited, and it's employees livelihoods depend on this vehicle. We have had to delay work that has already been signed for and cannot go forward with new work due to the fact that we have lost the use of one (1) company vehicle and a crew of roofers have been sent home until further notice.

This therefore will cause a hardship to not only the income of Brookside Roofing Limited, but to its employees, who with the lack of cash flow to the business, may suffer a layoff.

Yours truly,
BROOKSIDE ROOFING LIMITED,

William Woolsey,
Owner

In addition to the written information submitted prior to the hearing, the Applicant also offered evidence indicating the impact of the impoundment on his business, and Mr. Gerald Jackson, an employee of his business. He further explained that he was not in regular contact with his brother, and that he had not been able to contact his brother since the incident which resulted in the impoundment of his vehicle. In response to questioning by the Respondent, and the Presiding Member, the Applicant indicated that he had questioned his brother with respect to his possession of a valid driver's licence, but that he had not asked him to produce a copy of the licence. He indicated that he was not aware of his brother's driving record, which included previous suspensions, and that he accepted his brother's statements concerning his licence. He further indicated that it was the established practice for Brookside Roofing Limited to require employees who would be driving company vehicles to produce their driving licences which were photocopied and kept on file by the company.

The Applicant was questioned with respect to the impact of the impoundment on his business. He explained that, under normal circumstances, Brookside Roofing Limited would employ two vehicles, and two crews, comprising from 10 to 12 people on a fulltime basis. Since the impoundment, the company employs only one vehicle and one crew. The number of people working at any one time is to 4 to 5. There have been no layoffs as such inasmuch as the company has opted to "spread the work around" in order to lessen the impact on any one individual, and retain experienced staff. The Applicant indicated that the Profit and Loss Statements entered into evidence illustrated the impact of the impoundment on his business. Although both statements show an operating loss, the loss for October 2001 was significantly greater, approximately \$4000.00, than was the loss for the October 2000 time period, approximately \$1500.00. The Applicant also indicated that Brookside Roofing Limited had eight [8] outstanding orders which, given the weather-dependent nature of the roofing business, had to be completed within the next few weeks. He further stated that, although the company had these confirmed orders, the customers were questioning when the work would be done, and that his company's customer service reputation was at risk.

The Applicant was questioned with respect to the availability of alternatives to the impounded vehicles. He indicated that he had been able to transport work crews to the site using public transit and his own personal vehicle, but that the company was not able, due to financial considerations, to rent a replacement vehicle. He also indicated that, in his experience, rented vehicles were not an option given the damage which normally occurs in the transport of roofing materials, generators, and ladders.

At this point in the proceedings, Mr. Gerald Jackson was called, and sworn in as a witness for the Applicant. Mr. Jackson stated that, under normal circumstances, he could expect to work between 25 and 50 hours per week, and that, since the impoundment, he had worked an average of one and one-half days per week. Although the time sheet entered into evidence showed 32 hours of work during the first week of November, Mr. Jackson explained that he had not worked between October 14th and November 1st, 2001. In response to questioning by the Respondent, Mr. Jackson indicated that he had not sought other employment, and that he was relying on family members for support.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Richard M. Woolsey;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 16, 2001.

The Respondent offered no additional evidence. During the questioning of the Applicant, the Respondent offered an explanation as to why the driver of the vehicle would have a driver's licence in his possession even though it had been suspended [see Applicant's written statement]. She indicated that, upon conviction, the courts are to request that the driver's licence be surrendered to the court but that this is not always done. In situations such as this, it is the driver's responsibility to return the licence to the Ministry of Transportation.

In her concluding remarks, the Respondent indicated that, in the opinion of the Registrar, the conditions surrounding both due diligence and exceptional hardship had not been met. With respect to due diligence, the point was made that, although the Applicant had asked his brother whether or not he had a valid driver's licence, he had not asked that he show him the licence. With respect to exceptional hardship, the Respondent put forward the position that all of the conditions outlined in the legislation pertaining to exceptional hardship had not been met.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section

55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue of due diligence, the evidence established that the Applicant had, in fact, asked his brother whether or not he had a valid driver's licence. The evidence also established that he had not asked his brother to show him that licence. As a matter of company practice, Brookside Roofing Limited requires employees to produce a driver's licence if they are to operate company vehicles. The importance of this latter fact is that it shows that, in dealing with persons at "arms-length" from the Applicant, he exercises appropriate care and caution. However, the exercise of due diligence with respect to a family member should be viewed in a different context. On the particular facts of this case, honesty and trust in this context, and that, within that assumption, simply asking the question concerning the driver's licence constituted due diligence. Moreover, it should be noted that, had the Applicant asked his brother to show him his driver's licence, his brother could have done so inasmuch as the court had not requested him to surrender it, and he had not returned it to the Ministry of Transportation. The Applicant had no indication that his brother had any problems respecting his driver's licence.

As to the issue of exceptional hardship, the legislation requires that certain conditions be met. The legislation requires that there are no alternatives available, and, in this regard, the Applicant indicated that the financial situation of his company, and his experience in the roofing business precluded the rental of a replacement vehicle. The legislation also requires that the loss resulting from the impoundment be immediate, significant, and lasting. There is no doubt that the losses experienced by Brookside Roofing were immediate, and significant. This is illustrated by the Profit and Loss Statements entered into evidence. Whether or not they will be lasting cannot be definitively stated, but it can be argued that the impact of not being able to meet the outstanding orders in a timely fashion could have long term implications for Brookside Roofing Limited. Exceptional hardship also requires that the loss of the vehicle impact upon a person ordinarily transported in the vehicle, and that person be other than the driver. The testimony of Mr. Jackson clearly demonstrates a loss of income as a result of the impoundment, and that loss would be much greater if the Applicant had chosen to layoff the staff affected rather than attempt to 'spread around' the available work among the regular workforce of Brookside Roofing Limited.

In conclusion, therefore, the Tribunal finds that the conditions of due diligence and exceptional hardship have been met.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: November 15, 2001

MOSKVITIN, AND DAUGAVA AUTO SALES LTD.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
VALERY MOSKVITIN AND DAUGAVA AUTO SALES LTD.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: July 26, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

VALERY MOSKVITIN AND DAUGAVA AUTO SALES LTD.

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Valery Moskvitin and Daugava Auto Sales Ltd., Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 15, 2001

To: The Registrar
Motor Vehicle Dealer and Salespersons Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

And to: Licence Appeal Tribunal
1 St. Clair Ave. West
Suite 1200
Toronto ON M4V 1K6

From: Daugava Auto Sales
4490 Chesswood Drive
Unit 12
North York, ON M3J 2B9

Valery Moskvitin
765 Steeles Ave West
Apt 1101
Willowdale, ON M2R 2S8

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Daugava Auto Sales. and Valery Moskvitin hereby consent to the following terms and conditions to their registration as a motor vehicle dealer and salesperson:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.

4. The Dealer agrees that all books and records shall be kept at the Dealer's registered premise, and shall be available to an inspector or investigator appointed by the Registrar, at all reasonable times.
5. The Dealer agrees to maintain a sign at the Dealer's registered premise that will be visible to the public.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
7. The Dealer agrees not to invite the public to deal at a place other than its approved location.
8. The Dealer will not conduct any purchases with anyone who is in the business of buying, selling and leasing motor vehicles without confirming that the person is registered as a Dealer under the Motor Vehicle Dealers Act.
9. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
10. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
11. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
12. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
13. The Dealer and/or Salesperson agree not to alter or cause to be altered the odometer of any motor vehicle sold by the Dealer and/or Salesperson. In the event that an odometer must be repaired or replaced, it shall be done in accordance with law. If an odometer is changed or altered in accordance with law, or if the distance travelled by the vehicle is different than the odometer reading, the Dealer and Salesperson agree to make full written disclosure of same to a purchaser, on a Bill of Sale, and to have the purchaser initial the written disclosure. Full disclosure shall include the odometer reading at the time the odometer was repaired or replaced or other explanation for the odometer discrepancy. All disclosures regarding the odometer and the distance travelled shall be in compliance with the OMVIC Standards of Business Practice.

14. The Dealer shall maintain copies of all documents related to any odometer replacement or alteration.
15. All applications submitted by the dealer to a third party warranty company shall include full and honest disclosure as to the distance travelled by the vehicle and if there is a difference between the distance travelled by the vehicle and the odometer reading, same shall be disclosed to the warranty company with an explanation for the discrepancy.
16. The Dealer and Salesperson agree that they are under a positive obligation to disclose all material facts in writing about the vehicles it sells to customers. They agree to make reasonable efforts to research the history of all the Dealer's vehicles prior to sale to ensure all material facts are disclosed. They agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
17. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
18. The Dealer will comply with all aspects of the Retail Sales Act with regards to filing, and ensuring all tax collected is accurately reported and remitted to the Minister of Finance when due.
19. The Dealer agrees it will not be involved with the buying and selling of motor vehicles without the benefit of registration.
20. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
21. The Dealer acknowledges that the Registrar may take further administrative action in the form of a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or compliance with these terms and conditions.
22. The Dealer acknowledges that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
23. The Dealer and Salesperson agree that should either the Dealer or Salesperson breach any of the Terms and Conditions set out herein the Dealer and Salesperson shall have their registrations revoked.

24. The Dealer and Salesperson hereby withdraw their appeals to the Licence Appeal Tribunal.

25. The Dealer and salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of November, 2001.

Daugava Auto Sales
I have the Authority to bind the corporation/dealership.
(Signature)

Valery Moskvitin

KLASSEN

HELENA KLASSEN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NEIL J. MACPHEE, Q.C.,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

HELENA KLASSEN, Applicant
JOHN HUTCHINSON, Agent for Applicant

DATE OF HEARING: November 9, 2001

DECISION RELEASED: November 15, 2001 Windsor

REASONS FOR DECISION

A hearing was held on November 9, 2001, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Helena Klassen (the “Applicant”)
Motor Vehicle:	1988 Buick Park Avenue, plate no. AFR3593 (the “vehicle”)
Date of Appeal:	October 23, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 9, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

19 Oct 2001

Dear Sirs

I am writing to state why I need my car. I need it to take my children to appointments at the doctor. Also I need it to get my groceries and to get my children to school and pay bills and my youngest to go to the dentist. And I want to look for a job.

Yours truly
Helena Klassen

The Applicant Helena Klassen testified that she presently has only the one vehicle which is now impounded. However, on cross-examination by counsel for the Respondent she admitted that she did own another vehicle, which is still registered in her name, until several months ago when she was in an accident which was not her fault. She also stated that she and her husband were paying the expenses to operate both vehicles. The Tribunal concludes from this that until the accident she and her husband could afford two automobiles.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by James Klassen;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 18, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in

determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The grounds for the appeal are that the impoundment of her vehicle will result in exceptional hardship to the Applicant and her family. For this to succeed, the Tribunal must find first that there is no alternative to the impounded vehicle. Based on the facts as evidence, the Tribunal finds that the Applicant does in fact have alternative transportation to the impounded vehicle. But if the Tribunal did not so find, the Tribunal also finds that the Applicant has not brought herself within the circumstances set out in Ontario Regulation 574, Section 22(2) and (3).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Neil J. MacPhee, Q.C.,
Presiding Member

RELEASED: November 15, 2001

G.J.P.

HIGHWAY TRAFFIC ACT

Section 50(1) and Regulation 574, R.S.O. 1990, Chap. H8 as amended

G.J.P.

IN THE MATTER of an APPEAL of A SUSPENSION OF A DRIVER'S
LICENCE

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 47(1) of the *Highway Traffic Act* TO
SUSPEND A PERSON'S DRIVER'S LICENCE FOR A MEDICAL
REASON

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

G.J.P

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), G.J.P (the "Applicant") initiated an appeal under section 50(1) of the Decision of the Registrar of Motor Vehicles made pursuant to section 47(1) of that Act, to suspend the Applicant's driver's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles to suspend the driver's licence of G.J.P.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: November 16, 2001

McCONNELL and FINCH

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario, 1990 Chapter M.42

IN THE MATTER of
LORRAINE McCONNELL AND PERCY FINCH

AND IN THE MATTER of a decision of the
Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund

TO DISALLOW A CLAIM
- Decision dated: July 23, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

LORRAINE McCONNELL AND PERCY FINCH

Applicants

- and -

BOARD OF TRUSTEES
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 5, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, February 19, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 16, 2001

YONECI-MELERDI, MAHMOUD O/A A.R. AUTO WHOLESALE NETWORK

MAHMOUD YONECI-MELERDI O/A A.R. AUTO WHOLESALE NETWORK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

LEO ADLER, counsel, representing the Applicant
MARY JANE SOUTH, agent, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF

HEARING: June 1, 2001 and September 21, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated December 28, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* ("the Act") to revoke the registration of Mahmoud Yoneci-Melerdi ("the Applicant") as a motor vehicle dealer under the provisions of the Act. The Applicant appeals the Notice of Proposal to the Tribunal.

The Registrar's Notice of Proposal states that the reasons for the proposal are:

1. The Applicant O/A A.R. Auto Wholesale Network has been registered as a motor vehicle dealer since November 24, 1989.
2. The Applicant has engaged in conduct that resulted in the following charges being laid against him: assault with a weapon, use of a firearm to commit, possession of firearm with altered serial number, possession of firearm while prohibited, possession of restricted firearm with ammunition, careless storage of a firearm.

3. The Applicant failed to make full disclosure on applications submitted to the Registrar's office.
4. The Applicant was convicted on July 23, 1993 pursuant to the Immigration Act. The Applicant was further convicted on two counts of assault on April 27, 1995.

THE LAW:

The relevant portion of the Act that is applicable to these proceedings is section 5(1) which reads:

1. An Applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (b) the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty,...

As established by the Divisional Court of Ontario in the decision R.G. Brenner v Registrar of Motor Vehicle Dealers, March 9, 1983, unreported,

....the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with the law and with integrity and honesty.

THE EVIDENCE:

REGISTRAR'S CASE

The first witness for the Registrar was Detective Donald Wilson, 32 Division, Toronto Police Services. Detective Wilson has been a police officer for over thirty years and a detective since 1980.

Detective Wilson testified that he conducted the investigation relating to the charges pending against the Applicant (Exhibit 4, Tab 7). Detective Wilson is the officer in charge of the investigation and did personally interview the Applicant.

On December 28, 1999 at approximately 1:00 p.m., a 911 call was received by Emergency Services from Nadia Mabsoud, age 36 years ("Ms. Mabsoud"). Ms. Mabsoud reported that her one year old daughter had been abducted at gunpoint by the Applicant.

Detective Wilson arrived at the Applicant's place of business, A.R. Auto Wholesale Network, 1100 Finch Ave. West, Unit 201B, Toronto. He was informed by Ms. Mabsoud that she and her daughter had attended at A.R. Auto Wholesale Network ("A.R. Auto") earlier that day. She also informed Detective Wilson that the Applicant was her ex-common law spouse. Upon informing the Applicant that she intended to use his family name to register the child, the Applicant became enraged, threatened the complainant and told her to leave. When the complainant refused to leave, the Applicant opened a desk drawer, removed a towel and revealed a gun. Ms. Mabsoud, fearing for her safety, fled the premises leaving her child with the Applicant.

Detective Wilson stated that when the police entered the premises at A.R. Auto, the Applicant was not there. A search of the premises revealed a loaded Smith and Wesson 22 calibre handgun in the drawer of a desk located in one of three offices. There were no fingerprints on the gun and the serial numbers had been obliterated. Subsequently, tests conducted at the Centre of Forensic Sciences found the gun to be in working order.

Detective Wilson testified that the Applicant and child were located by the police at the Applicant's residential address, 58 Nipigon Avenue, Toronto. According to Detective Wilson, the Applicant came out of the house and surrendered to police without incident.

Detective Wilson reviewed the various counts in the certified Information sworn December 28, 1999 (Exhibit 4, Tab 7):

Count 3 alleges that the Applicant did have in his possession a Smith and Wesson 22 calibre revolver "knowing that the serial number thereon had been defaced contrary to the Criminal Code."

Count 4 alleges that the Applicant "did have in his possession a firearm to wit a Smith and Wesson 22 calibre revolver while he was prohibited from doing so by reason of an order made pursuant to section 100(1) of the Criminal Code." Following a 1995 conviction for assault, an order was made prohibiting the Applicant from possessing firearms or ammunition for ten years.

Count 5 alleges that the Applicant "was not the holder of an authorization or licence under which he may possess a firearm."

Count 6 alleges that the Applicant stored the firearm in a "careless manner without reasonable precaution for the safety of other persons."

In cross-examination, Detective Wilson agreed that forensic tests confirmed that the gun was never fired. Further, while one serial number had been removed, a second serial number was found underneath the grip frame of the gun. Using this serial number police were able to confirm that the gun had not been used in a Criminal Code offence nor was the gun traceable to the Applicant.

Detective Wilson also agreed that the premises at A.R. Auto consist of a large indoor garage and three cubicle offices. Each office has windows and a door with a window. The gun was found by police in a drawer, in a desk in one of the three offices. The door to the office was unlocked and the desk and drawer were unlocked.

A search of the Applicant's home at 50 Nipigon Avenue revealed no articles or material relating to the storage, cleaning or maintenance of a gun. Similarly, a search of the Applicant's car and the premise at A.R. Auto revealed no evidence of a gun or materials relating to a gun.

Detective Wilson testified that he interviewed the Applicant after his arrest. The Applicant stated that on December 28, 1999 Ms. Mabsoud and her child showed up at A.R. Auto. Ms. Mabsoud was demanding money and he refused to pay. Ms. Mabsoud made a threat against the Applicant, then left the premises leaving the child with the Applicant. The Applicant did not know what to do with the child so he called the Childrens Aid Society. The Applicant denied any involvement or knowledge of the Smith and Wesson 22 calibre revolver.

Detective Wislon also testified that one witness, Shaham Laghai, was present when Ms. Mabsoud arrived at A.R. Auto. He apparently observed her carrying the child and a bag or briefcase. She was asked to wait for the Applicant in one of the three offices. She was alone with the child in the office for a period of time. Mr. Laghai reported that he overheard the Applicant and Ms. Mabsoud arguing about financial matters. He then saw Ms. Mabsoud leave the office without the child. According to witnesses/employees, this particular office is a common office area used by the three or four employees at A.R. Auto for eating or faxing. It is not the Applicant's personal office. It should be noted that Mr. Laghai and the other witnesses interviewed are all employees of the Applicant.

All of the employees denied seeing a gun or having any prior knowledge of a gun in the desk drawer. Further, none of the witnesses saw Ms. Mabsoud enter the office carrying a gun.

The second witness for the Registrar was Mary Jane South, Deputy Registrar of OMVIC since January, 1997. Ms. South is responsible for overseeing OMVIC's registration program and the licensing of dealers and salespeople.

According to OMVIC's records, the Applicant has been registered as a motor vehicle dealer since November 24, 1989 (Exhibit 4, Tab 3).

On October 5, 2000 OMVIC received an application from the Applicant for renewal of his dealer's registration. At question 1 a) of the application, the Applicant responded "yes" to the question "Are there charges pending or has the applicant been found guilty or convicted under any law?" A copy of a letter to the Applicant from his lawyer, Leo Adler, was provided to OMVIC. This letter states in part (Exhibit 4, Tab 5):

"With respect to the question about whether there are any charges pending, this letter will confirm that there are charges pending but that you have not been found guilty or have been convicted under any law

The charges are as follows: assault with weapon, use of firearm, possess firearm serial number altered, possession of firearm while prohibited, possession of a restricted firearm with ammunition and firearm careless storage.

This letter will also confirm that you have instructed me that you are pleading not guilty and that these allegations arise out of an incident involving your former wife who made these allegations."

By letter dated October 30, 2000 the Ontario Provincial Police wrote to OMVIC to provide the results of a CPIC data bank search using the Applicant's name and date of birth:

Jul 22 93 Brampton	Aid & Abet sec 94(1) (M) Immigration Act	Fined \$500
Apr 27 95 Toronto	Assault sec 266 CC (2 chgs)	30 days plus probation For 3 yrs proh Possessing Firearms Ammun or Explosive Substance for 10 yrs

The pending charges as described above are also listed on the CPIC data bank report.

On March 16, 1994 the Applicant submitted an application for renewal of his dealer's registration (Exhibit 4, Tab 12). In response to the question "Has the applicant ever been found guilty or convicted of an offence under any law or are any charges now pending?", the Applicant answered "no". It is the position of the Registrar that the Applicant misled the Registrar by failing to disclose the 1993 Immigration Act conviction.

On August 2, 1996 the Applicant submitted an application for renewal of his dealer's registration (Exhibit 4, Tab 11) on which he did disclose the 1995 assault conviction, but not the Immigration Act conviction.

On September 30, 1988, the Applicant applied for renewal of his dealer's registration (Exhibit 4, Tab 10). In response to the question "Are there any charges pending or has the Applicant been found guilty or convicted under any law?", the Applicant answered "no". It is the Registrar's position that the Applicant again attempted to mislead the Registrar by failing to disclose the 1993 Immigration Act conviction and the 1995 assault conviction.

In cross-examination, Ms. South stated that upon receipt of the 1994 application (Exhibit 4, Tab 12), no attempts were made by OMVIC to contact police to determine if the Applicant had a criminal record. Ms. South stated that in 1994, CPIC data bank searches were not done with respect to renewal applications unless the Applicant made disclosure.

With respect to the 1996 renewal application (Exhibit 4, Tab 11), Ms. South stated that a CPIC search was requested and conducted, however she is unable to state whether the CPIC search listed the 1993 Immigration Act conviction. According to Ms. South, CPIC information received by OMVIC must be destroyed immediately and therefore no CPIC records are kept by OMVIC. She agreed that it is impossible to know when the 1993 Immigration Act conviction first appeared on the CPIC data bank. The only evidence before the Tribunal is that this information did appear on the CPIC search done in 2000.

APPLICANT'S CASE

The Applicant gave evidence on his own behalf and did not call any other witnesses. He testified that he was born on September 11, 1955 in Iran and immigrated to Toronto in May, 1993. He is a Canadian citizen. The Applicant is divorced with two children ages fifteen and twelve. He is the owner/operator of A.R. Auto Wholesale Network located at 1100 Finch Ave. W., Unit 210, Toronto.

The Applicant stated that he has never owned or possessed a gun, nor has he ever kept a gun at his place of business. He denies ever showing Ms. Mabsoud a gun or pointing a gun at her on December 28, 1999.

With respect to the 1993 *Immigration Act* conviction, the Applicant concedes that he did not disclose this conviction to OMVIC. According to the Applicant, the circumstances giving rise to this offence occurred when he was returning to Canada from a vacation on a flight from Turkey. His ex-wife's sister was on the flight with him. When his sister-in-law was questioned by a Canadian Immigration official, she indicated that she was travelling with the Applicant. The Applicant told the Immigration officials that he was travelling alone when he was, infact, accompanying his sister-in-law.

The Applicant stated that he sought legal advice with respect to the *Immigration Act* offence from a para-legal. He stated that he asked the para-legal if an *Immigration Act* conviction would result in a criminal record, and if so, he wished to plead not guilty. According to the Applicant, the advice that he received was that the Applicant would not be convicted in a criminal court. Counsel for the Applicant has advised the Tribunal that attempts to locate the para-legal have been unsuccessful.

The Applicant stated that it was his understanding that he was only required to disclose Criminal Code charges or convictions on the renewal applications to OMVIC. Consequently, as he did not believe that the Immigration Act conviction was a criminal conviction, he did not disclose it.

In cross-examination, the Applicant conceded that he was convicted under the Immigration Act for misleading an Immigration official. He also conceded that his sister-in-law was a citizen of Iran, who was attempting to gain entry into Canada illegally by using his wife's passport. Exhibit 4, Tab 9 indicates that the Applicant was prosecuted summarily, did plead guilty and was fined \$500.

The Applicant was cross-examined closely on his failure to fully disclose his criminal record to OMVIC and on the wording of the question in the 1994 application (Exhibit 4, Tab 12). Specifically, the Applicant was asked why he did not disclose the *Immigration Act* conviction when the question states:

“Has the applicant ever been found guilty or convicted of an offence under any law or are any charges pending?”

The Applicant reiterated that it was his understanding and belief that he was only required to disclose Criminal Code charges and convictions.

With respect to the 1996 application and disclosure of the assault conviction, the Applicant stated that the facts giving rise to this conviction relate to a domestic dispute. According to the Applicant, he was invited to his ex-wife's home. Upon arrival at the door, he saw his brother in the house. He stated that he became very angry and he and his brother started to fight. The Applicant's ex-wife also became involved in a physical altercation with the Applicant. The police were called and the Applicant was charged with two counts of assault.

The Applicant was also questioned about his failure to disclose his criminal record on the September 30, 1998 application for renewal to OMVIC. He stated that he did not disclose the 1995 assault conviction because he had already provided this information to OMVIC in 1996. The Tribunal accepts this explanation and finds that there is insufficient evidence to conclude that the Applicant was attempting to mislead the Registrar with respect to the 1998 application.

On cross-examination, about the events of December 28, 1999, the Applicant stated that he was sitting in the north office at A.R. Auto Wholesale Network with a mechanic and one of his friends when he saw Ms. Mabsoud enter the building carrying a child and some bags. The Applicant confirmed that he is the father of this child. The Applicant asked Ms. Mabsoud to wait in the office until he finished his business meeting. Approximately ten or fifteen minutes passed, then the Applicant returned to the office to speak to Ms. Mabsoud. No one else was in the room. It is the Applicant's evidence that Ms. Mabsoud was demanding more child support. The Applicant stated that at that time, he was making voluntary payments to Ms. Mabsoud of \$300 per month for the support of the child. She was demanding \$600 per month.

The Applicant testified that he told Ms. Mabsoud that he could not afford to pay more money. He also told her that if she could not support the child, then she should think about putting the child into foster care. Ms. Mabsoud then left the office, leaving the child with the Applicant. The Applicant maintains that at no time was a gun involved or mentioned in his conversation with Ms. Mabsoud.

It is the Applicant's theory that Ms. Mabsoud planted the Smith and Wesson 22 calibre revolver in the unlocked desk drawer while she was alone in the office. The Applicant asserts that Ms. Mabsoud knew that he was prohibited from owning or possessing a gun and that she wanted to get revenge against him. It was not clear to the Tribunal why Ms. Mabsoud would wish to have the Applicant arrested for assault and possession of a gun. According to the Applicant's own evidence, Ms. Mabsoud came to A.R. Auto that day seeking more child support. It would not be in her best interests to have the Applicant arrested and jailed, without an ability to earn income or pay child support. However, the Applicant did testify that Ms. Mabsoud has since waived child support payments and the Applicant has not made any payments to her for several months.

The Applicant's counsel advised that the criminal trial on the pending charges is scheduled to take place in the spring, 2002.

APPLICATION OF LAW TO THE FACTS:

The Registrar bases her refusal on two grounds: first, the non disclosure by the Applicant on two separate applications to OMVIC and second, the pending charges and the circumstances surrounding those charges which the Registrar says goes straight to the issue of the Applicant's ability to carry on business in accordance with the law and with integrity and honesty.

The Tribunal is not satisfied that the Applicant intentionally mislead the Registrar by failing to disclose the 1993 Immigration Act offence. The Applicant testified that he understood that he was only required to disclose criminal offences. He further stated that based on the advice

given to him by a para-legal in 1993, the Immigration Act offence was not a criminal offence. Given the Applicant's rudimentary command of the English language, which was demonstrated during his evidence, the Tribunal accepts that he did not fully understand his disclosure obligations.

The question posed in the 1994 application (which is similar to the question posed in the other applications) states:

“Has the applicant ever been found guilty or convicted of an offence under any law or are any charges now pending?”

The words ‘guilty’ and ‘convicted’ suggest offences or charges of a criminal nature. It follows that OMVIC routinely requests a CPIC check on each applicant to determine if he or she has a criminal record. OMVIC did obtain CPIC checks with respect to the 1996 and 1998 applications however no issue was raised by the Registrar concerning the Immigration Act offence until 2000. It must be concluded that the CPIC checks performed in 1996 and 1998 did not list the *Immigration Act* offence as part of the Applicant's criminal record. This characterization of the *Immigration Act* offence would tend to support the Applicant's belief that the 1993 conviction did not form part of his criminal record. In other words, the Applicant's failure to disclose this information was based on his understanding that the offence was of a non-criminal nature as opposed to any attempt to mislead OMVIC.

The Registrar also alleges that the Applicant failed to list his 1995 assault conviction on his 1998 application. The Applicant testified that he did not disclose the 1995 assault conviction because he had already provided this information to OMVIC in 1996. As previously stated, the Tribunal accepts this explanation and finds that there is insufficient evidence to conclude that the Applicant was attempting to intentionally mislead the Registrar.

The second ground relates to the gun possession charges. Section 5(1)(b) of the Act mandates that an Applicant's integrity and honesty can only be assessed in light of ‘past conduct’. At the time of this hearing, the Applicant faces criminal charges based on allegations or facts that remain unproven. The Applicant has pleaded not guilty to these charges. It is not for this Tribunal to try the Applicant on the criminal charges. Mere allegations, no matter how serious, do not constitute facts upon which this Tribunal may assess past conduct.

The Registrar submits that it is appropriate for the Tribunal to consider the circumstances that give rise to the criminal charges, even when those charges are ultimately withdrawn at trial or the conviction is under appeal. In *John D. Coward* (1989) 18 CRAT 418, the issue was whether the hearing should proceed and not be delayed pending termination of the Applicant's appeal against conviction and the Crown's appeal as to sentencing. The Tribunal stated at page 422:

“It should also be noted that even in the event that Mr. Coward should succeed in his appeal, the facts that give rise to the initial conviction, might still be such that they did not demonstrate honesty and integrity as contemplated by the *Motor Vehicle Dealers Act*.”

The reasoning of the Tribunal in Coward is based on the fact that the evidentiary burden on charges under the Criminal Code is beyond a reasonable doubt which is a higher threshold to meet than the test before this Tribunal which is on the balance of probabilities. Moreover the facts giving rise to the conviction in the Coward case had been tested and proven at trial.

In the present case, there is a very real dispute between the Applicant and Ms. Mabsoud as to what transpired in the office on December 28, 1999. The only relevant issue is whether the Applicant possessed a gun and threatened Ms. Mabsoud. The evidence indicates that there were no fingerprints on the gun and there was no independent evidence connecting the Applicant to the gun other than it was found in a desk drawer at the premises of A.R. Auto. In order to make a proper determination of this issue, the trier of fact will need to assess the credibility of both Ms. Mabsoud and the Applicant. This task is for the criminal court and not this Tribunal.

The standard of proof is as summarized by the Divisional Court in *Coates v Ontario (Registrar of Motor Vehicle Dealers)* (1988), 65 OR (2d) 526 at p. 536:

“Nothing short of clear and convincing proof based upon cogent evidence will justify an administrative tribunal in revoking a licence to practice medicine or to gain a livelihood in business.”

It is the Tribunal's view that the Notice of Proposal to revoke the registration of the Applicant is premature pending the disposition of the gun possession charges. At the time of this hearing there is insufficient evidence to support the Registrar's conclusion that the Applicant's past conduct affords reasonable grounds for the belief that he will not carry on business in accordance with law and with integrity and honesty.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Act, the Tribunal directs the Registrar to refrain from carrying out the Notice of Proposal dated December 28, 2000 to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill, Vice-Chair

Released: November 16, 2001

GIBB

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SEAN ROBERT GIBB

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SEAN ROBERT GIBB

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Sean Robert Gibb, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 19, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
North York, ON, M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON, M4V 1K6

FROM: Sean Gibb
506-16 Cedarwoods Crescent
Kitchener, ON
N2C 2L4

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Sean Gibb (hereinafter referred to as "the Applicant"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to their registrations as a motor vehicle salesperson:

- 1) The Applicant agrees that if he is criminally charged or convicted in the future, he will immediately notify his employer in writing of the charges or convictions against him and provide a copy of the notification signed by his employer to the Registrar, giving the particulars of the charges or convictions.
- 2) The Applicant agrees that if he is convicted under the Criminal Code or convicted of any industry specific offences under any Statute in the future, he will be automatically revoked.
- 3) The Applicant agrees to provide full disclosure on all future applications.
- 4) The Applicant acknowledges that the Registrar is relying upon the accuracy of the disclosure provided in entering into these terms and conditions.
- 5) The Applicant agrees that he will provide written notification from his employer forthwith, stating that the Applicant has disclosed to them the circumstances of his pending charges.
- 6) The Applicant agrees that his explanation of the circumstances of his convictions, are substantially as set out in the disclosure provided to the Registrar.
- 7) The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a dealership.
- 8) The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
- 9) The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 10) The Applicant agrees not to be involved in the process of buying or selling motor vehicles without the benefit of registration.

Sean Gibb (initials)

- 11) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).
- 12) The Applicant agrees that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 13) The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 14) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
- 15) The Applicant will provide a copy of this order to his employer forthwith.
- 16) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- 17) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- 18) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2001.

(Signature) Sean Gibb

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar
Motor Vehicle Dealers Act

LILLINA FAMILY CONSTRUCTION LTD.

LILLINA FAMILY CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL:

TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

No one appearing for the Applicant,
CAROL STREET, Counsel representing the Registrar, Ontario New
Home Warranty Program, Respondent

DATE OF
HEARING:

November 13, 2001

Toronto

ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated May 29, 2001, (the "Proposal"), issued by the Registrar of the Ontario New Home Warranty Program (the "Registrar"), to refuse to renew the registration of Lillina Family Construction Ltd. (the "Applicant"), as a vendor or a builder under the provisions of Section 8(2) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990. Ch. 0.31 (the "Act").

The Applicant by a notice dated June 22, 2001, (the "Appeal") requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 9(2) and 9(4) of the Act.

DECISION AND ORDER:

At the hearing, Counsel for the Respondent stated that as a result of recent discussions between the Parties, a settlement of the issues had been reached and Minutes of Settlement had been executed. Counsel further stated that with the consent of Counsel acting on behalf of

the Applicant, she was authorized to speak to the settlement of the matter exclusively on behalf of both Parties and file with the Tribunal a copy of the Minutes of Settlement. It was proposed that no evidence would be produced or testimony given at the hearing save for the filing of the Minutes of Settlement.

Subsequent to hearing from Counsel and reviewing the Minutes of Settlement in light of the remarks made by Counsel, the Tribunal marked the Proposal, the Appeal and the Minutes of Settlement as exhibits and gave an oral decision subject to the release of this written order.

Accordingly, this Tribunal, pursuant to the authority vested in it by section 9(4) of the Act:

1. Directs the Applicant to pay on or before the close of business on December 14, 2001, the sum of \$10,380.75, together with the 7% Goods and Services Tax thereon in the amount of \$726.65 to the Ontario New Home Warranty Program in full settlement of the amounts claimed by the Registrar in the Proposal; provided that in default of payment by the Applicant as aforesaid, the Registrar shall carry out the Proposal to refuse the renewal of the registration of the Applicant as a vendor/builder under the Act effective as at the close of business on December 14, 2001;
2. Directs the Registrar to refrain from carrying out the Proposal in the event that the Applicant makes payment of the full sum of \$11,107.40 as hereinbefore provided and shall thereupon renew the registration of the Applicant as a vendor/builder under the Act for the period ending at the close of business on Tuesday, February 5, 2002; provided that upon payment as aforesaid, the Proposal shall be null and void ab initio; and
3. The Applicant may apply for a further renewal of its registration as a vendor/builder under the Act in the normal course without prejudice from or reference to the reasons stated in the Proposal.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

Released: November 19, 2001

SINGH, GURNEK O/A SARWAN AUTO SALES

GURNEK SINGH O/A SARWAN AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE THE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ARIF RAZA, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF HEARING: September 24, 2001 and November 15, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Gurnek Singh ("Singh") operating as Sarwan Auto Sales from a Notice of Proposal (the "Proposal") dated January 23, 2001 issued by the Registrar to revoke the registration of Singh as a motor vehicle dealer, under the *Motor Vehicle Dealers Act* (the "Act");

The proposal was issued in terms of Section 7(1) of the Act, which reads as follows:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

The reasons given by the Registrar in his Notice of Proposal are stated as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrant be financially responsible in the conduct of business and that Registrant carry on business in accordance with the law and with integrity and honesty. The Registrant's conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

The Proposal sets out the following Particulars upon which the Registrar bases his proposal to revoke Singh's registration as a motor vehicle dealer:

- 1) Singh Gurnek o/a Sarwan Auto Sales (hereinafter referred to as the "Registrant") is a sole proprietorship, which was registered as a motor vehicle dealer on or about March 10, 1994.
- 2) On the January 18, 1994 application to become a registered dealer question 10 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instance where an absolute discharge has been ordered"
The Registrant said "no".
- 3) By letter dated February 22, 1994 the Registrar was informed by the Registrant's lawyer that the Registrant had two charges pending: Assault with a weapon; and attempted obstruction of Justice.
- 4) On the June 18, 1996 application, to become a registered dealer question 10 asks:

"Have you ever been found guilty or convicted of an offence under any law or are any charges pending? (This includes those instances where an absolute discharge has been ordered)".
The Registrant said "no".
- 5) On the renewal application dated April 25, 1998, question 1(a) in section A asks:

"Are there any charges pending or has the applicant been found guilty or convicted under any act?"

The Registrant said "no".
- 6) A criminal record search found that the Applicant has the following convictions:
 - a. Conspiracy to commit indictable offence fraud, January 13, 1997
 - b. Fraud over \$5,000.00, January 13, 1997
- 7) The Registrant failed to make full disclosure on applications for registration submitted to the Registrar.

THE EVIDENCE FOR THE REGISTRAR:

The evidence presented by the Registrar at the hearing upon which the Registrar relies in support of his proposal are dealt with hereunder.

Evidence of George Scerbovic

George Scerbovic ("Scerbovic") testified that he is a constable with the Oxford Community Police. Prior to being with the Oxford Community Police he was with the Peel Regional Police.

Scerbovic stated that he was the Officer in charge of a criminal investigation involving Singh and he was assisted in this investigation by another officer. Following upon Scerbovic's investigation, Singh was indicted on 21 counts under the Criminal Code of Canada. When the matter came before the Provincial Court, Brampton, Ontario on January 12, 1998 Singh plead guilty to 2 of the 21 counts, namely counts 9 and 17.

Count 9 of the indictment to which Singh plead guilty alleged that he had "by deceit, falsehood or other fraudulent means" defrauded Progressive Casualty Insurance Company of a sum exceeding \$5,000.00 contrary to section 380(1)(a) of the Criminal Code of Canada.

Count 17 of the indictment to which Singh also plead guilty alleged that he had unlawfully conspired and agreed with other unindicted co-conspirators and with a person or persons unknown, to commit the indictable offence of fraud, contrary to section 465(1)(c) of the Criminal Code of Canada.

Singh was fined the sum of \$7,500.00 on each of the two counts to which he plead guilty. Singh has paid these fines.

Scerbovic testified further that his investigation revealed that Singh purchased motor vehicles at automobile auctions. The vehicles purchased by Singh at the auctions were insurance "write offs", having suffered damages. After purchase at the auctions, the vehicles were taken to Singh's auto body shop in Brampton which he operated under the name of Brampton Auto Collision Centre and were repaired to meet "the minimum standard to put them on the road". After such repairs had been carried out, the vehicles were sold by Singh through his motor vehicle dealership to various friends of Singh. Within a short time after sale, the vehicles were involved in "staged accidents". Scerbovic explained to the Tribunal that a "staged accident" is one in which both parties involved in the accident knew in advance that an accident would occur. Pursuant to the "staged accidents" the vehicles involved would be taken to Brampton Auto Collision Centre for repair, and the persons involved in the accidents then claimed compensation for "soft issue" damage. After the various motor vehicles were taken to Brampton Auto Collision Centre "the damages were increased". The increased damages were inconsistent with the police reports taken pursuant to the "staged accidents". Insurance claims were then made for the repair costs not only for the damage incurred on the "staged accidents" but also for the damages subsequently sustained by the vehicles after they were taken to Brampton Auto Collision Centre.

Furthermore, the investigation by Scerbovic revealed that Singh himself had claimed compensation from an insurance company when Singh was not present at the motor accident.

Scerbovic further stated in his evidence in chief that the police investigation arose following a report to the police by Singh's sister-in-law that her motor vehicle insurance premiums had increased markedly following an accident involving her motor vehicle. On querying the increase with the insurance company, she was told that the reason was due to her having filed 5 separate accident claims with the company pursuant to which the company had paid such claims to Brampton Auto Collision Centre. Singh's sister-in-law denied making 5 separate claims to her insurance company.

Scerbovic concluded his evidence by stating that Singh appeared to be the leader of the activities which resulted in criminal charges being laid against him and other co-accused and that the police had limited their investigation to 15 accidents as further accident investigations would have proved too intensive to undertake. However, the total value of claims made to insurance companies have thus far totalled \$250,000.00 with 3 investigations still ongoing.

In cross-examination by Singh's counsel, Scerbovic stated that his investigations revealed that in regard to count 17 to which Singh plead guilty, Brampton Auto Collision Centre received \$5,000.00 in repair costs after it had submitted such a claim to the insurer of the motor vehicle.

Additionally, the parties who claimed personal injuries arising from the "staged accidents" were paid \$55,000.00 by the insurance company. The parties who claimed damages for personal injuries were not present at the time of the actual collision.

Evidence of Laura Gordon

Laura Gordon ("Gordon") testified that she is the Director of Compliance with the Ontario Motor Vehicle Industry Council ("OMVIC") which is a non-profit corporation entrusted with the administration of the Act including ensuring compliance with the terms of the Act and its regulations.

Gordon reviewed the Proposal and confirmed that a written application for registration as a motor vehicle dealer dated January 10, 1994, had been received from Singh. (Exhibit 4, Tab 4)

She referred to paragraph 10 of that application which reads as follows:

Has the applicant ever been found guilty or convicted of an offence under any law or are any charges now pending? This includes where a conditional discharge or an absolute discharge has been ordered. If you, attach full particulars on a separate signed and dated statement. Note: Where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed.

This question was answered with "No".

Subsequent to receipt of this application, a police background check of Singh was initiated, which disclosed pending criminal charges against him. Following this disclosure, a letter was addressed to Singh requesting an explanation regarding the criminal charges. In answer Singh replied by letter dated February 22, 1994 through his solicitor. (Exhibit 4, Tab 5)

Singh's solicitor's letter indicated that Singh was awaiting trial on charges of Assault with a Weapon and Attempt Obstruct Justice that arose out of a December 1992 incident and to which charges Singh professed his innocence and his intention to contest both charges. Gordon made particular reference to the following portion of the letter:

It is clear that these charges were outstanding against Mr. Singh when he filled out the forms in connection with his application for an Automobile Dealership Licence. It is also clear that his answer to question 10 of the form, which dealt with prior convictions, findings of guilt and outstanding charges, was incorrect. I have spoken with Mr. Singh about this matter at some length and I have also spoken with one, Roger Kanda, his cousin, who is a university student who apparently assisted Mr. Singh in originally filling out these forms.

Mr. Singh thought the question referred to only prior convictions or at least to situations where he had been to Court and been found guilty. He said that was the way the question was put to him by Mr. Kanda who was assisting him with the form due to Mr. Singh's problems with the English language. In my conversation with Mr. Kanda this was confirmed. He states that when he read the question to Mr. Singh, he put it to him as to whether he had been previously convicted or found guilty of any offence. He says he overlooked or at least did not realize that the question went on to deal with the matter of pending charges.

Singh was registered as a motor vehicle dealer pursuant to his January 10, 1994 application.

By written application dated March 7, 1996, Singh applied for renewal of his registration as a motor vehicle dealer. (Exhibit 4, Tab 6) In answer to question 10 therein, Singh again answered "No". The wording of question 10 in this written application was identical to the wording on Singh's 1994 application for registration (Exhibit 4, Tab 4)

At the hearing, Singh's counsel conceded that the signatures appearing on both the 1994 and 1996 applications are those of Singh.

Gordon further stated that although the written application of Singh was dated March 7, 1996, it was stamped as received in the Ministry of Consumer and Commercial Affairs offices on June 18, 1996.

By way of written application dated April 25, 1998 Singh once again applied for renewal of his registration and this application was received in OMVIC's offices on May 1, 1998. (Exhibit 4, Tab 7)

Question 1(a) of Section A to this renewal application reads as follows:

Are there any charges pending or has the applicant been found guilty or convicted under any law?

To this question the answer “No” has been indicated.

By way of written application, which is undated but stamped as having been received by OMVIC on May 29, 2000, Singh again applied for renewal of his registration and once again in answer to question 10 on that application form the answer “No” was marked. (Exhibit 4, Tab 8) Question 10 on this application is identical in its wording to the previous application of April 25, 1998 (Exhibit 4, Tab 7).

In concluding her testimony in chief, Gordon stated that full and honest disclosure in all applications is considered to be essential as the information sought is material and goes to the very root of an Applicant’s honesty and integrity. The convictions, such as those registered against Singh, as well as their non-disclosure reflect a lack of honesty and integrity and a failure to act in accordance with law. The repeated non-disclosures by Singh of his convictions in all his applications for registration reflect an ongoing course of conduct that is contrary to Section 5 of the Act.

Under cross-examination, Gordon stated that no consumer complaints have been registered against Singh in connection with his motor vehicle dealership. Her concern, however, was that in looking at Singh’s 1994 application, as well as his 1996, 1998 and 2000 applications, a pattern of non-disclosure is evident.

Evidence of Singh, Roger Singh and others

Singh’s testimony was given in the Urdu language and was translated into English by an Interpreter.

Singh stated that he attained grade 8 at school in India where the language of instruction was Punjabi. He left India in 1980 and went to Dubai and then to England where he resided from 1984 to 1989. While in England he went to school two days per week otherwise he trained in auto body repair work.

Singh testified that he is 41 years of age and married with two children. His wife works in his motor vehicle dealership business. He stated that he is the sole proprietor of the dealership which he has operated since 1994. He is also the principal of Brampton Auto Collision Centre.

Singh was shown the application for registration dated January 10, 1994 (Exhibit 4, Tab 4) and confirmed the signature that appeared thereon as his signature. However, he denied that the handwriting elsewhere on the five page application is in his handwriting and specifically denied having marked the "Xs" on page 2 and at the bottom of page 1 of the application.

As to the March 7, 1996 application (Exhibit 4, Tab 6), Singh admitted the signature at the foot of page 5 thereof is his signature but denied that any other handwriting on that document is his handwriting.

As to the April 25, 1998 application (Exhibit 4, Tab 7), Singh acknowledged that the signature that appears twice at the foot of that application, is his signature. However, he said that the handwriting that appears in the block at the top right of the application and the handwriting that appears in "Section B" of the application is not his handwriting. Further, the marks made in answer to the questions in "Section A" of the application were not made by him.

Singh further stated that in his application received by OMVIC on May 29, 2000 (Exhibit 4, Tab 8) the two signatures that appear on that application form are his signatures, but no other handwriting that appears on the form is his handwriting and the marks opposite the questions in "Section A" were not made by him.

In referring to his written application for registration dated January 10, 1994 (Exhibit 4, Tab 4), he stated that the application was completed in the handwriting of his cousin Roger Kanda. He does not remember who completed the written application form of March 7, 1996 (Exhibit 4, Tab 6) but does recollect that the application April 25, 1998 (Exhibit 4, Tab 7) and the application of May 1998 (Exhibit 4, Tab 8) were completed in the handwriting of Manjinder Singh. Manjinder Singh presently lives in New York City, and Singh stated he is not able to contact him.

Singh further stated that when he filed his application form on January 10, 1994 (Exhibit 4, Tab 4) he was then the subject of criminal charges but that he did not know he had to answer question 10 therein as Roger Kanda did not read the form to him.

Singh further stated that as at March 7, 1996 when he signed his application form he was not subject to any criminal charges and had not been convicted of criminal charges. He conceded that he did plead guilty to two criminal charges on January 12, 1998 (Exhibit 4, Tab 9) and was convicted and fined \$7,500.00 on each charge. He admitted he had committed fraud. Insofar as the April 25, 1998 application form is concerned (Exhibit 4, Tab 7), he stated that the handwriting thereon as well as the "ticks" to the answers in "Section A" of the form are not his. Furthermore, the questions posed in the application form were not put to him by Manjinder Singh, the person completing the form for him, nor was a translation of the questions given to him by Manjinder Singh.

Singh confirmed that his wife and one other employee work for him at his dealership (Sarwan Auto Sales). He testified that the motor vehicle's that he sells in the course of his business have been purchased by him as insurance write offs at auction sales. The vehicles purchased as write offs are then repaired at Brampton Auto Collision Centre.

Under cross-examination, Singh testified that besides his wife, he employs one other person in his motor vehicle dealership, who cleans cars and shows motor vehicles that are for sale when Singh himself is not present at the business.

Singh also testified that in advance of an auction he will view the motor vehicles that will be on auction and at the auction he receives a bill of sale. Bills of sale contain information as to the particular vehicles' identity number (VIN), its mileage, price and if it is "branded as salvage".

Singh was shown certain bills of sale by the Registrar's counsel. These bills of sale were marked Exhibits 6, 7 and 8.

Insofar as Exhibit 6 is concerned, Singh confirmed his signature appears on the bill of sale as vendor of the motor vehicle. In addition, he conceded that all other handwritten information that appears on the bill of sale was in his handwriting save and except the handwriting under the heading of "customer information" which contains the name of the insurance company, the insurance policy number and the driver's licence number of the purchaser.

Insofar as Exhibit 7 and 8 are concerned Singh confirmed that he signed as vendor on both bill of sales and that all the written insertions that appear on those bill of sales are in his handwriting.

Singh also confirmed in his testimony that he is the sole officer and Director of Brampton Auto Collision Centre.

Manmohan Roger Singh ("Roger Singh") who testified on behalf of Singh, stated that he is a second cousin of Singh and that in 1994 he was studying at McMaster University. When Singh commenced business he asked Roger Singh to assist in completing the January 1994 application form (Exhibit 4, Tab 4) as Singh's English was then very poor.

In referring to Exhibit 4, Tab 4, Roger Singh stated that what appears on the first page under paragraph 1 is in his handwriting, as is the handwriting on page 2 in paragraph 3 as well as the handwriting on page four and at the bottom of page 5. In addition, all "Xs" that appear on the form in answer to various questions were made by Roger Singh.

Gurnial Gill, Baldwin Singh Gill and Rajinder Kishan gave character evidence on behalf of Singh. Individually they stated that they had known Singh for some six to eight years and have had business dealings with him in his motor vehicle dealership. They all found Singh to be ethical and honest in his dealings with them.

FACTS FOUND PROVEN:

The following were the facts found to have been proven in this matter.

1. Singh was registered as a motor vehicle dealer on March 10, 1994.
2. In Singh's application form for registration as a motor vehicle dealer, which was signed by him and submitted to the Registrar on January 18, 1994, he denied that any charges were then pending against him.
3. There were in fact two charges pending against Singh when he signed and submitted the January 18, 1994 application from to the Registrar.
4. On January 13, 1997 Singh plead guilty to two criminal charges, was found guilty and convicted on those two charges and was fined \$7,500.00 on each charge.
5. The two charges to which Singh plead guilty and was convicted and fined were:
 - (a) On or about the 16 day of June in the year 1995, at the City of Brampton in the said region, unlawfully did, by deceit, falsehood or other fraudulent means defraud Progressive Casualty Insurance Company of a sum of money exceeding five thousand dollars contrary to section 380(1)(a) of the Criminal Code of Canada;
 - (b) On or about the 23 day of July in the year 1994, at the City of Brampton in the said region, and elsewhere in the province of Ontario, did unlawfully conspire and agree together one with the other, with the following unindicted co-conspirators:
 - 1) Majinder SINGH;
 - 2) Randhi AUJLA;
 - 3) Harjinder AUJLA;And with a person or persons unknown, to commit the indictable offense of fraud, contrary to section 465(1)(c) of the Criminal Code of Canada;
6. On April 25, 1998 Singh signed and submitted to the Registrar a written application for renewal of his registration as a motor vehicle dealer. In that renewal application, in answer to question 1(a) which asked whether Singh had been found guilty or convicted under any law, the answer given was "no".
7. On or about May 29, 2000 the Registrar received a renewal application from Singh under his signature. In that renewal application, in answer to whether Singh had been found guilty or convicted under any law, the answer given was "no".

8. Singh completed in his own handwriting the Bills of Sale between Sarwan Auto Sales and Boughan, Li and Kaur (Exhibits 6, 7 and 8).

THE LAW:

The Act's relevant portions are:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

DECISION AND REASONS:

The onus of proof falls upon the Registrar to show that the past conduct of Singh affords the Registrar reasonable grounds for belief that Singh will not carry on business in accordance with law and with integrity and honesty.

The Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of Singh afforded reasonable grounds for belief that Singh will not carry on business in accordance with law and with integrity and honesty. This was clearly indicated in the case of *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No. 1017, April 7, 1983. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of Singh does not afford reasonable grounds for belief that Singh will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusion based upon the evidence, are set out hereunder.

FAILURE TO DISCLOSE

The evidence discloses that Singh in his 1994 application for registration as a motor vehicle dealer did not disclose that there were two criminal charges pending against him. Singh admitted through his then solicitor that he failed to disclose the pending charges against him and claimed to have a poor understanding of English which resulted in him misunderstanding the question in the application. The question in the application was "Have you ever been found guilty or convicted of any offence under any law or are there any charges pending?" The answer given was "no". The Registrar appears to have given Singh the benefit of the doubt as to whether the non-disclosure was deliberate or an innocent oversight and proceeded to register Singh.

However, the Tribunal notes that when Singh's solicitor interceded on his behalf when the Registrar initially queried the non-disclosure in the 1994 application, Singh's solicitor stated in his letter to the Registrar that "I have spoken to Mr. Singh about this matter at some length" and went on to state that "Mr. Singh thought the questions referred to only prior convictions or at least to situations where he had been to Court and been found guilty" (Exhibit 4, Tab 5). As far back as 1994, Singh therefore conceded that he knew he had to disclose "prior convictions" or where he had "been found guilty".

Despite Singh having stated to his solicitor that he knew of the requirement to disclose previous convictions, he did not when signing his 1998 and 2000 renewal applications disclose the two convictions registered against him in January 13, 1997.

The Tribunal places no credence regarding Singh's statements that when signing the 1998 and 2000 renewal applications, the relevant questions regarding prior convictions were not read to him or explained to him by the person or persons then filing in the details on the application forms. The Tribunal believes that Singh, well aware of the two 1997 convictions coupled with his previous experience knew he had the obligation to disclose previous convictions but deliberately withheld that information from the Registrar as he feared that the consequences of disclosing the convictions would result in a refusal of his application for registration.

From having observed him during the hearing, Singh's grasp of English, while by no means perfect, is sufficient to understand the questions posed in the various application forms. The Tribunal is lead to this belief having regard to the admission by Singh that he completed in his own handwriting, the three bills of sale in the transactions with purchasers Bougham, Li and Kaur. (Exhibits 6, 7 and 8). All three bills of sale bear the signature of Singh as salesperson and as the "official" who acted on behalf of the Vendor.

The Tribunal is of the opinion that the actions of Singh in failing to disclose his 1997 convictions in his 1998 and 2000 applications were no innocent oversight or due to a lack of proficiency in English but were deliberate acts undertaken with the intent to withhold material and relevant information from the Registrar.

As was stated in Cooke (1999) O.C.R.A.T.D. No. 4 released on January 13, 1999;

The question asked of the Applicant in both applications is highly relevant and of great importance to the Registrar in his consideration as to whether or not an applicant is a worthy candidate for registration. The Applicant when signing both applications certified that the information provided in support of those applications was to the best of his knowledge and belief true. The Registrar's faith in and belief in the integrity and honesty of the Applicant must understandably be destroyed when such Applicant not only once, but on a second occasion conceals relevant information specifically requested of him in the application for registration.

The Tribunal is of the opinion that the twice repeated dishonest answers to the questions, being #10 in both applications, afforded the Registrar with reasonable grounds for his belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

CONVICTIONS

Singh plead guilty to and was convicted on two charges, one under section 380(1)(a) of the Criminal Code of Canada and the other under section 465(1)(c) of that Code. Both convictions were the result of guilty pleas by Singh to two serious criminal charges of an economic nature that were industry related.

The first charge of fraud under section 380(1)(a) of the Code and his plea of guilt and consequent conviction are evidence of deceit, falsehood or fraud. The large fine imposed on Singh speaks to the serious nature of the economic crime committed by Singh.

The second charge of conspiracy to commit a crime under section 465(1)(c) of the Code and Singh's plea of guilty and consequent conviction together with Constable Scerbovic's evidence that Singh was the leader of the conspiracy itself and the nature of the conspiracy leads the Tribunal to the conclusion that he not only planned criminal acts but caused such acts to be carried out.

Both convictions are recent in time and indicate a lack of honesty and integrity on Singh's part. The failure to disclose the 1997 convictions in both the 1998 and 2000 applications for renewal, particularly when Singh was aware of the obligation to disclose such convictions as was so clearly stated in his solicitor's letter of February 22, 1994, are reflective of his repeated disregard of the necessity to be honest and ethical.

Both the convictions and the repeated non-disclosure of such convictions, affords the Registrar reasonable grounds for his belief that Singh will not carry on business in accordance with the law and with integrity and honesty as required by section 5(1)(b) of the Act. The evidence of the three character witnesses was general in nature and in balancing their evidence against the facts presented in this matter, the Tribunal is not persuaded that the Registrar was wrong in his conclusion respecting Singh being a registered as a motor vehicle dealer.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal dated January 23, 2001 to revoke the registration of Gurnek Singh o/a Sarwan Auto Sales.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: November 19, 2001

KALSATOS

ALEXIOS KALSATOS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair
ANTOINE AOUAD, M.D., Member

APPEARANCES:

ALEXIOS KALSATOS, the Applicant representing himself
A. MICHAEL ROTHE, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: November 1, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated June 12, 2001 proposed to refuse the registration of Alexios Kalsatos (the "Applicant"), as a motor vehicle salesperson under the provisions of the Act. The Applicant appealed the proposal to refuse registration to the Licence Appeal Tribunal by Notice of Appeal dated June 26, 2001.

ISSUE:

The Registrar's Notice of Proposal to refuse registration stated that the Applicant's past conduct was inconsistent with the intention and objective of the Act, and therefore warranted disentitlement to registration under the Act. The requirements of the Act included that

registrants be financially responsible in the conduct of their business and that they carry on business in accordance with the law and with integrity and honesty.

The issue in this proceeding is whether the Registrar had sufficient grounds to support the belief that the Applicant would not be financially responsible or carry on business in accordance with the law and with integrity and honesty.

THE LAW:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

6. (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

EVIDENCE:

The evidence of the Registrar was presented by Joseph A. Persaud, John Taylor and Mary Jane South. Mr. Persaud was a Field Collection Officer with the Ministry of Finance, Collections and Compliance Branch who gave evidence regarding the prior convictions of the Applicant and amounts outstanding and owed to the Minister of Finance. Mr. Taylor was an Inspector for the Ontario Motor Vehicle Industry Council ("OMVIC") during the relevant time period and conducted inspections on the premises where the Applicant was employed. Mary Jane South is the Deputy Registrar of OMVIC and gave evidence regarding the prior history of the Applicant and the reasons for the Registrar's proposal to refuse registration of the Applicant as a Salesperson.

The Applicant, Alexios Kalsatos, gave evidence on his own behalf as well as cross-examining the Registrar's witnesses.

FACTS FOUND PROVEN:

Based upon the oral and documentary evidence presented at the hearing, the following are the facts found by the Tribunal to have been proven:

1. The Applicant was registered as a motor vehicle salesperson on or about January 20, 1983.
2. The Applicant was the directing mind and sole officer and director of 515652 Ontario Ltd. operating as Alex Sales & Service which, was registered as a motor vehicle dealer on or about January 20, 1983.
3. According to the Applicant's evidence and statements in his prior Application for Registration in 1999, the Applicant had been the owner and operator of Alex Sales & Service since 1973. This did not coincide with the information from the Ministry, and the discrepancy was not explained to the Tribunal.
4. In 1975 the Applicant was convicted on two counts of uttering and three counts of forgery and received a suspended sentence and probation for one year. The Tribunal accepts the explanation of the Applicant that those convictions related to signing safety certificates while he was young and foolish and an apprentice mechanic and that no further convictions of that nature had been repeated in the last twenty-five years.
5. In or about 1983, the Applicant expanded his business and 515652 Ontario Ltd entered into new business ventures including heavy trucks, freight and tractor trailers.
6. While operating the freight business, the Applicant kept current the registration of Alex Sales & Service and personally as a salesperson.
7. The Applicant's trucking and freight business expanded quickly, and by 1989 he had sixty-five employees and a fleet of thirty trucks.
8. The Applicant ran into financial difficulty and used money that was withheld from the employees payroll deductions and money collected under the Retail Sales Tax Act for the purposes of keeping his business going.
9. On or about April 22, 1994, the Applicant was convicted for nine charges of breaching the *Income Tax Act* and sentenced to fourteen days on each charge consecutively.
10. On September 12, 1995, the Applicant was convicted of further breaches of the *Income Tax Act*, although the Applicant disputes that date and thinks that the convictions were in 1994.

11. On July 9, 1992, an audit was completed on Alex Sales & Service covering the period August 1, 1986 to April 30, 1992. As a result of Retail Sales Tax collected and not remitted, 515652 Ontario Ltd. operating as Alex Sales & Service was convicted in Provincial Offences Court.
12. As sole officer and director and the controlling mind of 515652 Ontario Ltd. operating as Alex Sales & Service, the Applicant was personally liable for Retail Sales Tax collected and not remitted under the Retail Sales Tax Act.
13. The amount currently outstanding to the Minister of Finance including interest and penalties is \$351,825.83.
14. To date no payments have been made on the outstanding amount directly by the Applicant, although \$19,000.00 was received from a third party seizure through the Court.
15. On December 6, 1996, the registration of Alex Sales & Service as a motor vehicle dealer was revoked.
16. On December 6, 1996, the registration of the Applicant as a motor vehicle sales person was revoked.
17. The Applicant had given evidence in this hearing that he was up to date in his Retail Sales Tax remittances until 1990 when free trade started to deteriorate his business. This Tribunal takes note that the amount owing to the Province of Ontario for Retail Sales Tax arrears as a result of the audit completed on July 9, 1992 was for Retail Sales Tax collected but not remitted covering the period of the audit of August 1986 to April 1992.
18. In June of 1999, the Applicant applied for individual registration as a salesperson under the Motor Vehicle Dealers Act. In that application the Applicant listed his employer as Centre City Auto Sales Inc. Since March of 1998 to the time of the Application. Centre City Auto Sales Inc. was owned by the Applicant's brother, Gus Kalsatos and the Applicant's position there was listed as a ARunner@.
19. On or about the 22nd day of July 1999, the Registrar issued a Notice of Proposal to refuse registration of Alexios Kalsatos as a salesperson under the *Motor Vehicle Dealers Act*.
20. Alexios Kalsatos did not exercise his rights to a hearing in accordance with Section 7 (2) of the Act. The Registrar issued a Final Notice on September 27, 1999.

21. The Final Notice sent to Alexios Kalsatos contained the statement that A...no person shall act as a salesperson of or on behalf of a motor vehicle dealer unless registered as a salesperson of such dealer and any person operating without such registration is guilty of an offence and on conviction is liable to a fine and/or imprisonment.@
22. On January 30, 2001, the application of Evelyn May Watling as a salesperson and Centre City Quality Cars Inc. as a dealer was approved. Evelyn May Watling was the only officer and director of Centre City Quality Cars Inc.
23. Evelyn May Watling is the common law spouse of the Applicant.
24. The Applicant, Alexios Kalsatos, filed an Assignment in Bankruptcy on January 22, 2001.
25. On February 28, 2001, John Taylor, a representative of the Registrar, attended at the registered premises of Centre City Quality Cars Inc. for the purpose of conducting a new vehicle dealer inspection.
26. With the cooperation of Mr. Kalsatos, Mr. Taylor contacted the owner, Watling at home and she faxed over three vehicle purchase agreements as requested by Mr. Taylor.
27. One vehicle purchase agreement dated January 15, 2001, bearing the name of Georgina Tackor as purchaser, had the signature of the Applicant, Alexios Kalsatos, as authorized representative of Centre City Quality Cars Inc.
28. The second vehicle purchase agreement dated February 10, 2001, bearing the name of Nuno Vaz as purchaser, was also signed by the Applicant, Alexios Kalsatos, as authorized representative of Centre City Quality Cars Inc.
29. The third vehicle purchase agreement dated February 14, 2001, bearing the name of Josie Mare as purchaser, was also signed by the Applicant, Alexios Kalsatos, as authorized representative of Centre City Quality Cars Inc.
30. It was also noted that on the agreements of purchase and sale that contained the notations that they had been paid in full and/or delivered, the notations were made by the Applicant, Alexios Kalsatos, with his initials beside the notations.
31. The Registrar's representative found the Applicant, Alexios Kalsatos, was the only person on the premises and had been left in charge of the dealership.

32. Mr. Taylor filled out a New Dealer Report which contained the notation "only people registered to the dealership may buy, sell, lease or represent vehicles on behalf of the dealer. Mr. Alexios Kalsatos is not registered and is, therefore, not permitted to buy, sell, lease or represent vehicles". The Inspection Findings were signed by the Applicant, Alexios Kalsatos.
33. The Applicant had business cards in the name of Centre City Quality Cars Inc. with the address and phone number of the dealership with the name Alexios Kalsatos imprinted on the business cards.
34. On March 20, 2001, the registration of Centre City Quality Cars Inc. and Evelyn May Watling was canceled in accordance with Section 13 (3) of Regulation 801 to the Act.
35. On April 25, 2001, the Applicant, Alexios Kalsatos, applied for registration under the Motor Vehicles Act as a salesperson. He proposed to work for Centre City Quality Cars Inc.
36. On the application to become a registered salesperson, question 9 asked: "Have you ever been found guilty or convicted of any offence under any law or are any charges pending?" To this question, the Applicant answered "Yes - only what your office has on file".
37. The Registrar did not have all of the Applicant's convictions on file nor did the Applicant disclose same.
38. The Applicant had written to his original lawyer to obtain details of the charges for the purpose of forwarding same to the Registrar, however, no such communication with the details was received by the Registrar.
39. Question 8 on the application to become a registered salesperson asked: "Are there any unpaid judgments or outstanding court orders pending against you? If yes, submit a copy of each judgment and/or court order. State amount outstanding and repayment arrangements." The Applicant answered, "Yes" and stated in the space provided "see attached". The Applicant provided an AICON Inquiry Subsystems Outstanding Payment Update with an asterisk beside "Balance owing" indicating that there were two amounts of \$1,020.00 outstanding. The Applicant did not disclose any further amounts.
40. On March 7, 2001, Centre City Quality Cars Inc. sold a motor vehicle to Judith Bush. Although Evelyn Watling had signed a vehicle purchase agreement as authorized representative, the notations on the agreement that the amount due had been paid by

cheque and that the vehicle was delivered, were the notations of the Applicant in the Applicant's handwriting and initials. The Applicant had talked to the purchaser about the vehicle and had taken the purchaser for a test drive in the vehicle. The Applicant had also delivered the vehicle and received the money for payment of the vehicle by cheque.

41. On March 7, 2001, Centre City Quality Cars Inc. sold a motor vehicle to Sharon Mills. The vehicle purchase agreement was signed by E. Watling as authorized representative but the notations on the vehicle that it was paid and delivered were made by the Applicant in his hand writing and with his initials.
42. The Applicant stated that his wife was gone each afternoon at various times to care for their child. When his wife was not present at the dealership, the Applicant would deal with the customers.
43. The Application for Registration under the Motor Vehicle Dealers Act contained the statement:

?I understand that I may not buy or sell vehicles for a motor vehicle dealer unless I am registered under the Act as a Salesperson to that dealer. I acknowledge that ?buying or selling? refers to any form of negotiation concerning the purchase or sale of a vehicle and it not limited to the signing of contracts. I know that this also includes attendance at wholesale auctions or the positions commonly referred to as sales manager, finance and insurance manager, and business manager. I confirm that I will not buy or sell vehicles for any dealer until I receive confirmation from OMVIC that I am registered as a salesperson.?
44. Underneath the above acknowledgment, the Applicant, Alexios Kalsatos, signed his name and inserted the date of April 25, 2001.
45. On May 5, 2001, Centre City Quality Cars Inc. sold a motor vehicle to Maria Carneiro. The vehicle purchase agreement was signed by the Applicant, Alexios Kalsatos, as authorized representative of the dealership. The vehicle purchase agreement also had a notation in the handwriting of the Applicant that the vehicle was delivered on May 8, 2001.
46. On June 12, 2001, Centre City Quality Cars Inc. sold a motor vehicle to an individual named Gonsalves. The vehicle purchase agreement had the signature of the Applicant, Alexios Kalsatos, as authorized representative of Centre City Quality Cars Inc. The agreement also contained a notation in the Applicant's handwriting as to its delivery on June 12, 2001 and that it was paid in full.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of the Applicant, Alexios Kalsatos, ought to be refused based upon his activities carried on in contravention of the Act and Regulations and that his past conduct afforded reasonable grounds for belief that the Applicant would not carry on business in compliance with Section 5 of the Act.

The leading authority, which has been followed in numerous cases, is the Divisional Court decision of *Brenner*, reported in 19 CRAT 58. This decision held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it is of the opinion that the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. The authority of the Tribunal under Section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar was reviewed by Southey J. where he stated at page 60:

The effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

This Decision was confirmed by the Divisional Court in *Albert Fascenda* (1994) 26 CRAT Part II 1050, where it stated at page 1051:

. . . that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

As the result of the above and a line of cases following that reasoning, to overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision. It must find that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will carry on activities in contravention of the Act and its regulations. The Tribunal must not concern itself with its own opinion of whether or not the Applicant has reformed. It must look at the past conduct of the Applicant and at the decision of the Registrar to come to a conclusion as to whether or not the past conduct of the Applicant would afford reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty in the future.

In reviewing the evidence before the Tribunal, the Applicant has several convictions dating back to 1975. The 1975 convictions for fraud and uttering were not afforded very much weight by the Tribunal considering the length of time that has passed since those convictions and the fact that they have not been repeated in subsequent years.

What is of great concern to the Tribunal is the Applicant's and his prior companies convictions under the Income Tax Act and the Retail Sales Tax Act in 1994 and 1995. The Applicant had admitted the convictions as set out by the Registrar and placed the blame for his actions on the coming into force of Free Trade. The Applicant stated that was the cause of the downturn of his business. That was the reason that he gave for using the money collected for Retail Sales Tax and the money withheld from his employees as deductions, for the purposes of keeping his business running.

The funds collected and not remitted by the Applicant were trust funds held by the Applicant and were not his funds to use for any purpose except to remit to the Government. The Applicant's use of trust funds for his own business purposes is a completely unsatisfactory and irresponsible approach to the conduct of business. A business downturn is no excuse for a person to misappropriate another person's funds. To do so is not acting with honesty and integrity or in accordance with the law.

The Applicant's non disclosure in his application to be registered as a salesperson is also of great concern to the Tribunal. The *Motor Vehicle Dealers Act* is a public protection statute and the Registrar bases his decision on whether or not to grant or refuse a licence, in part, on the responses given by the Applicant. The Applicant's non disclosure amounts to material misrepresentation to the Registrar and thus to the public.

Also of great concern to this Tribunal is the Applicant's actions concerning his participation in Centre City Quality Cars Inc. both before and after his application to the Registrar.

The Applicant had previously been the holder of a salesperson's registration under the Act and was familiar with the Act and the regulations under the Act. His registration as a motor vehicle salesperson was revoked on December 6, 1996. In June of 1999, the Applicant applied for individual registration as a salesperson. Above his signature on the application was a statement acknowledging that he understood that he could not act as a salesperson until he received confirmation from OMVIC that he was registered as a salesperson. The Registrar issued a Notice of Proposal to Refuse Registration on July 22, 1999, which proposal was not appealed by the Applicant. The Applicant was issued a final notice on September 22, 1999 which notice again stated to the Applicant that he could not act as a Salesperson unless registered as a Salesperson under the Act. Despite all of the above mentioned warnings and notices, the Applicant, Alexios Kalsatos, was involved in the sale of a motor vehicle to Tackor on January 15, 2001, Vaz on February 10, 2001 and Mare on February 14, 2001.

On February 8, 2001, a representative of the Registrar attended at Centre City Quality Cars Inc. to conduct a new vehicle dealer inspection. The Applicant, Alexios Kalsatos was the only person on the premises and in charge of the dealership at that time. A New Dealer Report was filled out which contained another warning that only people who were registered to the dealership could act on behalf of the dealer and that since Mr. Kalsatos was not registered he was not permitted to buy, sell, lease or represent vehicles. Mr. Kalsatos was aware of that New Dealer Report and signed it.

Despite the above, the Applicant Alexios Kalsatos was subsequently involved in further motor vehicle sales to Bush on March 7, 2001, Mills on March 8, 2001, Koufos on April 20, 2001, Carneiro on May 5, 2001 and Gonsalves on June 12, 2001.

By continuing to act as a salesmen, the Applicant was continuing to violate the provisions of the Act. His involvement in the sales were industry-specific offences, relating to the very type of commercial activity which is regulated by the Act. The present Notice of Proposal to Refuse Registration was issued by the Registrar as a result of a second application for registration by the Applicant made on April 25, 2001. Above the Applicant's signature, he again acknowledged the statement that he understood that he was not to act as a salesperson unless he was registered under the Act as a salesperson to that dealer. He further acknowledged that buying or selling referred to any form of negotiation and was not limited to the signing of contracts. One of the sales in which the Applicant was involved was only five days prior to that statement and two of the sales were subsequent to that statement.

Upon all of the evidence presented, the Tribunal concludes that the past conduct of the Applicant affords the Registrar reasonable grounds for his belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

The Tribunal further finds that the Applicant was, both before and after the submission of his application for registration, carrying on activities in contravention of the *Motor Vehicle Dealers Act* by continuing to act as a salesmen while not registered to do so.

Having carefully considered all of the evidence presented, this Tribunal finds no ground to interfere with the Registrar's proposal.

ORDER:

Pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated June 12, 2001 to refuse the registration of Alexios Kalsatos as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Vice-Chair
Presiding

Antoine Aouad, M.D.,
Member

Released: November 19, 2001

L. A.A.

HIGHWAY TRAFFIC ACT
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)

IN THE MATTER of an application by L.A.A. to
appeal the decision of the Registrar of Motor
Vehicles pursuant to section 32(12)(b)(i) of the
Highway Traffic Act;

AND IN THE MATTER of

L. A.A.

APPLICANT

and

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Monday, November 26, 2001, at Sudbury, Ontario;

AND WHEREAS the Applicant requested an adjournment of the hearing to permit her to meet with her Cardiologist and to obtain a medical report;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 11:00 a.m. on Friday, December 14, 2001 at the Holiday Inn Sudbury, Salon "B", 50 Brady Street, Sudbury, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: November 19, 2001

CENTENNIAL TRUCKING (NIAGARA) INC.

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1506515 OWNED BY: CENTENNIAL TRUCKING (NIAGARA) INC. of: 3762 Northwood Drive, Niagara Falls, Ontario L2H 2Y5 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: November 8, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

CENTENNIAL TRUCKING (NIAGARA) INC.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Centennial Trucking (Niagara) Inc., Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: November 19, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

CENTENNIAL TRUCKING (NIAGARA) INC.

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On November 8th, 2001, the motor vehicle described in **Order to Impound #1506515** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The Applicant, Centennial Trucking (Niagara) Inc., whose name is shown on the plate portion and vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the Applicant.
4. The Applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the *Highway Traffic Act*, stating **that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.**
5. Investigations conducted by the Registrar revealed that the driver of the motor vehicle at the time the impound order was made was not then under suspension.
6. The Applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Centennial Trucking (Niagara) Inc.

Registrar of Motor Vehicles

(signature of Applicant)

(signature of Registrar)

(date)

(date)

MacDONALD, LEANNE AND 2001530 ONTARIO INC. O/A MAC MOTORS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LEANNE MacDONALD AND 2001530 ONTARIO INC. O/A MAC MOTORS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: July 16, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LEANNE MacDONALD AND 2001530 ONTARIO INC.
O/A MAC MOTORS

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on November 19, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario at 9:30 a.m., on Monday, March 4, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 20, 2001

THINEL-BITTSCHWAN

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1506382 OWNED BY: JACQUELINE A. THINEL-BITTSCHWAN of: 129 View Street, Callander, Ontario P0H 1H0 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: October 22, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

JACQUELINE A. THINEL-BITTSCHWAN

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jacqueline A. Thinel-Bittschwan, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: November 20, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

JACQUELINE A. THINEL-BITTSCHWAN

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On October 22nd, 2001, the motor vehicle described in **Order to Impound #1506382** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
8. The applicant, Jacqueline A. Thinel, whose name is shown on the vehicle portion and plate portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
9. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
10. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(c) of the *Highway Traffic Act*, stating **that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.**
11. Materials provided to the Registrar indicate that the applicant took reasonable steps in exercising due diligence.
12. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
13. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Jacqueline A. Thinel-Bittschwan

(signature of Applicant)

(date)

Joanna Tsilikas

(signature of Registrar)

(date)

CROWE

RANDY CROWE

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Randy
Crowe to seek an extension of the time to
commence an appeal from an impoundment order
of the Registrar under Section 55.1 of the *Highway
Traffic Act*;

AND IN THE MATTER of

RANDY CROWE

APPLICANT

-and-

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

RANDY CROWE, Applicant

DATE OF
MOTION: November 14, 2001

By teleconference

ORDER

A motion was heard by teleconference on November 14, 2001, at Toronto, Ontario, to consider the request of Randy Crowe (the "Applicant") for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of

the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Copy of Impound Order dated September 25, 2001, relating to the impoundment of the motor vehicle for 45 days. (Exhibit # 1)
2. Original Notice of Appeal, including Applicant's position on Appeal, dated October 5, 2001, received by the Tribunal on October 16, 2001. (Exhibit # 2)
3. Letter from the Applicant received by the Tribunal November 2, 2001.

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to section 55.1 of the *Highway Traffic Act*.

The motor vehicle was ordered impounded on September 16, 2001 while being driven by Mike York, whose driver's licence was under suspension at the time of the impoundment. The Applicant stated that the vehicle was taken by Mr. York without the knowledge or consent the Applicant.

The fifteen-day deadline for filing an appeal with the Tribunal was October 10, 2001. The Applicant's Notice of Appeal was received by the Tribunal on October 16th, 2001, twenty-one days into the impoundment period, and 6 days past the appeal deadline date.

The Applicant testified that he was not aware of the impoundment, and was informed when he received the Order to impound on September 25th, 2001. He was subsequently informed by the impound facility of the procedures for filing an appeal, though he was aware of the appeal process from the information contained in the Order. The Applicant assumed that the fifteen-day deadline for filing his appeal was measured from the date he received the appeal information package from the Tribunal.

The Applicant was unsure of the exact date that the Notice of Appeal was mailed to the Tribunal, but believed it was either the 10th, 11th or 12th of October, 2001. The Tribunal noted that the Applicant's letter to the Tribunal's Registrar dated October 30th, 2001 was received at the Tribunal on November 2nd, 2001, only two days later.

Notwithstanding the fact that the Applicant said he received the Order to Impound on September 25th, 2001, which was nine days after the impoundment, it took the Applicant an additional twelve days to file the appeal. The Applicant testified that he made his best effort to pursue the matter, and that he had difficulty scheduling the time to complete the forms and obtain a money order, as well as a general misunderstanding of the process. The Applicant acknowledged that "*it was his fault if it was a little bit late*". The Applicant did not provide the Tribunal with any evidence to support his testimony that these reasons prevented him from filing his appeal within the prescribed fifteen-day filing period.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that he, acting in good faith, was unable through accident, illness or other cause beyond his control, was not able to bring the

appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. Though the Tribunal acknowledges the desire of the Applicant to accept fault in this matter, the Tribunal is precluded from considering other factors not arising from or directly related to these criteria.

The criteria listed in Section 20(7) which the Tribunal should consider in granting an extension are matters outside the Applicant's control. The testimony of the Applicant was that the initial nine-day delay was due to his receipt of the Order to Impound. However the specific reasons for the further twelve-day delay in submitting his Notice of Appeal form to the Tribunal remained unclear. A variety of reasons were given, including a misunderstanding of the intent of the regulations regarding the date of which the fifteen day Notice of Appeal filing period was to commence. Though the Applicant's Notice of Appeal was dated October 5th, 2001, it was not received by the Tribunal until October 16th, 2001, and it is the date at which the Notice is received at the Tribunal that establishes the filing of an appeal.

The Tribunal is not satisfied that the evidence before it is sufficient to show that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the *Highway Traffic Act* was the result of accident, illness or other cause beyond the Applicant's control.

ORDER:

Accordingly, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is dismissed.

LICENCE APPEAL TRIBUNAL

Stuart Cork,
Presiding Member

RELEASED: November 21, 2001

826- SEIZURE

MED – 826 - SEIZURE

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

**TO CHANGE THE CLASS OR CLASSES OF
MOTOR VEHICLE IN RESPECT OF WHICH
THE LICENCE WAS ISSUED**

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: KYLE M. BIEL, Respondent
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: November 16, 2001

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 – Notice of Appeal from Applicant dated October 22, 2001.

Exhibit # 2 - Notice of licence downgrading dated October 10, 2001.

Exhibit # 3 - Letter from Applicant's family physician dated November 16, 2001.

Exhibit # 4 - Case summary received from the Respondent.

FACTS:

The Applicant, a 44 year old sales manager and truck driver, had his driver's licence downgraded on October 10, 2001 after the Ministry received a medical report from Physician # 1, a neurologist. The report detailed the Applicant's medical history from 1992 until the present including a seizure in March 2000 and a diagnosis of sleep apnea.

In 1992, the Applicant was admitted to hospital with noted behavioural changes and somnolence. After suffering several seizures and periods of delirium, he was diagnosed as having an encephalitis-like illness although it could not be proven. Several EEGs, CT scans and a MRI were normal. He was finally prescribed Valproic Acid and Ativan following his final seizure on December 22, 1992.

His "A" driver's licence was suspended and he was given a "G" licence in April 1993. The "A" licence was reinstated in August 1995 after the Ministry received several medical reports from Physician # 1 updating his condition.

On August 29, 1997, the Applicant was driving on the 401 to Windsor when an OPP officer observed his truck drive off the highway. The truck went through a ditch, over a ramp through another ditch and into a wire fence before stopping. He was arrested, but not charged, although he appeared to be impaired, but with no odour of alcohol. The officer recommended a medical review.

Physician # 1 examined the Applicant on September 12, 1997 and no abnormalities were found. The doctor accepted the Applicant's explanation that he had felt tired and was pulling off the road when he lost control of the truck. The Medical Advisory Committee ("MAC") recommended monitoring the Applicant, but allowed him to retain his "A" licence.

In March and April 2000, the Ministry received letters from Physician # 1 and a Physician # 2 from the Brampton Hospital. They both indicated the Applicant was a risk driving a motor vehicle for medical reasons.

On June 19, 2000, Physician # 1 reported to the Ministry that the Applicant had sustained an episode of unconsciousness in May of that year. He stated this disturbance was associated with being tired and taking over the counter preparations for a cold. His neurological examination, CT scan and an EEG were negative. He recommended it would seem reasonable for him to maintain his motor vehicle privileges as he has had no seizures for several years.

On April 11, 2001, Physician # 1 reported that the Applicant had been seizure free since March of 2000, at which time he had a grand mal seizure while at home. He went on to say he has been subject to sporadic seizures for about a decade. He again reported his neurological examination and tests were all normal.

Physician # 1 again recommended, from a neurological perspective, the Applicant should be permitted to maintain his current motor vehicle licence status because he has been asymptomatic for more than a year. The MAC felt there was an unclear history of seizures in that it appeared there had been a seizure in March 2000 and another in May 2000.

Another report dated August 8, 2001 was received from Physician # 1 with additional medical history. He stated there were sporadic infrequent seizures, the last being in March 2000. In addition, there were several episodes associated with flashing lights at the onset. The penultimate one was in 1997, but it was not clear whether it was a seizure or not. He also mentions the Applicant's history has been complicated because he has been subject to sleep apnea, which has not been successfully treated. Physician # 1 again refers to the last spell in March of 2000, when the Applicant blacked out after a spell of confusion. Prior to going to the hospital he took 2 tablets of Valproic Acid. It was noted that he had bitten his tongue, but an EEG and CT scan were normal.

The Applicant explained this episode quite differently. He testified that he was at home when he suddenly felt very ill. He told his son to get his mother, who was visiting a neighbour, but the son called 911, because he thought his father was having a heart attack.

The Applicant was taken to the Brampton Hospital in spite of the fact he was conscious.

The MAC was concerned about the history of another seizure and the Applicant having sleep apnea, and it recommended his licence be downgraded to "GM2". There was also concern expressed about possible non-compliance, because he took two pills of Valproic Acid before being taken to the hospital. MAC recommended a five-year seizure free period before considering reinstatement of his "A" licence.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;

- (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infraction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.

- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- 50(1) Every person aggrieved by a decision of the Minister under subclause 32(12)(b)(i) or a decision of the Registrar under section 17 or 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

In downgrading the Applicant's driver's licence from "A" to "G" pursuant to Section 32(12)(b)(1) of The *Highway Traffic Act*, the Registrar is relying on Regulation 340/94, Section 14, which states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely---

and Section 17(1), which states:

Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,

- (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;

There is no doubt that the Applicant had several seizures in 1992 when he suffered with what was described as an encephalitis-like illness. There were apparently no problems for the next five years until he drove his tractor-trailer off the highway in 1997. This may have been a seizure, but no one involved in the investigation labelled it as such.

Although the medical reports received from Physician # 1 contain inconsistencies, he states in the last two reports that the Applicant suffered a seizure in March 2000. The facts that the Applicant bit his tongue, took two Valproic Acid tablets immediately and went to the hospital, in spite of testifying that he believed it was an anxiety attack, tend to verify that it was a seizure. Physician # 2, who treated him in the emergency, and Physician # 1 were concerned enough to notify the Ministry.

The Tribunal is concerned about Physician # 1's report dated June 19, 2000, which stated an episode of unconsciousness in May of 2000 could be attributed to fatigue and the effect of over the counter medication for a cold. This report was written two months after he had notified the Ministry that the Applicant might be a risk when driving for neurological reasons and recommending investigations and therapy.

The Tribunal considered the Applicant to be a credible witness, but he did not appear to appreciate the significance or importance of certain things that happened. He stated in evidence that he did not really know if it was necessary for him to still take the anticonvulsant medications. He introduced a note from his family doctor (Exhibit #3) which states the Applicant had not had a seizure since 1992. The Tribunal did not give too much weight to this, because this doctor did not appear to be involved in the Applicant's treatment, according to the medical reports received.

The Tribunal believes the Registrar acted correctly in downgrading the Applicant's driver's licence according to Regulation 340/94, since the final medical reports clearly state the Applicant suffered a seizure in March 2000, which would be difficult to dispute.

The Canadian Medical Association's guide for physicians "Determining Medical Fitness to Drive", regarding professional drivers, states after an epilepsy diagnosis - resume driving if 5 years seizure free off medication and 10 years if seizure free on medication.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 15, 2001 of the Minister to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the parties;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: November 21, 2001

DERASP

DERRICK J. DERASP

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: DINO BOTTERO,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

DERRICK J. DERASP, Applicant
unrepresented

DATE OF HEARING: November 22, 2001

DECISION RELEASED: November 22, 2001

By teleconference

ORDER

A hearing by teleconference was commenced on November 22, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

WHEREAS the Registrar of Motor Vehicles made an Order to Impound dated October 13, 2001 of a 1982 Chevrolet Chevette, Licence Plate No. AJBM 463 owned by Derrick Derasp (the "Applicant");

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal to appeal the above noted Order to Impound;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on November 22, 2001 at the Tribunal's Chambers;

AND WHEREAS at the commencement of the hearing on November 22, 2001, the Applicant confirmed that his appeal before this Tribunal was withdrawn and that he did not wish to proceed with a hearing before the Tribunal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal and pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Dino Bottero, Presiding Member

RELEASED: November 22, 2001

FIACCO

LIVIO FIACCO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES:

LIVIO FIACCO, the Applicant, appearing on his own behalf
YOVANKA McBEAN, Agent, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 15, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated April 6, 2001 (the "Proposal") proposed to revoke the registration of Livio Fiacco (the "Applicant"), as a salesperson under the Act.

The Registrar's reasons for his Proposal were that the Act required registrants to be financially responsible in the conduct of business and to carry on business in accordance with the law and with integrity and honesty. The Registrar alleged that the Registrant's past conduct was inconsistent with the intention and objective of the Act and, therefore, warranted disentitlement to registration under the Act.

The particulars given were that the Motor Vehicle Dealers Compensation Fund (the "Compensation Fund" or "Fund") approved payment of a consumer claim in the sum of \$1,495.00 with respect to a warranty that was sold by Traxx Auto Sales and Leasing Inc. ("Traxx") and never submitted to the warranty company. As the Applicant was an officer and

director of that Traxx and had made no arrangements to repay the Fund, he failed to act with honesty, integrity or financial responsibility.

On April 17, 2001, the Applicant appealed the proposal to revoke his registration to the Licence Appeal Tribunal on the basis that he was not the person who sold the vehicle or warranty and was one of only three partners and, therefore, should not be totally responsible himself. On July 20, 2001, the matter came before the Licence Appeal Tribunal for a hearing, however, Counsel for the Registrar applied for and obtained an adjournment on the basis that Notice of Hearing had not been received. The matter was adjourned to November 15, 2001.

On October 31, 2001, the Registrar issued a Notice of Further and Other Particulars. This Notice alleged that one, Douglas Hewitt, had received a Judgment of \$1,899.00 against Traxx Auto Sales and Leasing Inc. on February 24, 2000. This was also a result of Traxx neglecting to submit warranty money paid by the purchaser for an extended warranty. A claim was made to the Compensation Fund, and the Applicant had made no arrangements to resolve the outstanding judgment. There was no written response from the Applicant.

THE ISSUE:

The issue in this proceeding is whether the Registrar had sufficient grounds to support the Registrar's belief that the Applicant would not be financially responsible or carry on business in accordance with the law and with integrity and honesty and that therefore the Applicant's registration as a salesperson under the Act should be revoked.

THE LAW:

The *Motor Vehicle Dealers Act* provides the following:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

6.(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration. R.S.O. 1990, c. M.42, s. 6.

Regulation 801 under the *Motor Vehicle Dealers Act* provides:

12.(1) The Fund is established as of the 1st day of July 1986, to stand in the place of a participant for the payment out of the Fund of claims of customers of the participant where the transactions occurred during the period when the participant was registered under the Act and where the participant has refused after demand or is unable to pay the claims.

(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.

.....

5. The customer has made payment for an extended warranty or service plan to a participant where the warranty or plan is not underwritten by an insurer and the term of the warranty or plan has not expired and the claim is for a non-earned premium or for a repair under the warranty or plan.

EVIDENCE:

The evidence of the Registrar was presented by Ms. Mary Jane South. Ms. South is the Deputy Registrar of the Ontario Motor Vehicle Industry Council ("OMVIC") which has the duty of administering the *Motor Vehicle Dealers Act*. Ms. South explained how OMVIC was created on January 7, 1997 by the Minister of Consumer and Corporate Affairs for the purpose of protecting consumers against dealers who would not or could not honour their financial

responsibilities. She explained what steps a consumer had to take to make a claim to the Compensation Fund and on what conditions the Fund would make payment to the consumer.

Ms. South gave evidence regarding the particulars set out in the proposal of the Registrar and the further notice given by the Registrar. The evidence included the fact that the Applicant is an officer of Traxx Auto Sales and Leasing Inc. which was registered under the Act for a two-year period but did not apply to renew its registration. She reviewed the evidence regarding the claims of Mr. Bernardo and Mr. Hewitt and the negotiations with the Applicant to try and obtain satisfaction of amounts paid by the Compensation Fund. She advised that the Registrar was concerned that there may be others who had purchased extended warranties from Traxx but have not yet had any problems and, therefore, have not noticed that they did not have coverage.

The Applicant, Livio Fiacco, declined to cross-examine the Deputy Registrar, although given the opportunity to do so. He gave evidence on his own behalf. The Applicant did not produce any witnesses. The main thrust of the Applicant's argument was that he was only one of three partners in the business so he should only be one-third responsible. The Applicant also stated that he was not the one who sold the vehicle or the warranty and, therefore, was not completely aware of all of the circumstances. In respect to Mr. Bernardo, he stated that his claim was for radiator repairs were not covered under the warranty in any event.

In regard to Mr. Hewitt, Mr. Fiacco was aware of the warranty problem. He and his nephew, Claudio Fiacco, went to a pre-trial with a Paralegal retained by Mr. Hewitt, and Mr. Fiacco said he was advised that he had a certain length of time to resolve the problem with Mr. Hewitt or the matter would go to trial. He said he never followed up on that because the business closed the year after. He did not remember when the pre-trial was. He stated that when he found out about the judgment, he had spoken to someone at OMVIC who wanted to discuss what he was going to do and if he could make any payments. He did not get back to OMVIC because he thought he could resolve the matter here, at the Tribunal.

He admitted that he and his nephew, Claudio Fiacco, were both Presidents of Traxx and both were responsible for maintaining the books and records of the company. Sebastiano Fiacco, the third owner of Traxx but was not involved much in the business.

The Applicant, Livio Fiacco stated that he was prepared to resolve the problems relating to Hewitt and Bernardo at this time. When asked why it had not been resolved before this time, he stated that his partners were waiting for the outcome of this hearing to see what they would do. He testified that neither former partner was then registered under the *Motor Vehicle Dealers Act*.

FACTS FOUND PROVEN:

Based upon the oral and documentary evidence presented at the hearing, the Tribunal finds the following are the facts to have been proven:

1. The Applicant was registered as a motor vehicle salesperson on or about May 28, 1996.
2. Traxx was registered under the Act as a motor vehicle dealer on or about June 4, 1998 for a two-year period. Its registration lapsed on June 5, 2000 and was not renewed.
3. The officers and directors of Traxx are the Applicant, Livio Fiacco, his nephew, Claudio Fiacco, and his cousin, Sebastiano Fiacco.
4. Sebastiano Fiacco had little to do with the activities of the business.
5. Claudio Fiacco was the main salesperson for the business with some responsibility for keeping Traxx's books and records.
6. The Applicant, Livio Fiacco, did some sales when his Claudio Fiacco was not there and also had some responsibility for keeping the books and records of Traxx, attending at auctions and doing the banking.
7. Traxx is still listed with the Companies Branch as an active company, however, it closed its doors as a motor vehicle dealer in June 2000 and its registration under the Act has lapsed.
8. The registration of Claudio Fiacco under the Act has lapsed, and he has not applied to his registration.
9. The Applicant transferred his registration as a motor vehicle salesperson from Traxx to another motor vehicle dealer in Toronto.
10. On or about May 13, 2000, Traxx sold a 1996 Integra to Albert Bernardo. Along with the vehicle, Mr. Bernardo purchased a two year/40,000 kilometer Secure Drive Warranty for an extra cost of \$1,300.00. The salesperson was Claudio Fiacco.
11. The purchaser, Mr. Bernardo, required some repairs on his motor vehicle and contacted the warranty company. It advised him that it had not received an application or funds and that his vehicle was not covered by any extended warranty. The purchaser was required to pay for his vehicle repairs in the sum of \$596.85.

12. On December 5, 2000, the purchaser, Mr. Bernardo, completed an Application for Claim to the Compensation Fund. The claim was made under Regulation 801, Section 12(3)5, relating to claims for extended warranties.
13. On December 5, 2000, Mr. Bernardo completed a Subrogation Agreement, assigning to the Compensation Fund all claims that he had against Traxx.
14. On January 5, 2001, the Administrator of the Compensation Fund wrote to the Applicant and advised him of the claim of Mr. Bernardo. The Applicant's attention was drawn to Section 5 (1)(a), (b) and (c) of the *Motor Vehicle Dealers Act* relating to carrying on business in accordance with law, honesty, integrity and financial responsibility. A response was requested on or before January 15, 2001.
15. There was a discussion with a representative at the Compensation Fund, and the Applicant was to advise of his position and/or repayment method. The Applicant did not get back to the Compensation Fund.
16. On February 16, 2001, the Administrator for the Compensation Fund again wrote to the Applicant requesting his written response regarding the claim of Mr. Bernardo and again drawing his attention to sections of the Act. A response was requested by February 23, 2001.
17. On February 20, 2001, the Applicant wrote to the Compensation Fund advising that he was not the one who sold the vehicle so he was not 100% familiar with the deal and felt that he should not be responsible for the whole matter. He continued to say that his expenses were at their maximum level and that he could not afford any other expense.
18. On April 18, 2001, the Compensation Fund paid Mr. Bernardo the sum of \$2,091.85 representing the amount paid for the warranty and for the repairs made to the vehicle.
19. On March 4, 1999, Douglas Hewitt purchased a motor vehicle from Traxx and paid an extra amount of \$1,899.00 for a thirty-six month/60,000 kilometer Gold Warranty. The salesman on behalf of Traxx was Claudio Fiacco.
20. On June 23, 1999, Mr. Hewitt had a Paralegal write to Traxx to demand return of his money for the extended warranty as the warranty company had not been paid or contacted by the dealership to extend his warranty.
21. Mr. Hewitt's claim was not resolved and on July 15, 1999, Mr. Hewitt commenced an action in Small Claims Court against Traxx and Claudio Fiacco.

22. The Applicant was aware of the claim by Mr. Hewitt and attended with Claudio Fiacco in Court at a pre-trial in 1999. The Applicant was told that he had a certain amount of time to resolve the problem with Mr. Hewitt, and he was aware that if he did not resolve the problem that it would go to trial.
23. The endorsement record of the Small Claims Court shows that the matter was ordered to pre-trial on August 27, 1999, and on February 24, 2000, judgment was entered in favor of the Plaintiff (Hewitt) in the sum of \$1,899.00 plus pre-judgment interest and costs. The endorsement states that no one appeared for the Defendants.
24. On or about May 11, 2000, a Notice of Garnishment was issued. On or about June 4, 2000, the registration under the Act of Traxx and Claudio Fiacco lapsed and was not renewed. The Applicant closed the business of Traxx.
25. The Applicant stated that he was well aware of the Judgment against Traxx but did not follow up on resolving it as Traxx was later closed.
26. On or about September 11, 2001, Mr. Hewitt applied to the Compensation Fund and completed the subrogation form assigning his rights against Traxx to the Compensation Fund, to the extent of payments made.
27. On September 25, 2001, the Administrator of the Compensation Fund wrote Mr. Fiacco, the Applicant, asking him to contact the Fund to discuss resolving this matter.
28. The Applicant spoke to the Administrator, and the Applicant was to get back to the Administrator to discuss making payment. The Applicant did not contact the Administrator again as he thought he could settle the matter here before the Tribunal.
29. On November 9, 2001, the Compensation Fund approved the claim of Mr. Hewitt against Traxx in the sum of \$466.50.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of Livio Fiacco ought to be revoked based upon the particulars set out in the Notice of Proposal dated April 6, 2001 and the Notice of Further and Other Particulars dated October 31, 2001.

The leading authority, which has been followed in numerous cases, is the Divisional Court Decision of *Brenner*, reported in 19 CRAT 58. This decision held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it is of the opinion that the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. The authority of the Tribunal under Section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar was reviewed by Southey J. where he stated at page 60:

The effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

This Decision was confirmed by the Divisional Court in *Albert Fascenda* (1994) 26 CRAT Part II 1050, where it stated at page 1051:

. . . that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

Considering the above and a line of cases following that reasoning, to overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision. It must find that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will carry on activities in contravention of the Act and its regulations. The Tribunal must not concern itself with its own opinion of whether or not the Applicant has reformed. It must look at the past conduct of the Applicant and at the decision of the Registrar to come to a conclusion as to whether or not the past conduct of the Applicant would afford reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty in the future.

There is no doubt that the Applicant was a director of Traxx Auto Sales and Leasing Inc. and in fact, he described himself as one of the three presidents. Accordingly, he had a position of authority in Traxx, but he did not have majority control in shares or authority. In such circumstances, the Registrar has not established that he was the directing mind of Traxx. The

officer and director dealing with Bernardo and Hewitt who suffered the loss for which they have been compensated by the Compensation Fund was Claudio Faccio, not the Applicant.

Traxx through subrogation, can be pursued by the Motor Vehicle Dealers Compensation Fund for all amounts that it had paid out, although this remedy may not be practical. Also, the Registrar can no longer effectively regulate Traxx or Claudio Faccio as they were no longer registered under the Act. The Applicant is still registered as a salesperson under the Act. The issue then becomes one of whether the Registrar had reasonable grounds to believe that the actions of the Applicant in the Bernardo and Hewitt matters afforded reasonable grounds for the Registrar to believe that the Applicant would not in the future carry on business in accordance with the law and with integrity, honesty and financial responsibility.

The Tribunal is mindful of the decision in Josef Reznik (1990) 20 CRAT 65 referred to in Udel (1995) CRAT No. 4, which held that judgments against an Applicant which remain unpaid provide evidence that the Applicant is not capable of satisfying the test of financial responsibility set forth in Section 5(1)(a). Here, however, there is no evidence to show that there is a judgment against the Applicant.

In the present case, the judgment was against Traxx and Claudio Faccio and not against the Applicant personally. Although the Applicant was aware of the claim by Hewitt and the Small Claims Court action against the dealership and Claudio Faccio, it was his position from the time of first notification up to the time of this Hearing that he should only be partially responsible as he was not the sole director of the corporation. He added to that the fact that he did not sell the vehicle or the warranty to Mr. Hewitt. The Applicant appeared to be totally ignorant of the law and his legal obligations under the Act. He stated that it was his belief that he was coming to the Hearing before the Tribunal to decide who should be responsible for repaying the Compensation Fund and in what proportions. He came prepared to settle the matter and appeared to think that would be the end of it.

In the present case, the Applicant has been registered as a salesperson since May 28, 1996. There was no evidence put forth by the Registrar of any complaints filed against the Applicant during that entire period to the present except for the Registrar's complaints presently before the Tribunal. Although the Applicant had access to all books and records of Traxx and was partially responsible for keeping those books and records, there was no evidence presented by the Registrar that the Applicant was aware that the warranty money was not forwarded to the warranty company.

Although the Registrar was concerned that there may in the future be more claims of this nature, there was no evidence produced that this may be the case or that these two particular instances were anything more than an oversight. In any event, the evidence connecting the Applicant to the two transactions is tenuous at best. Without the opportunity to review the books and records of Traxx and in the absence of any further complaints, the Registrar had no

ability to support this concern. Therefore, the Registrar's opinion must only be based on the Applicant's non payment of the Hewitt and Bernardo claims.

In the Hewitt matter, the Applicant was aware of this claim while Traxx was registered under the Act, but that does not establish personal liability on the Applicant, either for the conduct leading to the claim or its payment. In the circumstances of this particular case, the Applicant was only one of the three directors of Traxx. He had no significant role in the two transactions that resulted in claims against the Compensation Fund. The lack of registration in a regulated industry is a significant penalty. For the Registrar to deny registration to the Applicant there must be a reasonable basis to conclude that the Applicant will not be financially responsible in the conduct of business or in accordance with the law and with integrity or honesty or will carry on activities in contravention of the Act or regulations. This has not been established in this case. In view of this, the Tribunal finds that the Registrar did not have sufficient reasonable grounds to believe that the Applicant would not in the future be financially responsible in the conduct of business or that he would not carry on business in accordance with the law and with honesty and integrity.

ORDER:

Pursuant to the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs that the Registrar refrain from carrying out his proposal dated April 6, 2001 respecting Livio Fiacco.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

RELEASED: November 26, 2001

G.E.

HIGHWAY TRAFFIC ACT

Section 50(1) and Regulation 574, R.S.O. 1990, Chap. H8 as amended

G.E.

IN THE MATTER of an APPEAL of A CHANGE OF CLASS OF
DRIVER'S LICENCE

AND IN THE MATTER OF the DECISION of the Registrar of Motor
Vehicles made pursuant to section 32(12)(b)(i) of the *Highway Traffic
Act* TO CHANGE A CLASS OF A PERSON'S DRIVER'S LICENCE
FOR A MEDICAL REASON dated September 13, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said
DECISION

G.E.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

DISMISSAL ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), G.E. (the "Applicant") initiated an appeal under section 50(1) of the Decision of the Registrar of Motor Vehicles made pursuant to section 32(12)(b)(i) of that Act, dated September 13, 2001 to change the class of the Applicant's driver's licence;

AND WHEREAS, the Applicant has failed to pay the filing fee as prescribed by section 3(2) of Ontario Regulation 632/98 under the *Highway Traffic Act*;

AND WHEREAS, the Applicant has not responded to the Tribunal's Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S. 22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal, whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers and Procedures Act*, as amended, this proceeding, initiated by the Applicant's request for a hearing before this Tribunal, is dismissed;
2. Pursuant to the authority vested in it under section 50(2) of the *Highway Traffic Act*, this Tribunal confirms the Order of the Registrar of Motor Vehicles dated September 13, 2001 to change the class of driver's licence of G.E.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: November 26, 2001

HECIMOVICH

VESNA HECIMOVICH

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Vesna
Hecimovich seeking an extension of the time
requirements for this Applicant to commence an
appeal from an impoundment order of the
Registrar under Section 55.1 of the Highway
Traffic Act;

AND IN THE MATTER of

VESNA HECIMOVICH

APPLICANT

-and-

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: MALCOLM FEALING, Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

VESNA HECIMOVICH, Applicant
JOHN BRACEWELL, Q.C., Counsel for Applicant

DATE OF
MOTION: November 20, 2001

By teleconference

ORDER

A motion was heard by teleconference on November 20, 2001, at Toronto, Ontario, to
consider the Applicant's request for an extension of time to appeal the impoundment order of

the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

3. Copy of Impound Order dated October 5, 2001, relating to the impoundment of the motor vehicle for 45 days. (Exhibit # 1)
4. Original Notice of Appeal, including Applicant's position on Appeal, dated October 29, 2001, received by the Tribunal on October 31, 2001. (Exhibit # 2)
3. Letter from the Applicant's Counsel received by the Tribunal November 7, 2001.

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to the above-captioned legislation.

The motor vehicle was ordered impounded on October 3, 2001 while being driven by Peter Hecimovich, whose driver's licence was under suspension at the time of the impoundment. The vehicle was taken by Mr. Hecimovich without the knowledge or consent the Applicant.

The fifteen-day deadline for filing an appeal with the Tribunal was October 18, 2001. The Applicant filed her Notice of Appeal with the Tribunal on October 29, 2001, twenty six days into the impoundment period, and eleven days past the appeal deadline date.

The Applicant was represented by Mr. John Bracewell, Solicitor. Both Mr. Bracewell and the Applicant were sworn in. Mr. Bracewell explained that his client could barely express herself in English and would have to be prompted. He said that he had to use the services of an Interpreter when Mrs. Hecimovich went to see him on October 29, 2001.

The Applicant testified that she received the Order to Impound on October 5, 2001. Her husband read the forms to her. They both saw the telephone numbers on the back of the form, but they did not call to ask for assistance. Mrs. Hecimovich testified that it did not occur to her to speak to anyone else about the forms because she always left these matters to be dealt with by her husband.

Mrs. Hecimovich did nothing further respecting an appeal until October 16, 2001 when she called Mr. Bracewell's law office. She tried to express the nature of the matter to the secretary, but because of her inability to speak the language, the secretary thought she was calling about a family matter and made an appointment for October 29, 2001.

It was only when Mr. and Mrs. Hecimovich attended at his office that Mr. Bracewell realised the true nature of the problem. He filed out the Notice of Appeal immediately, and sent it to the Tribunal where it was received on October 31, 2001.

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

8. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

(c) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

(d) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that she, acting in good faith, was unable through accident, illness or other cause beyond her control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time.

The criteria listed in Section 20(7) which the Tribunal should consider in granting an extension are matters outside the Applicant's control. The Applicant clearly has a problem with the English language. As a result she defers business matters to her husband. She asked her husband about the notice of impoundment. Her husband did not tell her about the appeal deadline. In the unique circumstances of the Applicant, it would not be reasonable to expect her then to seek assistance from a third party. However, she did call the lawyer's office in a state of urgency on October 16, 2001. She could not say why her husband did not make the call himself.

It should also be noted that Mrs. Hecimovich was able, with a little prompting, to answer the questions put to her by her solicitor. However, the Tribunal finds that this only established an understanding of spoken English.

The Registrar's representative referred to the Tribunal's decision re Latimer 2001 OLATD-225, released June 15, 2001. It is noted that in this case, Mrs. Latimer suffered from a serious illness, and only found a "yellow copy" of the notice of registrar in her home sometime after the impoundment. She also had to have the assistance of her personal care worker and occupational care therapist in preparing the appeal forms. That case and the case here each depend on their own particular facts. Here, Mrs. Hecimovich relied on her husband because of her inability to understand written English. He did not inform her of the right of appeal and its deadline. This reliance was reasonable in her unique circumstance, and it resulted in the delay being beyond her control.

The Tribunal is satisfied that the evidence before it is sufficient to show that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days.

ORDER:

Accordingly, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is granted.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing,
Presiding Member

RELEASED: November 26, 2001

ADLS – 847 – MISTAKE IDENT

ADLS – 847 – MISTAKE IDENT

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: November 26, 2001

Kitchener

DECISION

A hearing was held on November 26, 2001, at Kitchener, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: November 27, 2001

ADLS – 847 – MISTAKE IDENT

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: November 26, 2001

DECISION
RELEASED: November 27, 2001

Kitchener

REASONS FOR DECISION

A hearing was held on November 26, 2001, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 27, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated November 5, 2001, and was received by the Tribunal on November 7, 2001, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"This is a case of mistaken identity. I am not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken."

Preliminary Matters

Prior to commencing the Hearing the Tribunal asked the Applicant if his command of the English language was sufficient to allow him to proceed without the presence of an interpreter. The Applicant confirmed that he understood and that he wished to proceed.

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents on file.

Also at this time, the Representative of the Ministry advised the Tribunal that Police Officer #1 would not be attending the hearing. The Representative of the Ministry sought to introduce a "Subject Profile" from the Guelph Police Services depicting a picture of the Applicant, as well as an Affidavit from Police Officer # 1.

The Tribunal asked the Applicant if he had had any objections, and as he did not, both items were entered in evidence.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1- Notice to Registrar dated October 21, 2001.
- b) Exhibit # 2- Notice of Appeal Form – received November 7, 2001.

By the Respondent:

- a) Exhibit # 3- Ministry of Transportation submissions – received November 20, 2001.
- b) Exhibit # 4- Affidavit of Police Officer # 1 – Received November 26, 2001.
- c) Exhibit # 5- Subject Profile – received November 26, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(a) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Was the Applicant whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

As per Notice to the Registrar, the Applicant's Driver's Licence was suspended on October 21 2001.

Applicant's Evidence

On page 1 of the Notice of Appeal the Applicant marked "mistaken identity", as the reason of appeal.

At the Hearing the Applicant confirmed that he was in fact stopped by the police on October 21, 2001 and that he is the person from whom a breath sample was demanded.

The Applicant further testified that he is the person who provided the breath sample and to whom the documents attached to the Notice of Appeal were given: Notice to the Registrar; Promise to Appear; Certificate of Qualified Breath Technician; Notice of Intention to Produce Certificates; Certificates of an Analyst.

In closing the Applicant confirmed that he appealed because he needs his licence to drive to work.

Respondent's Evidence

The Respondent provided the following Documents:

1. Certified Copy of Notice to the Registrar, sealed November 9, 2001
2. Certified Copy of the Driving Record of the Applicant, sealed November 9, 2001
3. Copy of Vehicle Record as of Occurrence date, sealed November 9, 2001
4. Copy of 1994 Licence Renewal, sealed November 19, 2001
5. Copy of 1996 Licence Renewal, sealed November 19, 2001
6. Copy of 2000 Licence Renewal, sealed November 19, 2001

Police Officer # 1 attests in an Affidavit sworn on November 23, 2001 that she verified the identity of the Applicant as "...he handed ...valid driver's licence with photo ...identified him, as Minh-Hai PHAM".

The Respondent offered no viva voce evidence, opting to rely on the information provided for the hearing.

In closing, the Respondent emphasized the fact the Applicant testified that there was in fact no mistaken identity.

APPLICATION OF THE LAW TO FACTS:

At issue is whether the Applicant is the one and the same as the individual from whom a breath sample was demanded as per Section 50.1(2)(a).

The Tribunal notes that the Applicant confirmed he entered the wrong date on the Notice of Appeal and that October 21, 2001 is in fact the date of the suspension.

Based on the evidence, the Tribunal finds that it is evident that Mr. Phan was the person from whom a breath sample was demanded and from whom a breath sample was taken. This finding is corroborated by the Applicant's own admission that he is one and the same as the individual stopped by the police and the one who provided a breath sample.

Regulation 574 as amended, particularly Section 13, provides that the Applicant has the onus of establishing the merit of the appeal. The Tribunal finds that the Applicant, Minh-Hai Pham failed to do so.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated October 21, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: November 29, 2001

DEVLIN

PREHEARING

PATRICK AND DEBRA DEVLIN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: G. KENT McCLURE, Q.C., Chair

APPEARANCES:

ROBERT W. COLLINS, Counsel, representing the Applicants, Patrick and Debra Devlin, with Patrick Devlin;
NETANUS RUTHERFORD, Counsel, representing the Ontario New Home Warranty Program, with Roger Hicks;
JEFFREY W. KRAMER, Counsel, representing Kansun Homes Ltd., Added Party, with Mr. Kansun

DATE OF
PRE-HEARING: November 27, 2001

Toronto

ORDER

FOLLOWING attendances on November 27, 2001 at a prehearing before the Tribunal of Robert W. Collins, Counsel on behalf of Patrick and Debra Devlin (the "Applicants") with Patrick Devlin; and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") with Roger Hicks a Warranty Representative of the Program; and Jeffrey W. Kramer, Counsel on behalf of Kansun Homes Ltd. (the "Added Party") with Mr. Kansun, Principal of the Added Party;

THE TRIBUNAL MAKES THE FOLLOWING ORDER:

- 1) The Parties to the hearing are the Applicants, the Program and the Added Party.

- 2) The Parties present at the prehearing recorded that there had been no resolution of the Applicants' claim under section 14(1)(b) of the *Ontario New Home Warranties Plan Act* for breach of warranty set out in section 15(2)(a) and (b) of Regulation 892 under the Act.
- 3) The issues to be dealt with at the hearing are contained in the Program's decision letter of April 30, 2001.
- 4) It was agreed by the parties that the Applicants took possession of their home at 3126 Baytree Court, Mississauga, Ontario on December 18, 1997, that the Applicants' written notice of claim in this matter was received by the Program on September 9, 1999, and that the Applicants' written request for conciliation was filed with the Program on January 4, 2000.
- 5) The Parties indicated they propose to call the following witnesses to testify at the hearing:
 - (a) The Applicants will call five (5) non-expert witnesses and two (2) expert witnesses (likely respecting engineering and health);
 - (b) The Program will call one witness, likely Roger Hicks, the Program's Warranty Representative;
 - (c) The Added Party will call two (2) non-expert witnesses and two (2) expert witnesses (likely respecting engineering and mold).
- 6) The hearing of this matter will commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Monday, March 25, 2002 to continue March 26, 27 and 28, 2002 and if necessary continue May 6, 7, 8, 9, and 10, 2002 and May 21, 22, 23 and 24, 2002.
- 7) All Parties to the hearing shall comply with the Rules of Practice of this Tribunal respecting disclosure, particularly Rule 6.3.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: November 28, 2001

HUNT, GARY O/A GARYS

GARY HUNT O/A GARYS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: EDWARD W. CLAXTON, Counsel, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: August 7, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written notice of proposal dated May 11, 2001, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Gary Hunt o/a Garys (the "Applicant") as a motor vehicle dealer under the provisions of the Act.

REGISTRAR'S POSITION

It is the position of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. The Applicant, when applying for a registration as a motor vehicle dealer on or about January 24, 2001 (the "Application"), failed to disclose, while previously registered, that he was an officer and director of a corporation that had declared bankruptcy.

2. Prior to the bankruptcy, the corporation of which the Applicant was an officer and director, Grandview Ford Lincoln Sales Ltd. ("Grandview"), was in default with respect to remittance of taxes due pursuant to the *Retail Sales Tax Act* and Grandview failed to remit payment of approximately \$82,927.68 for remittances filed for October, November and December 2000, which moneys were held in trust by Grandview pursuant to the *Retail Sales Tax Act*.
3. The Motor Vehicle Dealers Compensation Fund (the "Fund") has paid out \$22,226.84 on behalf of Grandview and there are further claims which have been submitted but have not yet been considered by the Board of Trustees of the Fund and to date, no moneys have been repaid to the Fund.
4. An execution search revealed that the Applicant is indebted to Canada Customs and Revenue Agency in the amount of \$81,280.00.
5. On or about February 8, 2001, Canadian Imperial Bank of Commerce obtained a judgment against the Applicant and Donna Hunt in the amount of \$277,350.00 plus costs of \$3,500.00.
6. On or about February 22, 2001, the Bank of Nova Scotia obtained a consent judgment against the Applicant and Donna Hunt in the amount of \$794,924.74.

APPLICANT'S POSITION

It is the Applicant's position that the bankruptcy of Grandview and his financial problems were not a result of any action by him but that when he acquired an interest in Grandview the company was already in financial difficulty.

THE EVIDENCE:

The evidence introduced by the Registrar consisted of the testimony of William J. Assini, Thomas W. Everett and Mary Jane South. Documentary evidence was introduced by the above parties and the respondent's Book of Disclosure was made Exhibit 3 in these proceedings.

TESTIMONY OF WILLIAM ASSINI

Mr. Assini is a chartered accountant, licenced trustee and a senior partner with PriceWaterhouseCoopers Inc. ("PWC") in their insolvency section. Mr. Assini testified that the trustee had difficulty serving the receiving order on Mr. Hunt but that Mr. Everett, who was also an officer, was served and subsequently notice was given to Mr. Miles O'Reilly who was the

solicitor for Mr. Hunt. Mr. Assini explained that PWC was appointed by the Bank of Nova Scotia (the "Bank") in October or November 1999 to act as a monitor of Grandview as the BNS was concerned about the operations of Grandview. As the monitor, PWC was not to interfere with the day-to-day operations of the business. On December 10, 1999, the role of PWC was changed from that of monitor to receiver/manager and on December 22, 1999, BNS made a petition for a receiving order for Grandview. On January 12, 2000, Grandview was adjudged bankrupt and, PWC was appointed trustee.

Mr. Assini stated that the BNS originally became involved with Grandview when it was owned and operated by Harry Edward Learn and Thomas W. Everett. However, the BNS had lost confidence since Mr. Hunt had taken over management of the dealership. It was Mr. Assini's information that Mr. Hunt became involved in February 1999 when he purchased an interest in Grandview. However, the BNS did not wish to finance Mr. Hunt. Through the period of October and November 1999, PWC's people were on site and Mr. Hunt was in charge as general manager. It was Mr. Assini's testimony that at that point in time Messrs. Everett and Learn appeared to have no operational role with the dealership.

Mr. Assini referred to PWC's report to the first meeting of creditors dated February 1, 2000 (Exhibit 3, Tab 8) and particularly page 3 of that report wherein reference is made to the fact that approximately ten vehicles were sold-out-of-trust ("SOT Vehicles") and explained that the proceeds from the sale of the vehicles were to be paid to the BNS within 24 hours of settlement after a vehicle is sold. With respect to the aforementioned ten vehicles, they had been sold, but the BNS had not received funds which was one of the reasons why BNS was concerned about Grandview. The BNS estimated that the amount for the SOT Vehicles sold but for which it had not received payment to be between \$332,000.00 and \$338,000.00.

Mr. Assini testified that as the role of a receiver/manager is not as wide as that of a trustee, it was decided that PWC's role would be converted to that of a trustee by petitioning Grandview into bankruptcy. Efforts were then made to trace the SOT Vehicles and to determine to whom they were sold and the amounts paid.

Mr. Assini testified that there was a transaction which occurred on or about November 30, 1999, pursuant to which a group of vehicles were sold to Bay Ford at an invoice price of \$177,693.00, however only \$65,270.00 was paid by cheque which was delivered to 924747 Ontario Limited, a company to whom Mr. Hunt owed money. A settlement was made with respect to this transaction by the numbered company repaying the sum of \$32,000.00 to the trustee. It was Mr. Assini's evidence that the signature on the invoices was that of Mr. Hunt and that Mr. Hunt had arranged for the cheque to go a numbered company, 924747 Ontario Limited.

Mr. Assini testified that there were other reviewable transactions including the sale of several vehicles on December 3, 1999, also to Bay Ford for which settlement was made with a payment to the trustee of \$12,000.00.

Mr. Assini stated that the records of Grandview indicated various payments by Grandview from its credit card accounts; one payment was for \$40,000.00 to Donna Hunt and payments were made for various personal expenses of the Applicant. Mr. Assini referred to a payment marked as a bonus for which no T-4 slip had been issued. Mr. Assini did indicate that such payment could have been reversed at year-end and treated as income.

Mr. Assini's attention was directed to the proof of claim (Exhibit 3, Tab 9). He acknowledged that the Ministry of Finance for the Province of Ontario had filed a proof of claim for provincial sales tax with respect to the bankruptcy and that the amount set forth in the proof of claim was approximately \$82,000.00.

On cross-examination, Mr. Assini was asked as to the period for which a trustee can review arm's length and non-arm's length transaction and asked if he had reviewed any transactions in June, July and August 1999 or earlier. Mr. Assini testified that the trustee had only gone back to September 1, 1999. Mr. Assini stated that he understood that Mr. Hunt left the dealership on November 30, 1999, but had no information as to the reason for such departure.

Mr. Assini testified that he was not aware of an agreement with Grandview with respect to the "boat loan" and did not review the records of the previous year to see how payments purportedly for Mr. Hunt on his boat loan were treated by Grandview. Mr. Assini stated that the trustee did not issue a T-4 slip with respect to payments for the boat loan.

When asked about the litigation between Mr. Hunt and the Bank, Mr. Assini testified that he knew that Mr. Hunt had sued the BNS and that the matter had been settled but did not know any of the details of the settlement.

TESTIMONY OF THOMAS W. EVERRETT

Mr. Everett testified that he is a chartered accountant with experienced in the motor vehicle industry. He stated that while articling, one of his firm's clients was Mr. Learn and that he subsequently worked for Mr. Learn and later became general manager at Ed Learn Ford in St. Catharines and Phoenix Ford in Guelph prior to becoming involved with Grandview . Mr. Everett became a partner with Mr. Learn in 1988.

Mr. Everett testified that he was not involved with the day-to-day operations at Grandview but did visit Grandview weekly to review its operations.

Mr. Everett stated that when Mr. Learn indicated that he wanted to dispose of his interest in Grandview and as Mr. Everett did not wish to take it over, Mr. Everett began to look for someone who might be interested in acquiring the dealership and who would be approved by Ford. Mr. Everett knew of Mr. Hunt and knew that he was managing a large dealership in Barrie and that Mr. Hunt was in line for a dealership with Ford.

Mr. Everett testified that in his discussions with Mr. Hunt, he understood that the Applicant was looking for a smaller dealership in the same geographical area as the Barrie dealership. Mr. Everett had received glowing reports about Mr. Hunt and it appeared that Mr. Hunt would be acceptable to Ford Motor Company.

On or about January 31, 1998, an agreement was reached with Mr. Hunt regarding Grandview and on or about February 18, 1998, Mr. Hunt was made president, general manager and a director of Grandview. This was done because Mr. Hunt wanted a firm commitment from Grandview and its owners before leaving the Barrie dealership.

Mr. Everett testified that at the beginning of the Applicant's involvement with Grandview, Mr. Everett was involved, but very quickly Mr. Hunt took over because of his experience and after approximately 1½ months Mr. Everett reverted to his previous role of dropping in at Grandview once a week on Wednesdays for about 2 to 2½ hours for consulting purposes.

Mr. Everett testified that Mr. Learn was even less involved with the dealership than Mr. Everett. Mr. Everett stated that in March 1998, an agreement was drawn up between the Applicant and Messrs. Everett and Learn. On or about April 3, 1998, a letter was received from Ford of its intention to approve Mr. Hunt and documents were signed on April 30, 1998, at which time Mr. Hunt acquired a 20% interest in Grandview. Mr. Everett testified that the Applicant had his own lawyers and accountants with respect to this transaction. The original proposal provided for Mr. Hunt to become a 100% owner within five years, however this was never completed.

Mr. Everett testified that Grandview experienced a net loss of approximately \$49,300.00 in 1997 and that was turned around such that by December 31, 1998, there was net income of approximately \$40,000.00 which was attributed to the management skills of Mr. Hunt. Mr. Everett acknowledged that there had been an amendment to the Dealer Sales and Services Agreement some time around April 14, 1998, which reflected that Mr. Everett's company held 40%, Mr. Learn's company held 40% and Mr. Hunt's company held 20%.

Exhibit 5 is a copy of the Amendment to Dealer Sales and Service Agreement which sets forth the foregoing percentages and indicates that Gary Hunt was the president and Tom Everett was the secretary-treasurer.

Mr. Everett testified that a dividend in the amount of \$593,984.00 was paid in early 1998 at a time when Mr. Everett's company owned 51% and Mr. Learn's company owned 49%. It was Mr. Everett's testimony that the acquisition by Mr. Hunt was based on the retained earnings of Grandview being zero and the dividend of \$593,984.00 was paid to "clear out" the retained earnings. Mr. Everett stated that subsequently there was a dividend on December 31, 1998, of which Mr. Everett's company received 40% and Mr. Learn's company received 40% and Mr. Hunt's company received 20%.

Mr. Everett acknowledged that in March 1998 Grandview borrowed \$350,000.00 from the BNS and that the proceeds of the loan were paid out proportionately to Everett's company and Learn's company with the result that the long-term debt of Grandview was increased by \$350,000.00.

A letter from the BNS dated September 1, 1999, addressed to Grandview to the attention of Mr. Ed Learn, Vice President, was acknowledged by Mr. Everett as being with respect to the aforesaid loan. He acknowledged that according to the letter the loan was in default as of September 2, 1998 and that a default letter had been sent as of that date and another default letter was sent on May 5, 1999.

When asked, Mr. Everett could not recall a period of time when the Applicant was not able sign cheques alone but needed a second signature. A letter addressed to the BNS dated July 15, 1999, was entered as Exhibit 9 which indicated that, effective immediately, there was a change in the signing authority such that the president or office manager along with either the vice president or secretary-treasurer, or the vice president or secretary alone were authorized to sign on behalf of Grandview.

In reply, Mr. Everett testified that the Applicant was aware of the \$593,984.00 dividend because it was part of the March 18, 1998, agreement of purchase and sale for the shares and that the \$350,000.00 loan was required by Ford Motor Company of Canada to meet its capitalization requirements which required a debt to equity ratio of one to one.

TESTIMONY OF MARY JANE SOUTH

Ms. South, the Deputy Registrar, referred to the Notice of Refusal dated May 11, 2001 (Exhibit 3, Tab 1) and confirmed that the Registrar was unwilling to register the Applicant because of concerns with respect to his integrity and honesty and specifically the Applicant's dealings with the bankruptcy of Grandview and his failure to answer honestly the question on the Application.

Ms. South referred to the Application (Exhibit 3, Tab 3) and specifically Question No. 7 which asks if the Applicant had been an officer, director or majority shareholder of a corporation which has been declared bankrupt to which the Applicant had responded "No" and stated that the Applicant had not answered this question truthfully.

Ms. South testified that the truthful completion of an application was a key test in establishing an applicant's integrity and honesty and that by not truthfully answering Question No. 7, the Applicant failed that test.

Ms. South stated that when the Ontario Motor Vehicle Industry Council ("OMVIC") realized, as a result of a bankruptcy search, that Grandview had gone into bankruptcy, it contacted PWC and was provided with a statement of affairs. Ms. South stated that further investigations revealed that the Motor Vehicle Dealers Compensation Fund had paid out a total of \$22,226.84 on claims submitted by consumers with respect to Grandview as indicated by the letter at Exhibit 3, Tab 10. Further, OMVIC learned that the Applicant was indebted to Canada Customs and Revenue Agency in the amount of \$81,280.00 as indicated by the certificate addressed to the Sheriff at Waterloo (Exhibit 3, Tab 11) and the certificate addressed to the Federal Court of Canada, Trial Division from Canada Customs and Revenue Agency (Exhibit 3, Tab 12) and that a writ of seizure and sale in this amount had been issued out of the Federal Court of Canada, Trial Division (Exhibit 3, Tab 14).

Ms. South testified that OMVIC's investigations indicated that a writ had been issued in favour of the Canadian Imperial Bank of Commerce ("CIBC") to the Sheriff at Waterloo in the amount of \$277,350.35 plus \$3,500.00 in costs as indicated on the certificate at Exhibit 3, Tab 15.

Ms. South referred to the judgment at Exhibit 3, Tab 18 dated February 8, 2001, of the Ontario Superior Court of Justice against the Applicant and Donna M. Hunt in favour of the CIBC. Referring to Exhibit 3, Tab 16, Ms. South advised that according to the letter from Kronis, Rotsztain, Margles, Cappel, as of May 8, 2001, the amount of \$290,519.03 remained outstanding on the judgment in favour of the CIBC.

Ms. South referred to Tab 21 of Exhibit 3 which is a copy of a judgment dated February 23, 2001 pursuant to which the BNS obtained judgment against the Applicant and Donna Hunt in the total amount of \$794,924.74.

Ms. South confirmed that the Registrar maintains its position that the Applicant should not be registered under the Act.

Ms. South acknowledged receiving a letter of the Applicant (Exhibit 8) in response to questions raised by OMVIC with respect to the Application, explaining why he did not answer Question No. 7 in the affirmative and responding to other matters including the judgment of the CIBC and the payments by the Compensation Fund. She acknowledged that the Applicant did not deny that he was an officer and that the letter to OMVIC from the Motor Vehicle Dealers Compensation Fund did not indicate as to when or who was involved in connection with the claims submitted to the Fund by customers of Grandview.

In response to questions regarding the Applicant's personal loans, Ms. South noted that the letter from the Applicant (Exhibit 8) made no mention of the BNS matter even though the judgment would have been given prior to the letter from the Applicant.

When it was suggested to Ms. South that there was no conduct prior to December 1999 with respect to the Applicant, reference was made to the employment by the Applicant of an unregistered salesperson and certain transactions with respect to another dealership where the Applicant was the used car manager, however no formal complaint was ever made with respect to these matters and they do not form part of the Registrar's proposal.

TESTIMONY OF GARY HUNT

The Applicant testified that he was 54 years old and had been in the automobile industry since 1971. He had initially worked with Brant County Ford from 1971 to 1980 and had been out of the industry for approximately six years and returned in 1986 to Brant County Ford where he stayed for five years reaching the position of general sales manager. The Applicant then worked for Phil Walker Ford (previously Huronia Ford) which at the time was losing money, however within a period of 7½ to 8 years when the Applicant was general sales manager and then general manager from 1993, the dealership became number one in used car sales, number five in new car sales and number three in customer satisfaction.

The Applicant stated that he was interested in acquiring his own dealership and that several were available. Mr. Everett approached him about purchasing Grandview and although the financial statements showed that Grandview had suffered losses, the Applicant believed that he could turn this dealership around. The Applicant stated that he had known Mr. Learn for many years.

It was the Applicant's understanding that he would be the general manager and that Tom Everett would be responsible for finance. As general manager, the Applicant would be responsible for sales, the body shop and hiring. In order to improve the financial position of Grandview, the Applicant needed to deal with the problem of used cars on the lot for 200 days or longer, the need to hire better salespeople and streamline the repair shop operation. As a result of these changes, expenses were approximately \$100,000.00 less in 1998 than in 1997. The Applicant stated that he had started off at Grandview with a loss of \$35,000.00 and had reached a profit of \$50,000.00 a year later.

The Applicant testified that in order to buy the 20% interest in Grandview for which the Applicant paid \$135,000.00, he had to have Ford Motor Company's approval which was obtained in April 1998.

The Applicant stated that as a result of the money taken out as retained earnings and a \$350,000.00 loan to Grandview, it was never in a positive cash flow position and by December 31, 1998 the dealership owed \$818,000.00.

The Applicant stated that he was not privy to financial information for the dealership and that most of the information that he did receive came from Tom Everett who would advise the Applicant that the BNS wanted this or that and that Grandview had to respond.

It was the Applicant's evidence that Messrs. Everett and Learn wanted \$1,000,000.00 for Grandview but the Applicant did not think that the dealership was worth that much money. Further, the Applicant testified that he had a meeting with the BNS and when he asked if the BNS would support him if he purchased Grandview, the Applicant was told that the BNS would support him. The Applicant testified that notwithstanding that the purchase money had been paid, as far as he was aware the shares had never been transferred to him. The next day following the payment of his money, the BNS lowered the credit line by \$100,000.00.

Subsequently, the BNS took \$170,000.00 out of Grandview's account and there were daily calls from the account manager regarding the operations of the dealership.

The Applicant testified that in mid-October, Mr. DeBokx, deputy manager of the BNS's branch, asked the Applicant to sign a form permitting PWC to come in as a monitor otherwise the BNS would close the dealership. PWC was in the next day and was there from opening of the dealership in the morning until closing every day thereafter. With the presence of PWC personnel, the Applicant stated that morale fell and sales fell off because no one was working. Further, it was a struggle to find money to pay salaries and on one occasion, the Applicant had three different bids for a group of cars, accepted one and used the money to meet the payroll.

The Applicant testified that by the end of November, he felt that it was impossible for him to effectively run the dealership, and he gave his resignation to the general sales manager. The Applicant stated that when he received calls from PWC regarding vehicle sales, he assisted PWC in tracing the vehicles. Further, he advised that his father and wife had each purchased a demonstrator which had been sold at a profit with the moneys going to Grandview.

With respect to the Ministry of Finance and payment of Provincial Sales Tax, the Applicant stated that the company had been indebted to the Ministry of Finance over the past years and in 1997, had owed the Ministry of Finance the amount of \$280,000.00; in 1998, \$140,000.00 and in 1999, \$60,000.00. The Applicant believed that quarterly amounts had been paid up to November, however PWC was in charge and he was not aware of what took place after he left.

The Applicant testified that in July 1999, Tom Everett met with him and advised that the BNS was not happy with Grandview and that either Tom Everett or Ed Learn would have to sign cheques for Grandview.

With respect to the CIBC judgment, the Applicant testified that in 1997 he had a loan for \$477,000.00 for a boat and he sold the boat, reduced the loan by \$200,000.00 and purchased a motor home which was subsequently seized by the trustee. The Applicant told his account manager at the CIBC, that until the motor home was returned, Mr. Hunt was not paying any further moneys on the CIBC loan.

The Applicant subsequently learned that the CIBC had not registered any security interest against the motor home. When the CIBC found out that the BNS could sell the motor home, the CIBC served the Applicant with a statement of claim together with a motion for summary judgment, and it was the Applicant's understanding that the purpose of the summary judgment was to obtain an order so that CIBC could block the sale of the motor home. The Applicant testified that he had a 10-year relationship with the CIBC during which he had never missed a payment on any loan and that the CIBC advised the Applicant that the loan would be rewritten.

The Applicant stated that during this period his wife was suffering from a nervous breakdown and was in the hospital and that it was difficult to handle the family finances.

The Applicant stated that the BNS commenced an action against him and that he commenced an action against the BNS. It was as a result of this court action that he obtained more financial information about Grandview and learned that it was in jeopardy at the time that he purchased shares. The court action between the BNS, PWC and the Applicant and his company has been settled and the lawyers were drawing up the settlement papers.

With respect to the income tax issue, the Applicant testified that he was in regular communication with the Canada Custom and Revenue Agency and that he had previous losses to offset against income. The Applicant stated that the Canada Custom and Revenue Agency had not taken further steps with respect to collection and had lifted the writ in order to permit the sale of his house, as had the BNS.

The Applicant testified that between 1987 and 1988 he wrote a weekly article called "On the Road" about buying and selling motor vehicles for a local paper. In 1995, the Applicant was asked by the dean of Georgian College in Barrie why his dealership did not hire their graduates. As a result, the Applicant prepared a curriculum for a co-op program for the automobile business, designed the qualifications and interviewed the students for the program. One hundred and sixty students graduated from the program and all obtained jobs. In 1997, funding stopped and the course was cancelled, however the Applicant believes that the course is being used elsewhere.

The Applicant testified that in 1997 he was instrumental in obtaining ISO 9002 certification for his dealership which was the first to obtain such certification and that it was the Applicant who did the qualification work. In addition, the Applicant testified that he received awards for the top sales team in Ontario, was given Ford's highest award for customer service, was a member of Rotary and has spoken at various schools regarding the automobile industry.

The Applicant stated that when he wrote the OMVIC examination, he obtained a 93% average.

The Applicant responded to the various other matters raised which do not form part of the Registrar's proposal and need not be further addressed here.

The Applicant testified that he read Question No. 7 incorrectly and believed that the question asked if he ever been an officer, director **and** shareholder of a bankrupt company. Further, the Applicant stated that he believed that he had resigned prior to the bankruptcy of Grandview and had not been notified of the bankruptcy even though PWC knew where to find the Applicant.

With respect to the vehicles sold out of trust, the Applicant testified that this was a fleet order and that he was not aware that, until seven to ten days later, that all of the money was to be paid to the BNS.

The Applicant stated that the \$4,000.00 monthly payment for the boat loan was part of his compensation package and was to be reflected in the employment contract which was to have been attached to the March 18, 1998 agreement of purchase and sale (Exhibit 7) as part of the shareholders' agreement but the shareholders' agreement was not included in the agreement or purchase and sale.

On cross-examination, the Applicant stated that when he agreed to purchase an interest in Grandview, he was given the title of president and general manager, however his true job was that of general manager. The Applicant testified that he was responsible for what the Applicant referred to as "front end" and that Tom Everett was responsible for the financial operations of Grandview and that the officer manager had told the Applicant that the office manager worked for Tom Everett.

The Applicant stated that because he knew Ed Learn, he had been satisfied that the financial statements were correct.

The Applicant testified that from February 1998 through August 1999, he was involved with running the dealership and was aware of vehicle purchases and sales. The Applicant stated that he resigned because, in his mind, the BNS was running the dealership. After he resigned, the Applicant never went back to Grandview.

The Applicant testified that there was an agreement with the BNS regarding payment for vehicles went they were sold out of trust. The agreement was made sometime in 1998, but the Applicant was not sure as to exactly when.

When asked about the November 17, 1999 letter which is Exhibit 10, the Applicant stated that he never knew that 17 vehicles were sold out of trust but admitted that he gave no written response to the November 17th letter but did state that he was talking to the BNS every day.

With respect to the letter from the Applicant to Ms. South (Exhibit 8), the Applicant acknowledged that it was the first time he advised OMVIC of the error and did so a couple of days after receiving a notice of concerns from Ms. South.

With respect to moneys paid to the numbered company, the Applicant testified that he could not recall who was behind the numbered company. The Applicant admitted that he did not have a copy of any correspondence from Canada Customs and Revenue Agency with respect to the losses nor did he have any documents with him regarding the lifting of the writ by Canada Customs and Revenue Agency.

When asked about the statement appearing at Tab 2, Schedule "A", No. 14, the Applicant testified that he did not realize that the taking of the moneys from Grandview would jeopardize the financial position of the company.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant was an officer of Grandview as of the date of bankruptcy.
2. The Applicant told a person in a management position at Grandview that he was resigning as of December 1, 1999.
3. A petition for a receiving order against Grandview was made on December 20, 1999 and Grandview was adjudged a bankrupt on January 12, 2000.
4. The Applicant answered Question No. 7 on the Application incorrectly.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to refuse the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of Gary Hunt should be refused.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

In the leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in that case, Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

“The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051, the Court held:

“It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.”

APPLICATION OF LAW TO FACTS:

The Registrar based his refusal on the grounds that the Applicant failed to truthfully answer the question on the Application and that the past conduct of the Applicant with respect to his involvement with Grandview and his personal affairs indicated that the Applicant is not financially responsible and would not carry on business in accordance with the law and with integrity and honesty.

The Applicant's response to the first issue is that the Applicant believed that in order to answer the question in the affirmative you had to be not only an officer of the bankrupt company but also a director and shareholder. Further, the Applicant believed that he had resigned as an officer prior to the bankruptcy of Grandview which did not occur until the granting of the receiving order on January 12, 2000.

Although the Tribunal recognizes the need for honesty and complete disclosure on an application by an applicant, the Tribunal finds that the Applicant's failure to answer the question in the affirmative in this matter did not provide reasonable grounds for the Registrar's to refuse registration.

The financial issues which led to the bankruptcy of Grandview and the Applicant's involvement in those matters is more troubling. The Applicant testified that he was a "front end" person which would indicate that throughout his career there was always someone else in the various dealerships for which he was involved who would look after the financial details. Tom Everett, a chartered accountant, was involved with Grandview at least on a weekly basis and certainly must have known of problems within the dealership in September 1998 as a result of the default letter from the Bank and again in May 1999. Indeed, steps were taken in July 1999 to place controls on who could write cheques for Grandview. In addition, the BNS had PWC acting as a monitor of the activities of the dealership on a daily basis. The allegations that moneys were improperly paid either to or for the benefit of the Applicant or his wife were not proven to be examples of wrongdoing by the Applicant.

It is the Applicant's position that the payments made to him or on his behalf during a fiscal year are, at year-end, treated as salary and this is what was to have occurred with respect to what is referred to in these proceedings as the "boat loan." It is less clear what the treatment was to have been with respect to the \$40,000.00 payment to Donna Hunt.

The issue of the vehicles sold out of trust has not been clearly established as an unlawful or dishonest act by the Applicant.

It must be noted that the Registrar's proposal does not refer to the alleged diversion of Grandview funds for the personal use of the Applicant nor the sale of vehicles out of trust.

In the Registrar's proposal, reference is made to the failure of Grandview to pay retail sales tax for October, November, December 1999 (misstated in the proposal as 2000) however, this failure was not directly linked to the Applicant. The Applicant's ability to write cheques had been altered as of July 1999 and Tom Everett who had cheque signing authority with Ed Learn was still involved, and PWC was monitoring the activities of Grandview throughout most of this period.

With respect to the payments made by the Motor Vehicle Dealers Compensation Fund, no evidence was adduced in these proceedings to show that the Applicant was responsible for these payments being made or that the Applicant was directly responsible for the bankruptcy of Grandview.

As to the Applicant's indebtedness to Canada Customs and Revenue Agency, it is difficult, given the change in circumstances that the Applicant experienced with respect to the failure of Grandview and the Applicant's evidence that there are offsetting losses, to conclude that the Applicant is financially irresponsible and the same applies with respect to the Applicant's indebtedness to the CIBC.

With respect to the judgment against the Applicant to the Bank with respect to Grandview, this matter has been settled on terms that were not disclosed to the Tribunal.

The Applicant has been registered under the Act for approximately 24 years without a formal complaint being made against him and during that time has achieved certain recognition for his work directly and indirectly in the automobile industry.

The Applicant's involvement in acquiring an interest in Grandview may raise questions about the Applicant's business judgment, however it cannot be ignored that at the time that the Applicant became involved in Grandview, it was losing money and subsequently to his involvement began to show a profit. Further, the letter of September 1, 1999 (Exhibit 6) indicates that the loan arrangement accepted on March 12, 1998, was in default by September 2, 1998, during which period Tom Everett and Ed Learn owned 80% of

Grandview and Tom Everett initially had daily involvement with the operations of Grandview and continued to be involved at least weekly as a person authorized to sign cheques.

In conclusion, the Tribunal finds that the Registrar has not satisfied the onus of proof that the Registrar has reasonable grounds to believe that the registration of Gary Hunt should be refused.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to refrain from carrying out the notice of proposal dated May 11, 2001, to refuse the registration of Gary Hunt as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

RELEASED: November 29, 2001

VOLL and Franco

ROBERT VOLL AND DANIELA FRANCO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ROBERT VOLL AND DANIELLA FRANCO, representing themselves

ANDREA YORK, Counsel, representing the Ontario New
Home Warranty Program on February 19, 2001. On June 8, 2001 and on
November 19 and 20, 2001 CAROL STREET, Counsel, representing
the Ontario New Home Warranty Program.

PAUL H. STARKMAN, Counsel, representing Islington Woods
Developments Ltd. o/a Arista Homes

DATES OF HEARING: February 19, 2001 and June 8, 2001
and November 19 and 20, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Robert Voll and Daniella Franco (the "Applicants") from a written decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated October 17, 2000.

The Program's decision letter dealt with three claims of the Applicants. Two of those claims were resolved by the parties prior to the hearing. The remaining claim was denied by the Program in its decision letter and is the sole issue upon which the Tribunal was called to adjudicate. This claim related to:

Crumbling and cracked grout, kitchen floor, foyer, outside powder room, kitchen floor has now been re-grouted 3 times but contains to crumble.

The Program's observation/comment which is recorded in its decision letter under this claim is as follows:

Observation/Comment: The builder and the flooring contractor Dama Tile on six occasions as noted in your correspondence have addressed with you the issue of deteriorating and shade variations of grout in your ceramic tile floor areas. As stated in your correspondence, Dama Tile replaced all grout in kitchen, breakfast area and foyer with epoxy-latex additive grout on November 16-19, 1999. The areas of ceramic tile floor grout viewed during the re-inspection on August 23, 2000 at your home were consistent with damage caused by improper maintenance or cleaning of the tile. The areas of grout damage were only visible under close examination requiring viewing from within one to two feet of the floor surface to clearly see the extent referred to by the owner during the re-inspection.

The admixture of epoxy as a hardening agent is intended to impart improved hardness and durability to the cementitious based grout material. It is not engineered to meet the same durability and hardness of the fire glazed ceramic tile itself. No cracking of the grout was observed, indicating the grout remained intact. Further, water was unable to penetrate the grout joints during cleaning operations indicating the grout installation was performed in a good and workmanlike manner.

The house was constructed pursuant to the requirements of Section 9.3.0.6. Flooring Ceramic Tile of the Ontario Building Code. All visible structural members were sound and securely fastened. No noise or squeaking of the floor assembly was evident consistent with good building practices of the industry.

The Program in denying the Applicants' claim gave as its reason:

Pursuant to Section 13(2) of the Act which states "A warranty under subsection (1) does not apply in respect of; damage resulting from improper maintenance".

Further, a defect in work or materials supplied by the builder was not apparent pursuant to Section 13(1) of the Act.

The Applicants appealed the decision of the Program to deny their claim and their appeal is based upon Section 14(1)(b) of the *Ontario New Home Warranties Plan Act* (the "Act") which reads as follows:

14.(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in the mitigation of damages claimed under subsection (1).

THE EVIDENCE:

The Evidence of the Applicants

The evidence presented by the Applicants consisted of their oral testimony and certain documentary evidence. Their evidence follows.

The Applicants took possession of their home from Islington Woods Development Ltd. carrying on business as Arista Homes ("Arista") on February 25, 1999. Upon taking possession, a predelivery inspection was held and a written description of deficiencies in the home was noted. Among the deficiencies noted was the ceramic floor tile grout in the ensuite bathroom and the ceramic floor tile grout in the kitchen. (Exhibit 4, page 1) No variation in the colour of the grout was noted in Exhibit 4. One week after taking possession Dama Tile, Arista's tiler, made repairs to the grout.

On March 5, 1999 Ms. Franco addressed a letter to Arista regarding deficiencies in which she noted that there was a cracked floor tile near the tub in the ensuite bathroom and, in regard to the kitchen floor, the grout had not dried in a few spots as it appeared darker in colour in some places (Exhibit 6). On April 1, 1999 Dama Tile made repairs to the grout in the kitchen as well in the ensuite bathroom.

On June 3, 1999, Ms. Franco again wrote to Arista that "there seems to be a problem with the grout on the floor in the kitchen and in the ensuite bathroom" and that "the grout is cracking and in the kitchen and ensuite and a large piece of grout has come out of the kitchen floor". (Exhibit 3, Tab 8)

Dama Tile sent Vince, an employee, to the Applicants' home to inspect the grout. Pursuant to this inspection, Dama Tile on June 15, June 17 and June 18, 1999 sent a further employee to the Applicants' home to make repairs to the grout.

On June 21, 1999 Ms. Franco once again wrote to Arista (Exhibit 3, Tab 10) that she noticed that the grout that was replaced in the kitchen floor by Dama Tile earlier in June was different in colour to the original grout. On July 23, 1999 Agostino Gatto, the owner of Dama Tile, and Vince reinspected the grout in the Applicants' home.

On September 13, 1999 Ms. Franco wrote to Arista reminding Arista that the grout problem remained unresolved despite the grout in the ceramic tile floor in the kitchen having been twice removed and reinstalled during Dama Tile's attendances at the Applicants' home on April 1, June 15, June 17 and June 18, 1999. (Exhibit 3, Tab 18)

Not being successful in having the grout problem resolved, the Applicants completed a conciliation request form on October 11, 1999 and forwarded the form to the Program on October 15, 1999. (Exhibit 3, Tab 22) The complaints of the Applicants in respect of which they required a conciliation inspection related to numerous items, including the grout problems. All items, other than the grout problems, were subsequently resolved between the parties.

However, the grout problems persisted and were noted on the conciliation request form as crumbling and cracked grout in the homes' "kitchen floor, foyer and outside powder room".

During October, 1999, following a discussion between the Applicants and Arista it was arranged that Dama Tile would remove all the ceramic tile grout on the kitchen floor and foyer and regrout with epoxy latex grout. This was scheduled to be done on November 16, 17 and 18, 1999. (Exhibit 3, Tab 25) During the period November 16 to November 18, 1999 the kitchen floor and the foyer were regrouted by Dama Tile after they had removed all the grout in those areas.

On November 24, 1999, after the repairs of November 16 through 18 had been completed by Dama Tile, a meeting and reinspection was held at the home at which the Applicants were present as well as Vince of Dama Tile and Gail Dombrowski of Arista. The Applicants expressed concern and dissatisfaction in regard to the colour variation in the grout, and Vince explained that the colour problem was due to the grout not yet having "cured" and that it would take about a month to cure and become even in colour. It was arranged that, while waiting for the one month to pass to allow the grout to cure, no sealant would be applied to the ceramic tile floor or grout.

On December 29, 1999, Ms. Franco wrote to Arista that there was no change in the colour of the grout and "it has not cured in a month to become one even colour". (Exhibit 3, Tab 29) On March 6, 2000 Gail Dombrowski on behalf of Arista wrote to the Applicants that it, in conjunction with Dama Tile, had concluded that the grout on the main floor "is acceptable in that it is good, solid and not cracking". Arista also contended that "the grout as installed may have some shading differences, which are acceptable and therefore it is our decision to leave the grout as it is". (Exhibit 3, Tab 32)

On April 17, 2000, the previously requested conciliation inspection was held at the Applicants' home at which the Applicants were present as well as Arista's representatives, Gail Dombrowski and George Iadipaolo, and the Program's warranty representative, Philip Humphreys. Pursuant to the inspection, a conciliation inspection report authored by Philip

Humphreys was issued on April 21, 2000. The report, concludes that the grout problem is not covered under warranty, and states as follows:

1 Complaint: - (Item # 1, from Conciliation Request Form)
Crumbling and cracked grout, kitchen floor, foyer outside powder room, kitchen floor has now been re-grouted 3 times but grout continues to crumble.

Observation/Comment:

The owner acknowledged that the builder had completed the repair to the cracked grout. The owner stated that the color of the grout was excessively uneven and not acceptable.

There was some minor variation in the color of the grout however the variation was acceptable.

The Applicants were dissatisfied with the conciliation inspection report and requested a reinspection to review the grout problem. On August 23, 2000 a conciliation reinspection was held at the Applicants' home at which were present Ms. Franco, two representatives of Arista, Gail Dombrowski and George Iadipaolo as well as warranty representatives Philip Humphreys and Lance Gibson. On September 13, 2000 the conciliation reinspection report authored by Lance Gibson was issued by the Program which concluded the grout problem was not covered under warranty and which report stated as follows:

Complaint: (Item # 1, from Conciliation Request Form)

Crumbling and cracked grout, kitchen floor, foyer outside powder room, kitchen floor has now been re-grouted 3 times but grout continues to crumble.

Observation/Comment:

1. The kitchen/breakfast nook ceramic tile (12"x12") floor areas approximately 12'-6" x 10' and 8' - 10" x 12' - 4" respectively were installed in a good and workmanlike manner. In the kitchen area, no tiles were loose or cracked and the grout was secure. Approximately five locations of the grout totalling less than two lineal feet or less than 1% of total floor area exhibited signs of missing grout at the upper edge of the tile and the grout line. The grout was not cracked and the owner indicated it was difficult to detect and required close examination while scrubbing the floor to determine the extent of the damage. Further, the owner indicated the method of scrubbing the floor consisted of applying a volume of water to the surface of the tile and scrubbing with a stiff bristle brush to thoroughly clean the surface of the floor. The remedial grout replacement included the addition of an approved hardening additive to improve the characteristics of the base material in bonding and durability as indicated by the builder and confirmed by the owner. Although porosity is one of the properties of cementitious grout there was no apparent infiltration of water at the minor damaged grout areas of the floor.

The largest area of damage was located above a return air plenum for the heating/air conditioning/ventilating system of the house. The plenum was located in the space between the "Glulam" beam and the adjacent 2"x10" floor joist of the basement area in a good and workmanlike manner, as per common residential construction practice.

2. The front entrance foyer ceramic tile (12" x 12") floor area approximately 7' x 5' was installed in a good and workmanlike matter. No visible damage was observed at the inspection.

3. The main floor powder room/laundry ceramic tile (12" x12") floor area approximately 10'x 10' was installed in a good and workmanlike manner. The open floor area in front of the laundry appliances did not have any damage to the grouting. Minor damage not readily visible to the floor area grout at the powder room was evident totalling less than 1% of the total floor area.

Reason: This observed condition does not represent a defect in either materials or workmanship. It is minor in nature and not readily visible.

This complaint of damage is consistent with improper maintenance on the part of the owner and is specifically excluded from warranty coverage pursuant to Section 13(2)(f) of the Act. Further, the kitchen floor structure was designed and constructed pursuant to Section 9.3.0.6. of the Ontario Building Code.

When the Applicants received the conciliation reinspection report Ms. Franco, by letter dated September 18, 2000, wrote to the Program denying that she had informed Lance Gibson that she had scrubbed the surface of the ceramic tile floor using a stiff bristle brush. (Exhibit 4)

Ms. Franco went on to testify that she was present in January 2001 when her husband, Robert Voll, took photographs of the ceramic tile floor and grout in the kitchen and foyer areas. (Exhibit 5(a), (b), (c) and (d)). Also at that time a videotape of those areas was taken.

Under cross-examination, Ms. Franco stated that the areas of her present concern regarding the ceramic tile grout, are on the main floor (first floor) of the home in the foyer, kitchen/breakfast dinette, powder room and laundry. There is no longer a complaint regarding the grout in the ensuite bathroom on the second floor of the home as it was replaced to the Applicants' satisfaction.

Ms. Franco also stated that on the recommendation of Dama Tile she used sealer to keep water from penetrating the grout used in the ceramic tile floors. When Philip Humphreys, the Program's warranty representative was present at the conciliation inspection, the grout was cracked and this was pointed out to him. As Humphreys failed to note this in his conciliation inspection report, she requested the August 23, 2000 reinspection of the home, at which reinspection Humphreys and Gibson were present. She also stated that in cleaning the ceramic tile floors, she used a damp sponge and denied she used a bristle brush. The ceramic tile flooring had been satisfactorily repaired between November 16 and November 18, 1999, and it was only in December 1999 that the variation in the colour of the grout was first noticed by her.

The Evidence of the Program

Evidence presented by the Program consisted of that of warranty representatives Philip Humphreys and Lance Gibson.

Humphreys stated that he has been a warranty representative with the Program for the past 13 years and that prior to that he had been an inspector with Canada Housing and Mortgage Corporation (C.M.H.C.) for 13 years. Prior to working for C.M.H.C. he had earned a college diploma in building technology and had worked in the building industry.

Humphreys testified that he set up the April 17, 2000 conciliation meeting after having received the Applicants' complaint regarding crumbling and cracked grout in their home's ceramic floor tile. At that meeting he inspected the grout which in the previous November had been entirely regouted by Arista. He was satisfied from his visual inspection that there was no problem with crumbling and cracked grout.

It was pointed out to him by Ms. Franco at the conciliation inspection that there was a colour or shade variation of the grout. He observed that there was a minor difference in the colour of the grout, but it was so minor that he deemed it to be acceptable. He issued the Program's conciliation inspection report in which he confirmed the above and stated that there was no defect in work or materials used by Arista as well as no violation of the Ontario Building Code. Accordingly, he considered the Applicants' complaint concerning the ceramic tile grout not to be covered under warranty. Humphreys went on to state that minor variations in the colour of grout can be expected. He also stated that, on reinspection of the grout on August 23, 2000, he did notice that in the kitchen near the dining door there were three or four ceramic floor tiles where the grout itself had separated from the tile. The total area of ceramic tile in the Applicants' home was over 500 square feet and the approximate two lineal feet of tile where he noted the grout had separated from the tile was not, in his opinion, excessive.

Lance Gibson also testified for the Program.

He stated that he had been employed as a warranty representative with the Program from December 1999 until April 2001 when he left the employ of the Program to become a commercial pilot.

He further testified that he had been in the construction industry for twenty-five years during which time he had personally laid ceramic tile on different construction jobs and has particular knowledge of ceramic floor tiles and the manner of their installation.

When the Applicants requested a reinspection of their home, he was instructed to attend at this reinspection with Humphreys. The Program had instructed Gibson to attend the reinspection due to his practical experience with the use of ceramic tiles in the building industry, as well as the actual laying of such tiles. On August 23, 2000 he met with the Applicants at their home when the conciliation reinspection took place.

He testified that he explained to Ms. Franco that the purpose of the reinspection was to review the grout issue. He requested that Ms. Franco point out the areas of concern regarding the grout. Ms. Franco pointed out an area containing approximately four square feet of ceramic

tile in the kitchen. Initially, Gibson could not see what Ms. Franco was pointing and that was of concern to her. Ms. Franco, when asked to show Gibson the area of concern, explained that she had noticed discolouration in the grout itself and when she noticed the discolouration "she had scrubbed it". It was the area which she stated she had scrubbed to which Ms. Franco pointed. Gibson stated that when standing, he could not see the area of Ms. Franco's concern but when he "got down closer to floor level" he noted an area of about six inches that was causing concern to Ms. Franco. He saw no loose tiles and no evidence that grout had failed in the power room, laundry, kitchen and breakfast eating area. In the kitchen area he noted - which he pointed out on photograph marked Exhibit 5(a) - grout about 1 1/2" in length that was darker in colour when compared with the colour of grout elsewhere. His assumption was that coffee or something of an acidic nature, such as milk or fruit juice, had been spilled upon that portion of grout and had affected its original colour. He also contended that the use of a stiff bristle brush would, over time, cause the grout surface to deteriorate. He noted that on closer examination of the darker coloured grout there appeared to be no depth to the discoloured grout and that the discoloured grout appeared as if the grout surface had been scrubbed or scratched away and that this had lead to the discolouration.

Gibson also stated that the portion of grout shown in photograph Exhibit 5(b) was pointed out to him by Ms. Franco. She contended that it appeared that there had been chipping of the ceramic tile where the tile meets the grout. In fact, there was no chipping or any damage according to Gibson and what she pointed to was generally common in the appearance of ceramic tile. To illustrate his point he handed in as an exhibit a ceramic tile (Exhibit 16) which during the firing and manufacturing process commonly takes on the appearance of a tile to which Ms. Franco pointed. There was nothing defective in such a tile or in its manufacturing process and the tile was in no way damaged or chipped.

The Evidence of the Added Party

The evidence of the Added Party consisted of the testimony of Nat Brioschi, Gail Dombrowski, Bruno Zaffino and George Iadipaolo.

Nat Brioschi (Brioschi) stated that he was a supervisor with Arista at the time of the construction of the Applicants' home. After July 1999 he had no involvement in the development in which the Applicants' home is situate as he was transferred by Arista to another site.

In March 1999 the Applicants came to Brioschi complaining of colour variances in the grout in the home's kitchen and "pin holes" and cracking in the home's ensuite washroom. He went to the home to inspect the complaints and saw no problem in the colour of the grout although he did see some variation in the shade or colour of the grout in the ensuite washroom and kitchen. He had to get on his hands and knees to enable him to see the "pin holes" in the grout in the kitchen and in the ensuite toilet. There was no cracking in the grout in the kitchen or dinette area that he observed.

After the inspection, Brioschi spoke with Vince of Dama Tile who told him that colour variations were not warranted. However, to appease the Applicants regarding the colour variations complaint, Dama Tile was prepared to regrout the floor in the washroom and the kitchen which was done in November 1999.

Brioschi did note a colour variation in the grout in the foyer area of the home. The variation that he noticed was that the area of grout around the perimeter of the floor mat was darker than the grout under the mat itself. He stated that the grout used was a natural grey grout which by the very nature of being a natural product shows slight variance in shading or colour.

In answer to a question put to him in cross-examination by Voll, Brioschi stated that if there was no heat on in the home, the tiller will not lay the ceramic floor.

Gail Dombrowski (Dombrowski) testified that since September 17, 2001 she has been employed by the Ontario New Home Warranty Program and prior to that was employed by Arista as customer service manager. She has had 15 years of experience in the building industry, both in the field and in office administration and has taken some building courses.

Dombrowski's first dealings with the Applicants was in March 1999 when she and Voll went through the reported deficiencies on closing. Voll complained of cracking of floor grout in the ensuite washroom. This was attended to by Dama Tile in April 1999. The next occasion she had dealings with the Applicants was in April 1999 when they complained of colour variations in the grout and the grout "lifting up". She went to the home and inspected the kitchen/dinette floor and the floor of the foyer. She did notice a minor area of grout in the kitchen measuring approximately 1 ½" to 2" in length where there was a colour variation in the grout. She also noted a minor colour difference in the grout in the foyer floor where there was a mat. Under the mat there was a different shade of grout to the area of grout around the mat.

Repairs were affected to the ensuite washroom floor by Dama Tile. In June 1999, the Applicants called Dombrowski complaining that the grout in the kitchen floor was of two different colours. Dombrowski determined that two different colours were caused by an error and this error had to be rectified. Accordingly, Arista would redo the entire floor in the kitchen/dinette area and the foyer. These were done in November 1999.

After November 1999, Ms. Franco called Ms. Dombrowski complaining that there was still a colour variation in the grout. Dombrowski went to the Applicants home with a representative of Dama Tile. There it was agreed that the matter of the colour variation would be held over for one month to allow the grout to cure. The colour variation noticed by Dombrowski were "minimal" and that was the only complaint of Ms. Franco.

On March 6, 2000 Dombrowski signed a letter on behalf of Arista that was sent to the Applicants. (Exhibit 3, Tab 32) That letter stated;

“Arista Homes along with Dama Tile have come to the decision that the grout on the main floor of the house is acceptable. We did regrout the entire floor area and the grout is good, solid and not cracking which was the original problem. The grout as installed may have some shading differences, which are acceptable and therefore it is our decision to leave the grout as it is”.

This was the conclusion that was reached by Arista. The opinion of Dombrowski from her inspection regarding the grouting in the foyer was that the colour variation was dark towards the quarter round as shown in Exhibit 5(c). She also noted that in the kitchen floor area there was no crumbling of the grout although there was a barely visible minor surface crack in the grout which was only visible if she bent down to inspect the crack closely. She testified that Exhibit 5(a) is a magnified photograph of the area in the kitchen floor grout where the minor surface crack was pointed out to her and the darkened area near the crack is what she terms “spalling” or flaking of the surface of the grout. Spalling occurs when natural grout is used.

Dombrowski further stated that she attended at the conciliation inspection of April 17, 2000. (Exhibit 3, Tab 34) The complaint at that stage was the variance of the colour of the grout in the kitchen/dinette area and the foyer. Variation in grout colour is normal and not unusual. The hairline crack in the grout in the kitchen was difficult to observe and was a minor shrinkage or surface crack.

As to the foyer, Dombrowski observed warranty representative Humphreys lift up the mat that was on the floor of the foyer. When the mat had been removed from the floor, variation in the colour of the grout could be observed in the area covered by the mat and that area not covered by the mat. There was a darker variation in colour in the areas not covered by the mat due to the foyer being a high traffic area.

There was no loose tiles observed in all the floors and this did not form part of the Applicants' complaint.

At the conciliation reinspection of the Applicants' home on August 23, 2000 (Exhibit 3, Tab 37), only Ms. Franco was present, not Mr. Voll. The complaint at the conciliation reinspection was the same complaint that was raised at the conciliation inspection. The same variation in grout colour existed as well as the same hairline cracks in the kitchen floor grout. These cracks were at the side of the grout where the grout meets the ceramic tile. The cracks do not penetrate the grout itself. Dombrowski was obliged to get down on her knees before she could observe any crack in the grout. The observations made in the foyer area regarding grout colour variation were the same observations as were made at the conciliation inspection. No loose floor tiles were observed.

Dombrowski stated that she was present at this reinspection and the conversation included how Franco maintained the ceramic tile floors. Ms. Franco had been asked this by Gibson of the Program, and she answered that she used water and a brush to maintain the floors.

On cross-examination by Mr. Voll, Ms. Fracno stated that the renewal and regrouting of the kitchen floor tile and the use of an epoxy latex grout was done to prevent any further complaint by the Applicants regarding the grout.

Between November 16 and November 19, 2000 Dama Tile removed and regrouted the kitchen and foyer.

On November 24, 2000, as a result of Franco reporting a colour variation in the newly relaid grout, Dombrowski attended with Vince of Dama Tile at the Applicants' home. She noted some colour variation in the grout and as it had been so recently laid it was suggested by Vince that a month should be allowed for the grout to cure. She stated that grout, like concrete, takes time to cure.

On cross-examination by the Program's counsel, Dombrowski stated that what is stated in the conciliation reinspection report of August 23, 2000 (Exhibit 3, Tab 37) under the heading of "Observation/Comment" to item 1 of the "Items not covered under warranty" is consistent with her observations at the reinspection meeting.

She further stated that the extent of spalling in the grout as reflected in Exhibit 5(a) is no more than 1" in length, that spalling in the grout is not caused by defective work or due to defective materials and that the spalling is aesthetics and such minor spalling was acceptable as it is barely visible.

She further stated that hairline cracks do occur in natural products such as grout. This is due to shrinkage which is normal in the drying process that takes place in a home after construction. She also stated that the minor colour variation in the grout is not indicative of a defect in materials or of defective workmanship. The colour variations noted were minor and not unpleasing.

The next witness was Bruce Zaffino who has been employed by Dama Tile since April 1999 as construction manager. Prior to joining Dama Tile, he has also worked for 5 years for two construction companies. He has also taken a two year course in building technology at Seneca College.

In November 1999, Dama Tile did a "complete repair" to the grouting at the Applicants' home. The repair entailed grinding out the grout which the Applicants complained contained colour variations. After removal of the old grout, new grout with epoxy latex was applied. The epoxy latex was used to give the grout added strength and to ensure a strong bond between the grout and the floor itself.

In February/March 1999, he went to the Applicants' home with Dombrowski to inspect the floors including the upstairs ensuite washroom floor. He observed no colour variations in the grout. The kitchen floor grout was normal. He had to go down on his knees to see the Applicants' complaint regarding minor surface cracks in the grout. In his opinion, the cracks were due to shrinkage of the grout which was normal with the drying of the grout.

On cross-examination by Mr. Voll, Mr. Zaffino stated in reference to photograph Exhibit 5(a), that the area of the kitchen floor shown on that photograph was a small localized area. If there had been no heat in the home when the floor was laid and when the grouting was applied, cracking would occur everywhere and not only in the minor area shown in the photograph. The hairline crack along the edge of the ceramic tile and the grout, as shown on the photograph, is not due to lack of heat when the grout was applied. Furthermore, the middle photograph on Exhibit 5 is like Exhibit 5(a) a magnified area of the same tile and grout and also reflects the localized area of hairline crack which is not continuous and is not a long crack.

Zaffino spoke to the use of epoxy latex in the grout applied in the kitchen. Epoxy latex creates a strong bond and was used in the kitchen so as to have Dama Tile avoid having to revisit the Applicants' complaint regarding the kitchen grout.

Zaffino also testified that he was in the Applicants' home in February 2000, and at that time he noticed no crumbling of the grout in the ceramic tile floors.

In cross-examination by the Program's counsel, Zaffino stated that when the home was occupied the grout was replaced in the Applicants' home in November 1999.

He also stated that photographs marked Exhibits 5(c) and 5(d), which show the foyer of the Applicants' home's floor, indicate some discolouration in the grout, and this could be the result of normal day to day traffic in that area. He also stated that the same cracks shown on the middle photograph of Exhibit 5 and Exhibit 5(a) are due to shrinkage of the grout, and the flaking is due to the drying process. To see the shrinkage crack and flaking on site, he was obliged to get down on his knees.

The final witness for the Program was George Iadipaolo (Iadipaolo) who has been employed as construction manager by Arista for the past 3 years. He has been in the building industry for the past 20 years and has during that time been a construction manager.

In April 1999, he and Dombrowski went to the Applicants' home to inspect the complaints of the Applicants which related to discolourization of the grout. At the home he observed the grout used in the ceramic floor tiling. It was natural grey grout and there were some areas of discolourization which was not unusual for natural grey grout. The area of discolourization was in the kitchen and front foyer where the mat had created the difference in colour.

In June or July 1999, Iadipaolo again visited the Applicants' home. In November of that year the decision was made by Arista to remove the grout and regrout so as not to have to deal with this complaint again. The reason given by Iadipaolo for the November decision, was that the repair done to the floors in April 1999 had caused problems that were then rectified by the November 1999 repair work.

In April 2000 he was again at the Applicants' home when he attended the conciliation inspection. The main issue at that conciliation inspection was the colour of the grout. The cracked kitchen grout had been repaired prior to the inspection. Iadipaolo saw nothing wrong with the grout's colour in the kitchen. A further complaint of grout discolourization in the foyer area was raised. Upon Iadipaolo lifting the mat on the floor of the foyer, the portion of the floor not covered by the mat appeared to be discoloured.

Iadipaolo reviewed Humphrey's conclusions contained in the conciliation inspection report of April 21, 2000 and concurred with those conclusions as well as the Observations/Comments" noted in that report under item 1 under the heading "Not covered under warranty". (Exhibit 3, Tab 34, page 1 of 7)

Iadipaolo stated that when Gibson attended at the conciliation reinspection on August 23, 2000, the grout in a small area in the kitchen floor and in the foyer was of concern to the Applicants. No loose ceramic floor tiles were observed in the home and various tiles were "knocked" to see if there were loose ceramic tiles.

Iadipaolo heard Gibson speak with Ms. Franco in the kitchen during the reinspection. He questioned Ms. Franco as to how the floor in the kitchen was cleaned and Ms. Franco replied that she "scrubbed the floor to make it clean".

Iadipaolo was shown by counsel for the Added Party a series of six photographs (Exhibits 18(a), (b), (c), (d), (e) and (f). All these photographs were taken by Iadipaolo after Arista received Exhibits 5 and 5(a), (b), (c) and (d) from the Applicants.

Iadipaolo stated that Exhibit 18(a) shows the ensuite washroom in a model home being displayed by Arista. In the photograph, Iadipaolo is shown pointing to natural grout in a ceramic tile floor. The grout contains 2 barely visible "pinpoints" which Iadipaolo identified as air holes in the grout and which he stated is a common condition found in natural grout.

Exhibit 18(b), magnified for effect, again shows another area of natural grout in the ceramic floor of the model home's washroom. The grout contains a "pinpoint" which Iadipaolo identified as an air hole in the grout.

Exhibits 18(c) and 18(d) were photographs of the ceramic tile floor of the model home's ensuite bathroom. Iadipaolo indicated that these two exhibits were the same, except that Exhibit 18(c) was a magnification of what appears on Exhibit 18(d), which was taken without

magnification. Upon magnification as shown in Exhibit 18(a), the grout line between two ceramic tiles is shown. A hairline crack is visible in the natural grout running along the edge of the grout where it meets the ceramic tile. Without magnification as shown in Exhibit 18(d), the same hairline crack is not visible. This photograph (Exhibit 18(d)) was taken from a standing position.

Exhibits 18(e) and 18(f) were also taken in the model home of ceramic floor tile with natural grout. Both photographs are of the same area and both were taken from a standing position. Exhibit 18(f) was taken without magnification and Exhibit 18(e) with magnification. Exhibit 18(e) shows barely visible areas of what Iadipaolo described as “still air pockets” in the grout. Exhibit 18(f) does not show the “still air pocket”.

Iadipaolo finally stated that the construction of the Applicants' home received the approval of the City of Vaughan after it was inspected by that City. Furthermore, an occupancy permit was issued by the City. The kitchen floor was a designed engineered product which complied with the Building Code requirements.

FACTS FOUND PROVEN:

The following are the facts proven in this matter.

1. The Applicants and Arista entered into a written Agreement of Purchase and Sale dated July 23, 1998 in terms of which Arista was to construct a residential home for the Applicants on a lot in the City of Vaughan, Ontario.
2. The home was constructed in accordance with the terms of the Agreement of Purchase and Sale.
3. The Applicants took possession of the home on February 25, 1999.
4. The home was constructed according to the building plans submitted to and approved by the City of Vaughan and was constructed in accordance with the Ontario Building Code and was and is fit for habitation.
5. An occupancy permit respecting the home was issued by the City of Vaughan.
6. By way of a written conciliation request form dated October 11, 1999 Applicants requested the Program to hold a conciliation inspection at the Applicants' home to consider 21 complaints regarding the construction of the home.
7. A conciliation inspection took place at the Applicants' home on April 17, 2000 and a conciliation inspection report was issued by the Program on April 25, 2000.

8. A conciliation reinspection took place at the Applicants' home on August 23, 2000, and a conciliation reinspection report was issued by the Program on September 13, 2000.
9. The ceramic floor tiles throughout the Applicants' home are free from defects in material and are securely and properly laid in a workmanlike manner and are not loose.
10. All and any deficiencies or defects in the ceramic floor tiling in the home's ensuite washroom has been fully rectified by Arista and or Dama Tile and the ceramic floor tiling including the grouting thereof is constructed in a workmanlike manner and is free from defects in material.
11. The difference in the colour of the grout used in the home's foyer is due to dirt or wear and tear in a high traffic volume area of the home and is not due to defects in material used by Arista and/or Dama Tile nor is it due to construction of the ceramic floor being done in an unworkmanlike manner.
12. The grout in the ceramic tile floor in the home's kitchen does contain a few locations where the grout, on close scrutiny, does exhibit hairline cracks.
13. The hairline cracks in the kitchen floor grout are consistent with shrinkage of the grout pursuant to the normal drying process of the grout. The hairline cracks in the kitchen floor grout are not due to the floor being constructed in an unworkmanlike manner and the grout itself is free from defects in the material.
14. The area of hairline cracks identified by the parties is minimal and in extent is no more than a few inches in total.
15. Where spalling or flaking of floor grout was observed, this occurred to the surface of the grout itself and there was no significant depth or penetration to the spalling or flaking of the grout. The spalling or flaking of the grout is not due to or indicative of a defect in material nor is it indicative of poor or inadequate workmanship.
16. The ceramic floor tile and grouting in the home's main floor powder room/laundry had been constructed in a workmanlike manner and is free from defects in material.

THE LAW:

The Act's relevant portions are:

14.(1) Where,
.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

(2) A warranty under subsection (1) does not apply in respect of,

.....

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

.....

(f) damage resulting from improper maintenance;

DECISION:

The onus of proof in this matter is upon the Applicants.

To succeed in their claim, the Applicants must prove that their claim falls into Section 14(1)(b) of the Act which has been set out above in this decision.

The Applicants must prove;

(a) they have a cause of action against the builder for damages resulting from a breach of warranty by the latter, and

(b) they have suffered financial loss due to the builder's breach of warranty.

The Tribunal's finding is that the Applicants have failed to discharge the onus for the reasons that follow.

The single issue in this matter relates to the Applicants' allegations regarding the cracking/crumbling grout and discolourization of grout in the kitchen/dinette area and the foyer of the home. The grout problem that existed in the ensuite washroom ceramic tile floor is no longer an issue as Arista has satisfactorily remedied the Applicants' complaint regarding that problem.

ANALYSIS OF EVIDENCE:

The evidence shows that on taking possession of the home on February 25, 1999 the Applicants reported in the pre-delivery inspection report that "a small section of grout in kitchen" required repair. Arista had attended at the home on April 1, 1999 to repair the floor in the ensuite bathroom and kitchen. The Applicants informed Arista by letter dated June 3, 1999 that there was a grout problem in the floor of the kitchen and ensuite bathroom. The problem complained of was that the grout was cracking and a "large piece of grout" had come out of the kitchen floor. Arista attended at the Applicants' home and on June 15, June 17 and June 18, 1999 the grout in the kitchen floor was removed and reinstalled.

Still not satisfied with the grout repairs, on October 11, 1999 the Applicants requested a conciliation inspection and noted in their request for such conciliation inspection that the complaint was of "crumbling and cracking grout" and the locations of the grout complaint was stated to be "kitchen floor, foyer outside powder room". Prior to the conciliation inspection, Arista agreed to have the grout problems repaired and between November 16 and November 19, 1999 the grout in the kitchen ceramic floor as well as in the foyer was removed and regouted.

On November 24, 1999 the Applicants complained that the regouted kitchen floor contained unacceptable colour variations in the grout itself and pursuant to an inspection at the Applicants' home it was agreed the complaint remain in abeyance for about a month in order to allow the grout "to cure". On December 29, 1999 the Applicants reported to Arista that there was "no change" in the colour of the grout and it had not cured to become "one even colour". A meeting was held at the Applicants' home to reinspect the flooring and the grout. As a result of that meeting, Arista and its tiling sub-contractor came to the conclusion that the entire floor area that had been regouted was acceptable and that "the grout is good, solid and not

cracking” and that while the grout “may have some shading differences”, they were acceptable. The conclusions were communicated by Arista to the Applicants by letter dated March 6, 2000.

On April 17, 2000 the Program's warranty representative Philip Humphreys conducted the conciliation inspection at the Applicants' home. Humphreys stated in his conciliation report that “the owner acknowledged that the builder had completed the repair to the cracked grout” but “the owner stated that the colour of the grout was excessively uneven and not acceptable”. Humphreys concluded that the Applicants' complaint was not covered under warranty and that the minor variation in the colour of the grout was acceptable. He also concluded that there was no violation of the Ontario Building Code, nor were there any defects in work or materials provided by Arista.

Dissatisfied with Humphreys' conclusions, the Applicants requested a conciliation reinspection, and this reinspection was held at the home on August 23, 2000. The warranty representatives present at the reinspection were Humphreys and Lance Gibson with the latter person authoring the conciliation reinspection report dated September 13, 2000. The findings of Gibson have been fully referred to in the evidence of Gibson dealt with earlier in this decision.

Both Humphreys and Gibson have had considerable experience in the building industry. Gibson was called in by the Program to give a second opinion regarding the Applicants complaint in connection with the floor tile grout installed by Arista. Both gave evidence in a forthright manner. Gibson, has had particular experience in ceramic floor tiling and the laying of such tiling. His expertise and testimony were in no way impugned by the Applicants, and the Tribunal accepts the testimony of both Gibson's testimony and Humphreys.

The Applicants conceded they had no expertise in construction or residential building. Their evidence in support of their views and contentions was not based upon expertise but upon their personal concerns and opinions. The lack of any expert opinion to support their views inevitably resulted in the failure of the Applicants to discharge the onus of proof that rested upon them.

The cracking the Applicants raised in their claim is present in certain very minor portions of the grout in the kitchen floor and it is consistent with normal shrinkage of the grout caused by drying out after construction. The photographs tendered in evidence by the Applicants greatly magnify the shrinkage cracks which are not apparent to an average observer when standing and viewing the floor. The great magnification of the photographs is an abnormal enlargement of hairline cracks that are, in fact, barely perceptible when viewed in the usual manner.

The spalling and cracking of the grout is confined to an area of the kitchen floor that according to the testimony of witnesses Humphreys and Gibson does not extend in total to more than 2 lineal feet in a total floor area of some 500 square feet. The spalling is barely visible, if at all,

when standing and viewing the floor. Only when, as with the hairline cracks, the spalling is shown with magnification does it become apparent. The evidence of the warranty representatives that the spalling was only superficial and did not extend into the grout is an indication that it did not fail. Indeed, although denied by Ms. Franco, the spalling was indicative of and consistent with improper maintenance of the floor by Ms. Franco. The Tribunal accepts that Ms. Franco told Gibson at the conciliation reinspection that she had scrubbed the kitchen floor with a bristle brush. The Tribunal accepts the evidence of Gibson that the spalling of the grout was indicative of the grout having been subject to scrubbing with a bristle brush which is indicative of improper maintenance.

The Tribunal also accepts the evidence of Gibson as to his observations of the appearance of the grout on the ceramic floor in the foyer of the Applicants' home. Gibson stated that the floor in the foyer area of the Applicants' home being a high volume area exhibited some minor discolourization in the grout used on that ceramic floor. The area of discolourization was minor and was confined to the outer periphery of the floor area that was not covered by a mat on the foyer floor. The nature of the minor discolourization of the grout and the extent and situation of the discoloured grout is indicative of dirt having been brought into the foyer from the outside and having been trodden into grout where not covered by the floor mat. This is the result of normal wear and tear.

The Tribunal accepts that the ceramic tile floors throughout the Applicants home are constructed in a workmanlike manner and are free of defects in material. The Tribunal also accepts that there is no violation of the Ontario Building Code and that the floors are constructed in accordance with that Code.

The Applicants expected perfection in the construction of their home. Indeed, Voll in his final submissions stated he expected and was entitled to 100% perfection. The Tribunal does not agree with this submission. As was stated in *MARK TEITELMAN* (1987) 16 CRAT 178 at page 181:

The Teitelmans were not the authors of the defects and the Tribunal understands that they are a constant source of irritation to them. However, they must accept the fact that no house, new or old, is perfect or is warranted to be perfect. Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonable acceptable levels. The limited warranty provided by the Ontario New Home Warranties Plan Act recognized these facts, and this Tribunal is obligated to make findings in accordance with the statutory provisions and not otherwise.

Quite apart from the fact that the imperfections claimed by the Applicants are found by the Tribunal to fall outside the ambit of the warranties covered by section 13(1) of the Act, and fall into the warranty exclusions covered by section 13(2) of the Act, the imperfections were only visible on abnormally close inspection as revealed by magnified photographs. As was stated in the *BREEN* decision (1999) CRAT released on April 15, 1999 at page 17:

The mark is only visible on an extremely close inspection. A microscopic examination is not the appropriate standard of testing. In law this type of mark could be considered "de minimis non curat lex" meaning that the law does not take notice of nor care about very small or trifling matters.

On the evidence, the Tribunal finds that the Applicants have not proven their claim.

ORDER:

Accordingly, by virtue of the authority vested in it under Section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: November 29, 2001

ENTERPRISE RENT A CAR CANADA LTD.

HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 1605210 OWNED BY: ENTERPRISE RENT A CAR CANADA LTD. of: 2300 Stevenage Drive, Ottawa, Ontario K1G 3W3 made pursuant to section 55.1 of the *Highway Traffic Act*, effective on: November 13, 2001.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the *Highway Traffic Act*.

ENTERPRISE RENT A CAR CANADA LTD.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Enterprise Rent A Car Canada Ltd., Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: November 29, 2001

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

ENTERPRISE RENT A CAR CANADA LTD.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. On November 13th, 2001, the motor vehicle described in Order to Impound #1605210 was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended.
2. The applicant, Enterprise Rent A Car Canada Limited, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the *Highway Traffic Act*, stating that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
4. Having investigated this matter, information from the police, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.

5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Tribunal set aside the order to impound.

Enterprise Rent A Car Canada Ltd.

**Authorized Delegate for
Registrar of Motor Vehicles**

(signature of Applicant)

(signature of Respondent)

(date)

(date)

SUCCAR

ELIJAH SUCCAR

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE
ISSUED BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JOE HEWITT,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

ELIJAH SUCCAR, Applicant
unrepresented

DATE OF HEARING: November 28, 2001

DECISION RELEASED: November 30, 2001

By Teleconference

REASONS FOR DECISION

A hearing was held on November 28, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Elijah Succar (the “Applicant”)
Motor Vehicle:	1992 Chevrolet COL, plate no. AEAJ 851 (the “vehicle”)
Date of Appeal:	November 8, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 28, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I live in a single parent home and have a job that helps support my family. I need my car to get to work, because there is no bus routes. I have an elderly grandmother that also lives with me, she relies on me for transportation. I am asking for forgiveness in this matter. I made a mistake by not ensuring that the driver of this vehicle had a license. I will never make this mistake again. I have a letter from my family to back me up. Also enclosed is a letter from my employer.

Elijah Succar

To whom it may concern:

My son Elijah plays a very important role in our family. I myself work long hours during the day and am unable to provide transportation for him. Also in our home live his sister and grandmother who rely on Elijah and his vehicle for various needs and errands. He provides his sister with a ride to school, which is quite a distance from where we live, and also his grandmother to frequent medical appointments as well as church during the week. I am pleased with my sons kind-heartedness, but without a vehicle, our entire family suffers.

Sincerely,

V. Macdonald.

To whom it may concern:

Elijah has been employed here at Remax Delmar for approximately six months and arrives to work by vehicle. We appreciate his punctuality, and often call on him to travel to different sites in and around the city. Without his automobile he is incapable of fulfilling many duties. He is a very reliable employee, and releasing his vehicle will allow him to maintain his good status here with us.

S.S.

The Applicant testified that he lives with his mother, sister and grandmother in north Burlington.

He provides the second family income to the household working for ReMax Delmar in Hamilton. Mr. Succar testified that he fixes up properties for agents. The impounded vehicle is used to transport him from house to house along with his tools and supplies. The Applicant testified that it would be impossible to take the bus from Burlington to Hamilton and Ancaster with his type of work. Taxi cabs have been used about 15 to 20 times but this is too expensive. Mr. Succar has lost about \$2,000.00 in income, plus \$500.00 to \$600.00 for the

costs of cabs. The cost of the impoundment fees will also be another financial burden. He has investigated rental cars, but he does not have a credit card, and the cost was restrictive.

Mr. Succar also stated that his sister is transported in the vehicle to school and to appointments and his grandmother to medical appointments. The vehicle is the second car in the household, Mr. Succar's mother uses her car to go to work in Hamilton, but she starts work early and often works late so sharing rides does not work.

The Applicant testified that since the impoundment, he has relied on friends sometimes to drive him to work or pick him from job sites. That this has been a tremendous inconvenience. The impoundment has caused him difficulty in maintaining his employment schedule, and he is falling behind in his workload. He cannot always rely on others for rides.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Shane Edward Fifield;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Dangerous Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 9, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with the section 50.2(3) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. It is unfortunate that the impoundment of the Applicant's vehicle makes it more difficult for the Applicant's sister or grandmother to get to their appointments. The difficulties they experience, however, are matters of inconvenience rather than exceptional hardship. There is no evidence that the difficulties they have experienced amount to loss of education for his sister or threat to health for his grandmother. An alternative to the vehicle is available. The Applicant under cross-examination testified that alternatives to the impounded motor vehicle are available including, transport by taxi cab, his mother's car and friends cars.

Though inconvenienced, the Applicant has not suffered any permanent loss of employment as a result of the impoundment. The Applicant has not presented any evidence that would indicate that the loss of the vehicle would be immediate, significant and lasting as required by section 22(3)(b) of Regulation 574 as amended by O. Reg. 632/98.

The Tribunal finds that the Applicant has failed to meet the onus required by the Act to establish exceptional hardship under section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

RELEASED: November 30, 2001

JANECZEK

WILLIAM JANECZEK

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP Q.C., Vice-Chair

APPEARANCES:

WILLIAM JANECZEK, appearing on behalf of himself, Applicant

KAREN JONES, Counsel, representing the Ontario New Home Warranty
Program, Respondent

DATE OF
HEARING: September 10, 2001 Sudbury

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an Appeal by the Applicant, William Janeczek (the "Applicant") pursuant to his Request for a Hearing dated December 2, 2000, to the Licence Appeal Tribunal (the "Tribunal"), from a decision of the Respondent, Ontario New Home Warranty Program (the "Program") which denied his claim in its Decision Letter dated October 27, 2000, (the "Program's Decision"). The Applicant is appealing pursuant to Section 16(2) and (3) of the *Ontario New Home Warranties Plan Act* (the "Act"), R.S.O. 1990. Ch. 0.31 and bases his claim on the provisions of Section 13(1) and clauses (b) and (c) of Section 14(1) of the Act.

The Applicant, by an undated letter received by the Program on June 26, 1991 (the "Original Complaint"), claimed that the vendor/builder, **844289 Ontario Limited carrying on business under the firm name and style of BSM Contractors** (the "Builder") was in breach of several of its warranties to construct the new home at 419 Moonrock Avenue, in the City of Sudbury (the "home"), which it contracted to build in a workmanlike manner and free from defects in material, and also that the home was free of major structural defects, as part of the Agreement of Purchase and Sale entered into between the Builder as vendor, and the Applicant and Margaret Janeczek as purchasers, dated April 3, 1990 (the "agreement"). The Applicant and

Margaret Janeczek closed the transaction contemplated in the Agreement pursuant to its terms and took possession of the home on July 4, 1990.

EVIDENCE:

At the hearing, three witnesses gave evidence, the Applicant, on behalf of himself and his wife as purchasers and owners of the home, and Kevin Blacklock and Denis Faubert, on behalf of the Program. The evidence on behalf of the Program consisted largely of the documentary material contained within Exhibit #4, the Respondent's Book of Documents, as supplemented by the recollections of the witnesses as to the meetings, events, discussions and circumstances respecting the home some ten years ago up to the date of the Program's Decision. The Applicant, without Counsel acting on his behalf, likewise gave testimony respecting that which transpired from the date of possession of the home and responded to the questions put to him by the Tribunal to elucidate the facts and issues in dispute. In addition, the Applicant, with the acquiescence of Counsel for the Program, produced eight photographs taken recently to illustrate the current condition of the home. With but one exception, the evidence was consistent and gave rise to little difficulty in the determination of factual aspects of the dispute.

FACTS:

Subsequent to the Original Complaint, conciliation services were requested by the Applicant and performed in the presence of the Applicant on July 22, 1991 by Robert Plourde on behalf of the Program, which issued a report respecting the inspection of the home. The Applicant informed the Program that he was dissatisfied with the inspection and a re-inspection of the home was conducted by Kevin Blacklock on behalf of the Program on September 19, 1991. The said report was re-issued following the said re-inspection and dated as of July 22, 1991 (the "Inspection Report"), being a listing of some fifty-five complaints made by the Applicant which the Program decided were either deficient, as noted in Schedule A-1 thereof, or compliant, as noted in Schedule A-2 thereof, with respect to the several warranties made by the Builder to the Applicant pursuant to the Agreement and/or under the Act.

From the Inspection Report, the Program issued a letter dated August 1, 1991, and re-issued on October 8, 1991, (the "Conciliation Report") requesting the Builder to deal with some thirty-eight items which required rectification by the Builder and related to those items listed in Schedule A-1 of the Inspection Report.

Due to the default by the Builder in responding to the Conciliation Report, the Program entered into a contract dated February 3, 1992 with L. Pen Construction to complete the items required of the Builder in the Conciliation Report. The Applicant thence delayed the commencement of such remedial work due, in part, to his reluctance to approve of the contractor and/or his dissatisfaction with the procedures adopted by the Program and did not respond to the requests made by the Program that the proposed remedial work should proceed.

The Program thence addressed the dissatisfaction of the Applicant and entered a new contract dated July 13, 1992 with Kingsley Homes (Sudbury) Ltd. (the "Remedial Contractor") to complete the remedial work consisting of the thirty-eight items as noted in the 12 pages of the work schedule attached to the said new contract (the "Work Schedule").

The Work Schedule was revised twice during the performance of the new contract on August 31, 1992, and on November 5, 1992, respectively, in order to complete additional work as demanded by the Applicant and as noted in the revised work schedule (the "Revised Work Schedule"). On March 22, 1993, a further contract was executed between the Program and Kingsley Homes (Sudbury) Ltd. in order to complete the Revised Work Schedule and the Program remitted full payment to the Remedial Contractor upon completion of all remedial work included in the Work Schedule and the Revised Work Schedule.

The Program tendered a form of release to the Applicant for his signature so as to confirm that the remedial work had been performed to the satisfaction of the Applicant and for the purpose of making payment to the Remedial Contractor. The Applicant refused to sign the said release form and it became clear to the Program that the Applicant would not execute the release or any other document to evidence that the remedial work had been completed. The Applicant stated that he wanted to delay his acceptance of the remedial work so as to assure himself that there was no latent defect in the construction of the home by the Builder or the remedial work performed by the Remedial Contractor to correct any such defect.

On May 17, 1993 an inspection of the new home was carried out by Kevin Blacklock, on behalf of the Program, in the presence of the wife of the Applicant, Margaret Janeczek, and in the presence of Leo Kingsley representing the Remedial Contractor. It is notable that the Applicant had ample notice of this May 17th meeting and inspection but was absent when it took place. A field inspection report of even date respecting the May 17th inspection was issued by Kevin Blacklock on behalf of the Program, in order to manifest the satisfactory completion of the remedial work (the "Field Inspection Report").

Some time passed subsequent to the Field Inspection Report and it was not until on or about March 28, 2000, that the Applicant made an oral complaint to the Program that the Builder was still in breach of not only its warranties to construct the home pursuant to the Agreement but also was in default of other statutory warranties under the provisions of the Act. Subsequent to further discussions between the Applicant and Denis Faubert on behalf of the Program respecting the alleged further breaches of warranties, the Applicant issued his claims in writing on August 11, 2000 (the "Later Complaint") and the Program's Decision was issued.

The only real conflict in the testimony given at the hearing was as to the condition of the cracks and gaps in the exterior brickwork and/or masonry subsequent to the remedial work being completed and the written statements made in the Field Inspection Report. The photographs taken by or under the direction of the Applicant in the late spring and summer of 2001 show clearly that there are jagged cracks in the brickwork running down the mortar joints of the exterior wall at the front of the home proximate to the garage entrance. These gaps are of varying widths, the largest of which appears to be up to an inch and a half in width. These photographs also indicate that the door frames, doors and brickwork in the vicinity of the said cracks and gaps are markedly out of plumb utilizing a vertical contractor's level to illustrate the comparison.

The evidence of Kevin Blacklock on behalf of the Program is that there were no cracks or gaps in the brickwork as at the date of the Field Inspection Report, as the admittedly pre-existing cracks and gaps had been properly repaired by the remedial work carried out by the Remedial Contractor. The Tribunal questioned the Applicant quite closely and repeatedly as to the cracks and gaps subsequent to the Field Inspection Report and each time the Applicant insisted that the said cracks and gaps were there in November of 1992 prior to the remedial work, but refused to be specific as to a date subsequent to the Field Inspection Report or, indeed, when such reappeared as shown in the photographs.

The Program was made aware of the reappearance some seven years later on the telephone complaint made by the Applicant on March 28, 2000 and as noted in the Later Complaint. In the absence of any evidence to the contrary, the Tribunal must thus conclude that the current state of the brickwork, door frames and doors as shown in the photographs occurred after the Field Inspection Report and before March 28, 2000.

ISSUES:

The main issue to be decided by this Tribunal is whether or not the current condition of the home as shown in the photographs and as noted in the Later Complaint was as a result of a breach of warranty by the Builder which is covered under the Act within the time limits prescribed and otherwise not rectified by the Program as noted in the Original Complaint. A

subordinate issue is whether or not the Applicant's refusal to execute the release form tendered or any other acknowledgement of remedial work performed by the Program extends indefinitely the time limits prescribed in the Act and the Regulations promulgated thereunder.

ISSUES OF LAW:

The Applicants are appealing the Program's Decision to the Tribunal under Section 16(2) of the Act and this hearing and this decision of the Tribunal is issued pursuant to Section 16(3) of the Act.

16.(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purpose the Tribunal may substitute its opinion for that of the Corporation.

Section 13(1) of the Act specifies certain warranties and sets out a list of circumstances in Section 13(2) in respect of which such specified warranties do not apply.

13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

- (a) defects in materials, design and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

It is notable that provision is made in Section 13(1)(c) of the Act for these specified statutory warranties to be expanded by regulation, and Part VI of Ontario Regulation 892 (Sections 14 to 24, inclusive) provides for such additional specific warranties by regulation together with terms, conditions, exceptions and exclusions which attach to these regulatory warranties.

Section 13(1)(b) of the Act defines the term "major structural defects" as referenced in the said Regulations as follows:

1. In this Regulation, ...

"major structural defect" means, for the purpose of clause 13(1)(b) of the Act, any defect in work or materials,

(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licencees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage."

Section 13(1)(c) of the Act refers to "warranties as are prescribed by the regulations" and Section 15(4) of Regulation 892 specifies that "the warranties described in subsection (2) are prescribed under clause 13(1)(c) of the Act." Section 15 (2)(e) of Regulation 892 specifies "that the home is free of major structural defects."

Section 13(3) of the Act provides that the vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

13(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

Section 13(4) of the Act provides that a warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

13(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Section 13(6) of the Act not only provides that all such specified statutory warranties and specified regulatory warranties apply despite any agreement or waiver to the contrary, but also recognizes that the owner may have other rights and other agreed warranties in addition to the warranties specified in Section 13(1) of the Act and the regulatory warranties prescribed in Section 13(1)(c).

13(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Under clauses (b) and (c) of Section 14(1), where an owner has a cause of action against a vendor for damages resulting from a breach of warranty, or the owner suffers damage because of a major structural defect, such an owner is entitled to be paid out of the guarantee fund the amount of such damage. The right to make a claim is set out in Section 14(1) in the Act.

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four year after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

A warranty is a defined term under the Act. Section 1 provides:

1. In this Act, ...

"warranty" means a warranty set out on section 13.

Section 16 of the Regulations extends the time for a claim due to major structural defects to seven years for new homes enrolled after December 31, 1990.

16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

The combined effect of the provisions in the Act and Regulations stated above is that the warranty period extends to one year after the date of possession and in the case of "major structural damage" such period is extended to five years from possession for "homes that were enrolled" prior to January 1st, 1991.

Section 14(3) of the Act provides that the Program may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed by the Applicant, as an owner.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in the mitigation of damages claimed under subsection (1).

The Applicant is an owner as defined by the Act and the Tribunal finds him so to be as a fact. The Tribunal also finds as a fact that the owners took possession of the home on July 4, 1990. As such, the Applicant is entitled to compensation or remedies from the assets of the guarantee fund for any and all damages by virtue of Section 14(1)(b) and (c) thereof, subject only to the limitation of amount as set out in the regulations thereto.

The Applicant claimed breaches of warranty within the time limits prescribed and the Program arranged for the performance of all remedial work required to rectify the Builder's breaches of warranty and the remedial work was completed to the satisfaction of the owners as noted in the Field Inspection Report. Subsequent to the Field Inspection Report, the owners made no further claim until March 28, 2000, well beyond the expiration of the warranty period. In the absence of any direct evidence or any expert testimony, the Tribunal is in some doubt that the defects shown in the photographs and described above fall within the definition of "major structural damage". However, even giving the Applicant the benefit of any Tribunal doubt, it still remains that the warranty period for any major structural damage expired on July 3, 1995, as provided in the Act and Regulation.

DECISION AND ORDER:

With respect to the issues presented by the Applicant to this hearing and pursuant to the authority vested in the Tribunal by section 16(3) of the Act, it is the decision of the Tribunal that the Program completed satisfactorily all work required to rectify the defects claimed by the Applicant in the Original Complaint in accordance with section 14(3) of the Act and as noted in the Field Inspection Report dated May 17, 1993. The Applicant in his discussions with the Program subsequent to March 28, 2000, as confirmed by the Later Complaint and shown in the photographs produced at the hearing has failed to satisfy the onus of proof required by this Tribunal that the claim respecting the current condition of the home falls within the warranty provisions of the Act. No evidence was presented either by an expert witness or otherwise that the defects claimed by the Applicant were within the definition of a "major structural defect" pursuant to the Act, nor was there any evidence to show that such defects, latent or otherwise, occurred within the warranty periods and time limits prescribed by the Act or the Regulations promulgated thereunder. Indeed, there was no evidence before this Tribunal as to the probable cause of the very evident and significant condition of the home as shown in the recent photographs produced at the hearing.

The reluctance by the Applicant and/or his refusal to execute a form of release tendered to him by the Program does not in any way extend the warranty periods or the time limits prescribed by the Act or the Regulations. A signed release, or the absence thereof, would at best be merely written evidence to support the facts, understandings and circumstances of all Parties at the time of its execution, or non-execution. As such it, or its absence, cannot alter statutory provisions. It was equally apparent to the Tribunal that the Applicant was never of a mind to sign any document, a release or otherwise, that would bind him to any fixed position no matter how reasonable the request to sign might be.

ORDER:

The Tribunal, therefore, orders that the Appeal by the Applicant to the Tribunal of the Program's Decision as set out in the Original Complaint and in the Later Complaint fails and is dismissed.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

RELEASED: December 5, 2001

ERLAND

MICHAEL ERLAND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM MCINTOSH, Vice-Chair

APPEARANCES:

J.S. NAPIORKOWSKI, Agent representing the Applicant
SARA E. KARGES, Counsel, representing the Ontario New Home
Warranty Program,
IAN RIGGS, Agent, representing the Added Party,
Brookfield Homes Ltd.

DATES OF

HEARING: October 22, 23, and 24, 2001 Ottawa

ORDER

Following attendances on October 22, 23 and 24, 2001 in Ottawa at a hearing before the Licence Appeal Tribunal of J.S. Napiorkowski, Agent on behalf of Michael Erland (the "Applicant") and Sara E. Karges, counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Ian Riggs, Agent on behalf of Brookfield Homes Ltd. (the "Added Party");

WHEREAS the hearing was scheduled to proceed on May 14-18, 2001;

AND WHEREAS upon consent of the parties the matter was adjourned to October 22-26, 2001;

AND WHEREAS upon the third day of hearing on October 24, 2001, the hearing was adjourned to a further date to be set by the Tribunal;

NOW THEREFORE this Tribunal orders that the hearing is adjourned to commence at the Gillespie Reporting Services, 130 Slater Street, Suite 200, Ottawa, Ontario at 9:30 a.m., on Tuesday, February 5, 2002 and to continue on February 6, 7 and 8, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

William McIntosh, Vice-Chair

RELEASED: December 24, 2001

POSTNIKOFF

GREGORY P. POSTNIKOFF

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: JOHN E. ORT, Presiding Member
ANTOINE AOUAD, M.D., Member

APPEARANCES: GREGORY P. POSTNIKOFF, representing himself
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: December 14, 2001 Toronto

ORDER

WHEREAS the Registrar, *Motor Vehicle Dealers Act* by proposal dated April 10, 2001 has proposed to refuse the registration of Gregory P. Postnikoff (the "Applicant") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on December 14, 2001 at the Tribunal's Chambers;

AND WHEREAS at the commencement of the hearing on December 14, 2001, after some preliminary discussion, the Applicant withdrew his request for a hearing before this Tribunal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John E. Ort, Presiding Member

Antoine Aouad, M.D., Member

Released: December 17, 2001

PEEL CONDOMINIUM CORPORATION No. 498

PREHEARING

PEEL CONDOMINIUM CORPORATION No. 498

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP, Q.C., Vice-Chair

APPEARANCES:

PATRICIA CONWAY, Counsel, representing Peel Condominium
Corporation No. 498, the Applicant

NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program, the Respondent

JONATHAN KULATHUNGAM, Counsel, representing
Sundial Homes (Osprey) Limited, the Added Party

DATE OF

PREHEARING: November 26, 2001

Toronto

ORDER

WHEREAS, the Tribunal appointed a time and place for a Prehearing Conference in the above matter on August 23, 2001 at Toronto;

AND WHEREAS, upon consent of all Parties, the Prehearing Conference was adjourned to September 26, 2001 at Toronto;

AND WHEREAS, upon consent of all Parties, the Prehearing Conference was further adjourned to October 1, 2001 at Toronto;

AND WHEREAS, at the Prehearing Conference held on October 1, 2001, Counsel for the Respondent, Ontario New Home Warranty Program (the "Program") requested a further adjournment of the Prehearing Conference and thence submissions were received from all Parties and heard by the Tribunal respecting the request from the Program for more time to review the findings of its expert witness upon whom the Program is relying to give expert testimony on its behalf at the Hearing of this matter;

AND WHEREAS, the Tribunal on October 3, 2001, ordered that the Prehearing Conference be further adjourned peremptory against the Respondent to November 26, 2001, at Toronto, and further, that the Hearing in this matter commence on Tuesday, January 15, 2002, at Toronto and continue on January 16, 17 and 18, 2002, if necessary;

AND WHEREAS, at the Prehearing Conference held on November 26, 2001, Counsel for the Respondent requested a further adjournment of the Prehearing Conference upon the consent of all Parties and thence submissions were received from each Party and heard by the Tribunal as to the manner in which this matter should proceed in an orderly and expeditious way having regard to length of time already taken to reach some satisfactory conclusion to the Applicant's appeal.

NOW THEREFORE, the Tribunal Orders:

- 1) The Tribunal hereby amends its Order released on October 3, 2001, to the effect that the Hearing in this matter shall commence on Monday, March 18, 2002, at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and shall continue on March 19 to 22, 2002 and on March 25 and 26, 2002, if necessary, and further orders that this matter should proceed without any further Prehearing Conference having completed a full discussion upon the issues and anticipated expert testimony or other evidence fully disclosed at this Prehearing Conference.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Vice-Chair

Released: December 5, 2001

PERGUNAS

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MARGARET PERGUNAS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MARGARET PERGUNAS

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1160773 ONTARIO LIMITED

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter on October 4 and 5, 2001;

AND WHEREAS, upon consent of the parties, the hearing was adjourned to December 11 and 12, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Respondent* to commence at the Frontenac Reporting Services, 308 Wellington Street, 1st Floor, Kingston, Ontario, at 9:30 a.m., on Monday, January 21, 2002 and to continue January 22, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 3, 2001

TEHRANI, BIJAN O/A FRIENDLY AUTO

BIJAN TEHRANI O/A FRIENDLY AUTO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

BIJAN TEHRANI, representing himself, the Applicant
MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 13, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a written notice of proposal dated May 14, 2001, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of Bijan Tehrani o/a Friendly Auto (the "Applicant") as a motor vehicle dealer under the provisions of the Act.

REGISTRAR'S POSITION

It is the position of the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") that the past conduct of the Applicant is inconsistent with the intention and objectives of the Act for the following reasons:

1. The Applicant was convicted on February 21, 2000, on four counts of providing false statements on a safety standards certificate contrary to section 99(2) of the *Highway Traffic Act*.
2. On the Applicant's application to renew his registration submitted to the Registrar on February 6, 2001, the Applicant failed to disclose the above-noted convictions.

By Notice of Further and Other Particulars dated July 9, 2001, the Registrar provided additional particulars for his proposal to revoke the registration of the Applicant as follows:

3. On or about October 25, 2000, the Applicant sold a 1991 Mazda MPV (VIN: JM3LV5223M0310005) to Magdi Kaldas who also purchased an Auto Guard warranty for an additional fee, however the Applicant failed to submit the warranty with payment to the warranty company.

By a further Notice of Further and Other Particulars dated July 27, 2001, the Registrar gave notice of further reasons for his decision:

4. On or about November 16, 1998, the Applicant sold a stolen 1997 Ford Crown Victoria (VIN: 2FALP7364TX106125) to Bahman Dadui and in so doing, misrepresented the true distance travelled by the vehicle.
5. The Applicant failed to comply with Act and in particular with sections 3 and 5 thereof.

APPLICANT'S POSITION

It is the Applicant's position that he did not personally do anything wrong and at the court hearing he was not represented by counsel. Also, he said that the Ontario Motor Vehicle Industry Council ("OMVIC") prosecutor told the Applicant that if he pleaded guilty there would be no further action taken by OMVIC. Further, it is the Applicant's position that the sanction sought by the Registrar is disproportionate to the offences alleged.

THE EVIDENCE:

The evidence introduced by the Registrar consisted of the testimony of Magdi Kaldas, Bahman Dadui, Hamidrizza Pourmin and Mary Jane South. Documentary evidence was introduced by the above parties and the respondent's Book of Disclosure was made Exhibit 5 in these proceedings.

TESTIMONY OF MAGDI KALDAS

Mr. Kaldas testified that he purchased a 1991 Mazda MPV on October 24, 2000 and the dealer purchase agreement at Tab 8, Exhibit 5 is a copy of the agreement of purchase for the said vehicle. The vehicle was sold certified with a one-year warranty for which Mr. Kaldas paid

\$149.00. The witness testified that the Applicant said he would mail the warranty papers into the warranty company.

Mr. Kaldas stated that after approximately four months the motor seized in the vehicle. When he attempted to report the problem to the Applicant, the witness was told that the Applicant was away, and the salesperson who took the call looked through the files and advised the witness that there was no record of a warranty and asked for a copy of the vehicle purchase agreement. Mr. Kaldas was told by the salesperson that he would call the Applicant.

The witness testified that it was subsequently acknowledged that there was a warranty and the witness was told to call Auto Guard; however, when the witness spoke to Auto Guard, they indicated that they had no records of a warranty.

Mr. Kaldas testified that the Applicant arranged to take the vehicle and have the engine replaced, however according to the witness, they replaced it with the wrong engine. The Applicant advised the witness that he could not find the warranty but, in any event, the warranty only covers \$750.00 of the costs of any work and the balance must be paid by Mr. Kaldas. The witness was told by the Applicant that he was too busy to look for the warranty at that time.

The witness subsequently went to Friendly Auto and asked for a copy but was told that a copy was not available and that the witness should return later that week. When the witness returned, the Applicant was abusive to the witness and it was after this incident that the witness contacted OMVIC.

The witness testified that after numerous discussions with the Applicant the witness finally arranged, with the assistance of the police, to retrieve his vehicle only to subsequently discover that there was approximately \$2,300.00 worth of parts missing.

The witness testified that he was concerned about the car and would not have purchased the vehicle without a warranty. Mr. Kaldas testified that he did not feel that he had been dealt with in a fair and honest manner.

On cross-examination, the witness testified that the car had been towed to a company called "Auto Rally" and from there was taken to "Speed Line Auto Repair Ltd." The witness confirmed that he had been advised by the salesperson that the one year warranty covered the problem, and it was the witness's understanding that the salesperson was in touch with the Applicant.

Mr. Kaldas testified that he was told that the vehicle was moved from Auto Rally to Speed Line Auto Repair Ltd. because the amount that Auto Rally estimated for the work was too high. The witness was told that the cost of a re-built engine would be approximately \$4,000.00.

TESTIMONY OF BAHMAN DADUI

Mr. Dadui testified that he had been a taxi driver for three years and leased a taxi licence. The witness stated that it was the practice within the taxi industry that the party leasing the licence would buy the car but that the car would be put in the name of the owner of the license who, in this case, was Serjio Guerrero.

The witness identified the Consumer Questionnaire appearing at Tab 10, Exhibit 5 and acknowledged his signature on the second page. The witness testified that he purchased the vehicle for \$16,500.00 paying \$10,500.00 by certified cheque and \$6,000.00 in cash on November 17, 1998.

Mr. Dadui stated that the document appearing on the second page of Tab 9, Exhibit 5, was an acknowledgment that he requested to show that he had paid for the vehicle. The witness explained that he had taken the bill of sale to Serjio Guerrero who signed it, and the witness returned it to the Applicant.

The witness testified that the document appearing at the second page of Tab 9 has Mr. Dadui's signature as buyer, Hamidrizza Pourmin as the seller and the Applicant signed as witness and owner because it was the witness's understanding that the Applicant was the owner of the car.

When asked about the difference between the amount shown on the purchase agreement and the amount on the document at Tab 9, the witness stated that it had something to do with saving tax.

The witness testified that he went to the Applicant as a result of a suggestion of a friend of the witness who told him that the Applicant had a car that might meet the witness's requirements. When Mr. Dadui met the Applicant at Auto Plus 2001, the Applicant did have the car which the witness purchased.

Mr. Dadui stated that when he inquired why the key was loose, he was told that the key was lost. When he asked about scratches around the door lock, the Applicant had no explanation. The witness testified that when he purchased the vehicle it was showing that it had travelled approximately 44,000 kilometers, however the speedometer was not registering in kilometers but was registering in miles and when the witness told the Applicant, the Applicant appeared surprised.

The witness stated that, approximately nine months after he purchased the car, he was stopped for speeding and when the police did a vehicle check, the witness was told that the vehicle was stolen.

The witness testified that he would still have purchased the car knowing that it had travelled 44,000 miles rather than 44,000 kilometers.

The witness testified that he spoke to the Applicant in an attempt to get his money back, however he never received any refund. The witness stated that throughout the entire matter, he dealt only with the Applicant.

The witness stated that he did not believe that he had been dealt with fairly and with honesty.

TESTIMONY OF HAMIDRIZA POURMIN

Mr. Pourmin testified that he was the owner of Auto Plus 2001 Inc. which he had owned for approximately two years. The witness stated that he still had the company, but it was not active.

The witness testified that, shortly after he opened his lot, he was approached by the Applicant who said that he wanted to work for the witness. Mr. Pourmin stated that he was looking for a partner, however the Applicant did not have money but was willing to be trained. The witness stated that the Applicant worked as a lot man picking up cars, etc., but did not do any sales because he did not know the business.

With asked about the bill of sale appearing at Tab 9, the witness testified that the buyer of the car needed a warranty and in order to obtain a warranty, the transaction had to be done through a dealer so the buyer and the car were brought to Auto Plus 2001 by the Applicant. The customer took the vehicle for a test drive and indicated that he was prepared to purchase the car. In order to complete the transaction, the ownership of the vehicle was transferred to Auto Plus 2001 and then to the customer.

The witness testified that the information on the bill of sale was provided by the Applicant and that witness did not know that the vehicle was going into the name of someone other than the person he understood to be the buyer until the document appearing at page 2 of Tab 9 was signed.

The witness testified that he was only involved because of the warranty. Mr. Pourmin stated that the bill of sale was in his hand-writing but that he had not filled in the serial number because at the time he completed the bill of sale, he did not have the ownership. The witness stated he was not concerned about the transaction because he trusted the Applicant.

TESTIMONY OF MARY JANE SOUTH

Ms. South, the Deputy Registrar, stated that it was her responsibility to oversee the OMVIC program and to make recommendations with respect to revocations. Ms. South referred to

Tab 1 of Exhibit 5 and the convictions for false statements on the safety standard certificates. Ms. South also made reference to the possible tax fraud in which the Applicant was involved as a result of the testimony of the witness, Bahman Dadui, who had stated that the difference between the amount shown on the bill of sale and the amount actually paid was to save tax.

Ms. South referred to the certificate at Tab 5 of Exhibit 5 and confirmed that the Applicant was presently registered under the Act. Referring to Tab 7, Exhibit 5, the witness identified the convictions under section 99(2) of the *Highway Traffic Act*.

Ms. South referred to the renewal form at Tab 6 of Exhibit 5 dated February 5, 2001 and particularly questions 1 a) and b) to which the Applicant answered "No" which Ms. South stated was a failure by the Applicant to honestly inform OMVIC of the convictions. It is the Registrar's position that such non-disclosure is a major issue.

The witness testified that tampering with safety certificates is similar to tampering with speedometers and is considered to be a significant breach of an important aspect of the consumer protection for the automobile industry.

With respect to the bill of sale at Tab 8, Exhibit 5, Page 3, the witness testified that the Registrar is concerned that the Applicant sold a warranty but failed to live up to the terms of the warranty and did not act honestly in dealing with the consumer.

Ms. South testified that the Dadui transaction, which occurred when the Applicant was not registered, involved a potential tax fraud and involved the sale of a stolen vehicle. Although the Applicant may not have known the vehicle was stolen, there was the question of the lost key and the failure of the Applicant to compensate the purchaser for the loss of the vehicle after it was seized by the police.

Under cross-examination, Ms. South testified that question 1 a) on the renewal form refers to "any law" and not just criminal matters. When asked with respect to OMVIC's concern regarding the Kaldas warranty, Ms. South testified that it is of concern to OMVIC that a consumer receives from a registrant what the consumer paid for and that in the case of a third party warranty a copy should be in the purchaser's file and registered with the warranty company. Ms. South further testified that if it is a dealer warranty, the dealer must honour it and the terms of such warranty must be disclosed in the bill of sale.

TESTIMONY OF BIJAN TEHRANI

The Applicant testified that the convictions with respect to the safety certificate related to things done by the mechanic at the garage where the vehicles were taken to be certified and that the Applicant knew nothing about false statements made by the mechanic.

The witness testified that he thought that there were two types of convictions, one for criminal offences and another for all others matters and he did not realize that the convictions with respect to the safety certificates counted as convictions for the purposes of the renewal form.

The Applicant stated that, with respect to the warranty issue, he tried to help get the car fixed for Mr. Kaldas. The garage to which the vehicle was taken had a regular arrangement with the Applicant to do warranty work. The Applicant stated that the warranty was the Applicant's warranty.

With respect to the sale of the vehicle through Auto Plus 2001, the Applicant testified that this occurred at a time when he was not registered and did not know how things were to be handled. The Applicant testified that it was the dealer, Auto Plus 2001 Inc., who collected the money and that the vehicle was transferred by the dealer. The Applicant stated that he was merely a witness. At that time, the Applicant was only a lot man and that it was Auto Plus 2001 Inc. who handled the transaction, wrote the letter signed by the purchaser, did the bill of sale and that the Applicant had done nothing wrong.

On cross-examination, the Applicant testified that from the time he came to Canada until February 1999, he worked as a convenience store clerk, truck driver and taxi driver for three to four years.

The Applicant testified that with respect to the safety certificates, he had gone to a licenced garage run by a licenced mechanic and that it was not he who signed the certificate but the garage owner and the mechanic that signed the certificate.

With respect to the Dadui transaction, the Applicant stated that he did not purchase the vehicle nor did he sell the vehicle and had no knowledge about scratches around the lock or the lost key.

The Applicant did acknowledge that he had made the statement appearing as Exhibit 7 and that it was his initials in the lower right corner of the various pages of Exhibit 7. The Applicant admitted that the statement was correct. The witness stated that he acted as an intermediary between parties buying cars and made a little money that way.

The Applicant admitted that he had never given a written warranty to Mr. Kaldas nor had he ever paid any money back to Mr. Dadui.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. The Applicant was convicted on February 21, 2000, of providing false statements on safety certificates contrary to section 99(2) of the *Highway Traffic Act*.
2. The Applicant did not disclose such convictions on the renewal of his application dated February 5, 2001.
3. The Applicant failed to process the warranty which he sold to Magdi Kaldas nor did the Applicant honour such warranty.
4. The Applicant was directly involved in the sale of a stolen 1997 Ford Crown Victoria at a time when the Applicant was not registered under the Act in contravention of section 3 of the Act.
5. The Applicant was part of the transaction where the purchase price for the 1997 Ford Crown Victoria was misrepresented to avoid the payment of taxes.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to revoke the registration of the Applicant under the Act.

LAW:

The authority granted to the Registrar is provided in subsections 5(1)(b) of the Act which states:

5.(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant, Bijan Tehrani, should be revoked.

For the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

In the leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

“The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.”

Due to the particular facts in that case, Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

“The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.”

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051, the Court held:

“It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.”

APPLICATION OF LAW TO FACTS:

It is clear from the evidence before this Tribunal that the Applicant has not acted in accordance with the requirements of the Act and has repeatedly conducted his business in a fashion which shows disrespect for the law and the Applicant's customers.

When confronted with the need to honour the warranty given to Magdi Kaldas, the Applicant provided different explanations as to the terms of the warranty and failed to honour the warranty in a satisfactory manner with the result that the consumer has suffered frustration and monetary loss.

The Applicant's testimony with respect to the transaction involving Mr. Dadui is inconsistent with the version of events provided by Mr. Dadui and Mr. Pourmin which coincides with the statement given by the Applicant in September 1999 (Exhibit 7). The Applicant's involvement in this matter demonstrates a lack of integrity and respect for the law.

The Tribunal does not accept the Applicant's explanation as to why he failed to disclose the convictions regarding the safety certificates. It is fundamental to the operation of a lawful business to appreciate the ramification of contravening the laws that govern that business.

The Tribunal finds that the Registrar has satisfied the onus of proof that there are reasonable grounds to believe that the Applicant's registration should be revoked.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carrying out the notice of proposal dated May 14, 2001, to revoke the registration of Bijan Tehrani o/a Friendly Auto as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Vice-Chair

Released: December 20, 2001

FORMULA FINE CARS LTD. AND AHMAD EL

FORMULA FINE CARS LTD. AND AHMAD EL MASRI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: MARJORIE L.HILEY, Vice-Chair

APPEARANCES:

CINDY COHEN, Counsel, representing the Applicants
A.MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF HEARING: September 19 and 28, 2001 and
October 2, 2001

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar under the *Motor Vehicle Dealers Act* (the “Registrar” and the “Act”, respectively) issued a Notice of Proposal on May 25, 2001 refusing to grant registration under the Act to Formula Fine Cars Ltd. and Ahmad El Masri (the “Applicants”). The Applicants requested a hearing with this Tribunal. Their Notice of Appeal was dated June 6, 2001 and sent to the Tribunal by their counsel with his letter of June 8, 2001 with a number of attachments. The documents were received at the Tribunal on June 12, 2001.

The hearing was held on September 19, 2001 and continued on September 28, 2001. Counsel completed their oral submissions on October 2, 2001.

ISSUE:

Does the Registrar, *Motor Vehicle Dealers Act*, have reasonable grounds to refuse to register Formula Fine Cars Ltd. as a motor vehicle dealership and Ahmad El Masri as a motor vehicle salesperson under the Act?

EVIDENCE:

Opening Statements:

Registrar:

Counsel for the Registrar stated that the Registrar refuses to register the Applicants due to the past conduct of the Applicants which does not meet the criteria as set out in section 5 of the *Motor Vehicle Dealers Act*. The reasons of the Registrar are: 1. The Applicants misrepresented the number of kilometres to a customer; 2. The Applicants did not make full disclosure to a second customer; 3. The Applicants did not provide the Registrar with full access to the books and records; 4. The Applicants have shown disregard for the law.

Applicants:

Counsel for the Applicants stated that Formula Fine Cars Ltd. is a new corporation which wishes to be registered as a motor vehicle dealer. Mr. Ahmad El Masri had previously been registered as a salesperson to Ultimate Fine Autos Inc. Accordingly to its corporate records, Ahmad El Masri was the secretary of Ultimate Fine Autos Inc., but Mr. El Masri has no responsibility for the management of this company.

Counsel stated that Ahmad El Masri's involvement as a salesperson in the allegations of misrepresentation of the number of kilometers and the lack of full disclosure would be explained in his evidence.

It was the submission of counsel that Ahmad El Masri did not have personal control of the books or records of Ultimate Fine Autos Inc. Counsel stated that Ahmad El Masri cooperated with the investigators to the best of his ability.

Testimony of Sirous Safaei:

Mr. Safaei is currently a motor vehicle salesperson and owns a motor vehicle dealership. He has worked in the motor vehicle industry since 1993.

Mr. Safaei testified that he personally knows Ahmad El Masri and his brother Mohamed El Masri. He had sold them a 1996 Honda Civic. The terms of that sale were as follows: they were to give him a 1991 Eagle Talon valued at \$1800.00 and a 1992 Oldsmobile valued at \$1800.00 and a cheque for \$2450.00 to make the deal worth \$6050.00.

Mr. Safaei referred to the bill of sale which is found at Tab 17 of Exhibit 3. He testified that the Ahmad El Masri's handwriting is on that bill of sale. He testified that he thought the comment "true mileage unknown" was referring to the 1992 Oldsmobile.

Mr. Safaei testified that he tried to sell the Eagle motor vehicle but when his prospective customer took it to a mechanic, that mechanic said the car was smoking and the turbo was not working. Mr. Safaei then took the Eagle to Associated Auction in London, Ontario for sale. That auction house found a lien registered against the car and told him to remove the car from the auction. The auction house also discovered odometer problems with this vehicle.

After being informed of these problems, Mr. Safaei wanted Ahmad El Masri and his brother to take back the vehicle. Mr. Safaei stated that Ahmad El Masri told him that the lien had been put on by a former partner, a person called Hasfar. After some time, Ahmad El Masri and his brother did pay Mr. Safaei for both the cost of the Eagle and the costs from the auction house. Mr. Safaei testified that he had "a hell of a time getting his money back".

On cross-examination, Mr. Safaei stated that the odometer on the Eagle was working. He knew this because he had driven the Eagle to his lot. He did not know that Ultimate Fine Autos Inc. had replaced the odometer. He did not know there was an \$8000.00 lien on the vehicle until told by Associated Auction. Associated had sold the car for \$2650.00 at auction on November 30th. It was after that sale that the lien was discovered.

Mr. Safaei stated that he had told Ahmad El Masri on the evening of November 30th that the car had been sold at auction. Only after that did Ahmad El Masri state that there was a lien on the vehicle because they owed money to Hasfar. Ahmad El Masri and his brother blamed Hasfar for the odometer problems.

Testimony of Neil Wells:

Mr. Wells is the operations manager for the London Ice Hockey Club. He has held that position for six years. He stated that he purchased a 1994 Honda Accord from Ahmad El Masri and Ultimate Fine Autos Inc. The retail bill of sale is dated December 22, 2000. It was purchased with a safety certificate.

Mr. Wells testified that he had asked both Ahmad and Mohamed El Masri if the car had been in an accident. They both told him no. When he asked if the car had a safety certificate, they told him yes.

Mr. Wells stated that the safety certificate is dated December 27, 2000. Mr. Wells took possession of the vehicle on December 28, 2000.

Mr. Wells stated that on January 14, 2001 he took the vehicle to London Honda for an inspection as he had not liked the way it was handling. London Hondo told him to contact the Ministry of Transportation as the car has been in an accident. They told Mr. Wells that the frame had been welded in two places, the air bag had been deployed and the right side driver's seat was broken. Mr. Wells stated the cost of the repairs to be \$1391.49. He still has problems with the wiring of the car.

After this, Mr. Wells contacted the Ontario Motor Vehicle Industry Council ("OMVIC"). He did not approach Ahmad El Masri or his brother.

Mr. Wells testified that if he had known that the car had been in an accident, he would not have bought the car. He still did not think the car was safe. He felt he had not been dealt with fairly by Ahmad El Masri and his brother.

Under cross-examination, Mr. Wells agreed that there was written on the retail bill of sale the words "as is condition and appearance". Although he was buying as is, he said he was getting a safety certificate.

It was the opinion of Mr. Wells that the repairs needed for the tailpipe and ball joints should be part of the safety certificate as were the repairs to the muffler and the front and rear brakes.

It was about three weeks after Mr. Wells' initial complaint to OMVIC that Ahmad El Masri contacted him. Mr. El Masri offered to buy the car. Mr. Wells did not want to do that until he had heard directly from OMVIC. Mr. El Masri was to call back in a couple of days, but he never did.

Mr. Wells agreed that he is not knowledgeable about air bags. He stated that London Hondo had found the switch had been pulled off and the air bag cover was now a different colour than that on the dashboard.

Testimony of Galynni Cini:

Ms. Cini is an inspector with OMVIC and has held this position since January, 2001. Prior to that time, Ms. Cini had three years of experience as a business sales manager at a motor vehicle dealership.

Ms. Cini testified that on February 1, 2001 she and Amanda Dempsey attended at the offices of Ultimate Fine Autos at 129 Exeter Road in London. They met Ahmad El Masri at that time. Mohamed El Masri was not at the dealership.

Ahmad El Masri told them the records for the dealership were locked in a cabinet. He telephoned his brother Mohamed El Masri but ignored the request of Ms Dempsey that she speak to Mohamed.

After his telephone conversation with his brother, Mohamed, Ahmad El Masri became agitated in appearance. He stated that he had done nothing wrong. He wondered why they were bothering him when OMVIC had not taken action on his recent complaint against another dealership. When Ms. Dempsey asked for particulars from him, he refused to give any.

Ms. Cini testified that she heard Ms. Dempsey explain the requirements for the books and records to Ahmad El Masri. Ms. Dempsey told him that there was a duty to supply the records to the investigators. Ms. Cini remembers him stating that he was refusing to provide the books and records for their inspection. A further appointment was scheduled for February 2, 2001 at 11:00 a.m.

Ms. Cini stated that she and Ms. Dempsey attended again at the offices of Ultimate Fine Autos Inc. on February 2, 2001. Ahmad El Masri told them that his brother Mohamed was not available and that they would have to return the following Tuesday.

Ms. Cini stated that both on February 1st and 2nd no books or records were provided for their inspection.

Under cross-examination, Ms. Cini stated that she had gone to the dealership in the role of an observer. She made no notes. Ms. Dempsey did make some notes, and Ms. Cini read those notes prior to her testimony.

Ms. Cini noticed on February 1, 2001 that Ahmad El Masri had gone into another room and tried to open some cabinets. She agreed that he never said he was in control of the records.

Ms. Cini stated that there was no further inspection of Ultimate Fine Autos Inc. prior to its registration being revoked on March 14, 2001.

Testimony of Mohamad El Masri:

Mr. Mohamad El Masri is the brother of the Applicant, Ahmad El Masri. He is an officer and director of Ultimate Fine Autos Inc. and is a registered motor vehicle salesperson. Mr. El Masri stated that his brother Ahmad had been an officer and director of Ultimate Fine Autos Inc. since its conception as well as a registered salesperson with Ultimate. It was only after the revocation of the registration of Ultimate that Mohamad El Masri had Ahmad El Masri's name removed as an officer and director of Ultimate Fine Autos Inc.

Mr. El Masri stated that he does not know the person named Hasfar that had been mentioned by Mr. Safaei.

Mr. El Masri stated that he obtained his motor vehicle salesperson registration in June, 2000. Prior to that time, his brother Ahmad did all of the buying and selling of vehicles. After Mohamad El Masri was registered, Ahmad El Masri continued to do the majority of the buying and selling as Mohamad was often not at the dealership.

Mohamad El Masri testified that he does not remember if he told OMVIC that Ahmad was an officer and director of Ultimate Fine Autos Inc. He was unsure if his brother Ahmad signed the incorporation documents or if the lawyer told Ahmad at that time about being an officer and director. Mohamad does remember that Ahmad knew of his responsibilities about three months after the incorporation. He said that Ahmad had not seen or signed the document from OMVIC outlining the conditions of registration. Mohamad had signed that document. Mohamad did the paperwork and Ahmad went to the auctions.

Mohamad El Masri testified that if Ahmad saw a car to buy, Ahmad would call him on his cell telephone and they would discuss the purchase. Sometimes they made decisions together and sometimes they made decisions separately. If an odometer was to be replaced, he said Ahmad would call him. Mohamad El Masri also testified that he always told his brother Ahmad to disclose everything to the customer.

Mohamad El Masri recalled that Ultimate Fine Autos Inc. would buy or sell about three cars in an average week. Ultimate could own from twenty five to fifty cars at a time, but the average was more like thirty to forty cars. He said that his brother Ahmad would know the details of these cars, as he was the person who would have bought them.

Mohamad El Masri stated that Ultimate was registered to purchase cars at Impact Auto. He did not remember filling out a number of the administrative forms required for registration at Impact Auto. These forms included the bank account history and the buyer application form. He said he might have filled out the Ontario Retail sales tax form. He knew of the calendar of auction dates.

Mohamad El Masri said that he did not think Impact Autos dealt only with insurance write offs or theft recovered vehicles. Some of the cars he had seen were perfectly okay. He said that such a car must be bought under the dealer's registration number, and he felt that Impact Autos also required other documents for the GST and the city business licence. He could not remember if Impact Autos asked about the purchaser's driver's licence.

Mohamad El Masri testified that he had seen Brad Bond, an inspector for OMVIC, in May, 2000 when Mr. Bond inspected Ultimate Fine Autos. He had shown Mr. Bond the dealer's books and records. He said that Mr. Bond would usually make an appointment and then Mohamad would wait for him. Sometimes both Ahmad and Mohamad El Masri would be present when Mr. Bond did his inspections and sometimes only Ahmad.

Mohamad El Masri stated that due to a back problem he had not been at the dealership on February 1st and 2nd. He left a message at some point for Amanda Dempsey asking her to re attend at the dealership the following Tuesday. He remembered his brother Ahmad telling him that Ms. Dempsey had been at the dealership, but he did not remember Ahmad telling him she was returning on the Friday, Feb. 2nd. He told Ahmad that he would call Ms. Dempsey. Also, he said that Ahmad did not ask him for a key to the cabinet which contains the books and records of the dealership.

Mohamad El Masri reviewed the documents found at Tabs 12, 13, 14 of Exhibit #3 and recognized his signature at Tab 13. He had seen Tab 14. He stated that Ahmad had purchased the Eagle motor vehicle, that the odometer for the Eagle was shaking, that the speedometer was broken and that Ahmad wrote TMU on the retail bill of sale.

Mohamad El Masri said he recalled speaking to Mr. Wells regarding the Honda Accord, which he said Ahmad had purchased and driven to the dealership. After his initial conversation about the car, Mr. Wells had left the dealership as the price was too high. Mohamad and Ahmad talked and decided to set the price at \$7400.00. Mr. Wells contacted Mohamad, came into the dealership and purchased the car. Ahmad El Masri prepared the bill of sale, but he did not discuss the car with Mr. Wells.

Mohamad El Masri testified that he could not recall Mr. Wells asking him if the car had been in an accident. He had noticed damage to the side and front headlight while he was driving the car to the service station for its safety certificate. Under cross-examination, he stated that the fender and headlight was fixed and the car painted. These repairs were done by Denny Autobody. There was no structural damage to the car. Mohamad El Masri testified that he did not feel he had an obligation to mention these repairs to Mr. Wells, as the vehicle was not reported as branded. He said that if a vehicle is a salvage vehicle then he must disclose the damages and get a structural safety certificate, but if the vehicle is not branded there is no obligation to disclose any damages. Mr. El Masri stated that OMVIC had not imposed terms or conditions on the dealership stating that such disclosure had to be given to customers.

Respecting the purchase of the 1996 Honda Civic for Mr. Safaei, Mohamad El Masri stated that he knew that the true mileage of the Eagle was 261,000. He was unsure if Mr. Safaei knew of that mileage. Mr. El Masri said he bought the cluster for the Eagle and had a mechanic install it. The cluster stated 142,000 km. He had no records for the repairs done to the Eagle or any records to verify the structural soundness of the Honda Accord. Mohamad El Masri felt that TMU on the bill of sale (Tab 17, Exhibit 3) referred to the 1992 Oldsmobile which was part of the purchase of the 1996 Honda Civic from Mr. Safei.

Mohamad El Masri stated that he was the one with the control of the books of Ultimate Fine Autos Inc. and that Ahmad had no access to the books. He further stated that if he is aware of an inspection date, he ensures that the records are available for inspection. He testified that at the time of OMVIC's inspection of February 1st and 2nd, he was on painkillers for his back. He did not until Saturday, February 3, 2001 see the inspection notice dated February 1st stating that Ms. Dempsey would be back the next day to inspect the books and records.

Mohamad El Masri stated that he checked the premises and cleaned the cars, and that Ahmad El Masri did most of the buying and selling. Ahmad was not responsible for the paperwork even though he was listed as the Secretary for the company.

Testimony of Amanda Dempsey:

Ms. Dempsey has been the manager of inspections for OMVIC since December, 1999. She oversees the inspection team.

Ms. Dempsey stated that the *Motor Vehicle Dealers Act* is a public protection statute. It deals with registration, complaints, mediation between dealers and consumers, inspection of books and records, and premises and investigations.

Ms. Dempsey stated that the core of the Registrar's Proposal was that the Applicants had failed to disclose mileage and accident repairs and had obstructed the inspectors. Ahmad El Masri was registered as a salesperson with Ultimate Fine Autos Inc. from May 15, 1999 to March 14, 2001. Ultimate Fine Autos Inc. was registered as a dealer from April 24, 1999 to March, 14, 2001 when its registration was revoked.

Ms. Dempsey testified that OMVIC did not know that Ahmad El Masri was an officer and director of Ultimate until a corporate search was done. They knew only that Mohamad El Masri was an officer and director of Ultimate.

Ms Dempsey was concerned by the application of Ahmad El Masri to be registered as a salesperson and of Formula Fine Cars Ltd. to be registered as a dealership.

Mr. El Masri stated on his application form that he has a valid driver's licence, but a criminal check showed that his driver's licence had been suspended. Ms. Dempsey stated that the print out of the history of his driver's licence shows he has had four suspensions, nine convictions and one collision since he was first licensed on September 4, 1996. In the opinion of Ms. Dempsey, a registrant needs a valid driver's licence because the auction houses require it. As well, a registrant must be able to insure dealer plates.

Ms. Dempsey stated that on May 10, 2000 she and Brad Bond attended at the offices of Ultimate Fine Autos Inc. At that time Ahmad El Masri provided them with the garage registry. He also informed them that his brother Mohamad El Masri was buying and selling cars although Mohamad at that time was not registered as a motor vehicle salesperson. Ahmad El Masri did not have access to the dealership's books and records so a notice was left for another appointment. As well, Ms. Dempsey informed Ahmad El Masri that the books and records must be kept at the offices of the dealership. Brad Bond did the follow up appointment on May 16, 2000.

On December 11, 2000, Brad Bond inspected Ultimate Fine Autos Inc. and found some records were missing.

On February 1, 2001 Ms. Dempsey visited Ultimate Fine Autos Inc. with Ms. Cini. Ahmad El Masri was there. He told her that she and Ms. Cini could not see the books and records. He was angry that they had come on this inspection. He said he had filed a complaint about another dealer, but OMVIC had done nothing. He wanted appointments to be booked ahead. He said the books and records were there but were locked in a cabinet.

Ms. Dempsey testified that she made another appointment for the next day, February 2, 2001 at 11:00 a.m. When she and Ms. Cini attended that day, only Ahmad El Masri was present. He said Mohamad would not be coming in, and he did not have the key to open the cabinet.

Ms. Dempsey stated that under the *Motor Vehicle Dealers Act* inspectors need free access to the books and records to check on the conduct of the business. The ability to do a spot check is an important inspection tool. In the case of Ultimate Fine Auto Inc., however, appointments had to be booked in advance to ensure that the books and records were there. It would take numerous appointments to see the books and records.

Ms. Dempsey reviewed a number of the documents entered as exhibits. Tab 17 of Exhibit 3 is the bill of sale dated October 19, 2000 from Toronto Auto Auctions to Ultimate Fine Auto Inc. of the Eagle motor vehicle with an odometer reading of 261,154 km. It had the signature of Ahmad El Masri. But the wholesale bill of sale from Ultimate to London Dega Wheel on November 18, 2000 had an odometer reading of 142,000 km. It also had the signature of Ahmad El Masri. Under Regulation 801 section 19, the dealer is required to give disclosure and keep repair invoices. Here, the dealer should have put TMU 261,000 for the Eagle motor vehicle. The Registrar wants full disclosure of the last known mileage on the odometer, and if

the odometer is repaired, the previous reading and the new reading. This information is important as it affects the value of the car and its safety.

Ultimate Fine Autos Inc. bought the 1994 Honda Accord at Impact Auto Auctions, which sold it on behalf of Personal Direct Insurance. The retail bill of sale by Ultimate to Mr. Wells does not say it was an insurance write off. Nor does it give any particulars on damage to the vehicle except saying "as is condition and appearance". Ms. Dempsey stated that the Registrar requires all material facts be disclosed. As well, she testified that the terms and conditions of registration for Ultimate Fine Autos Inc. required that they disclose all material facts.

Under cross-examination, Ms. Dempsey stated that she never received Mohamad El Masri's voice mail message but that Mr. El Masri's voice mail message was left on the voice mail of a Brenda Lacroix. Ms. Dempsey stated that she never scheduled a further appointment with Ultimate as the file went to a liaison committee for further review.

Ms. Dempsey stated that Mohamad El Masri being ill was not unreasonable but that some arrangements could have been made for him to give the cabinet key to Ahmad El Masri, particularly as they both lived at the same address.

She recalled that on February 1st Ahmad El Masri was quite angry with them and said he was refusing to let them look at the books and records. She could not think of anything that she or Ms. Cini had said or done which would have provoked this kind of a reaction.

In the past, the inspectors have only seen Ultimate's books and records when an appointment has been scheduled, and she recalled that on May 23, 2000 the inspector did see the books and records of Ultimate.

Ms. Dempsey stated that she was not aware of any dealers operating without a driver's licence. She does know that the franchise dealers require all staff to have valid driver's licences.

Ms. Dempsey agreed that when filling out his application which was submitted on May 1, 2001, Ahmad El Masri would not have had knowledge of the current suspension of his licence as the offence notice is dated May 12, 2001.

Ms. Dempsey felt that the word TMU written on the bill of sale to Mr. Safaei referred to the Oldsmobile only, as it was not written beside the 142, 000 km for the Eagle.

Ms. Dempsey stated that written disclosure is best as it avoids any issue of credibility which may arise with verbal disclosure. She agreed that the document from Impact Auto Auctions says the 1994 Honda Accord is not branded, but branding is a voluntary action by insurance companies. Ms. Dempsey felt that Ahmad El Masri should have considered the price of the car and should have made full disclosure about the car when selling it to a consumer.

Testimony of Ahmad El Masri:

Mr. Ahmad El Masri testified that he is 21 years of age. He is originally from Syria, and he has lived in Canada since 1990. He completed his high school education and worked as a car detailer and a clerk prior to working for his brother Mohammad at Ultimate Fine Autos Inc. Ahmad El Masri filed a registration form to be a dealer under the name of Formula Fine Cars Ltd. Formula was incorporated on April 6, 2001 with Ahmad El Masri as its sole officer and director and shareholder. Ahmad also applied for registration as a salesperson with Formula Fine Cars Ltd.

Mr. El Masri stated that he had no involvement in setting up Ultimate and was not aware until after March 14, 2001 that he had been a director and officer of that corporation. Despite his statements in page 3A of his application for registration as a salesperson (Tab 2 of Exhibit 4), he stated he had not been aware that he was the Secretary of Ultimate until after the revocation of registration of Ultimate Fine Autos Inc. He did not know until September 19, 2001 that the Secretary of a corporation is responsible for the paperwork.

Mr. El Masri testified that he bought and sold cars for Ultimate Fine Autos Inc. and that his brother Mohamad also bought cars. He stated that he had no management responsibilities for Ultimate. He did have signing authority on the bank account of Ultimate. If he was purchasing a car worth more than \$3000.00, he would discuss the purchase with Mohamad. He stated that Mohamad controlled the business records, that all records were locked in a cabinet and that Mohamad had the key to that cabinet.

Ahmad El Masri testified that the registration of Ultimate Fins Autos Inc. was revoked due to lack of inspection of the records.

Ahmad El Masri stated that true mileage unknown applies to both the Eagle and the Oldsmobile. The words "broken not working" applies to the Oldsmobile only. The repair bill to replace the odometer on the Eagle (Exhibit 6) shows the reading as 261,254 km. That bill was given to Mr. Safaei. Mr. El Masri stated that he got a call from London Deal a Wheel stating that the auction house told them there was a problem with the Eagle burning oil and the auction house wanted London Deal a Wheel to buy back the car. Ahmad El Masri stated that he was worried that the auction house would just take the car so he put a lien against the car to prevent that. He eventually paid London Deal a Wheel for the cost of the car and the arbitration fee. In light of these experiences, Ahmad El Masri now feels he would put on the bill of sale that the mileage was 261,000 but that the new odometer shows 142,000. He stated that tab 18 exhibit 4, the retail bill of sale to Dookeran, shows his new approach as it states very clearly true mileage unknown and the kilometres as 270,000.

Ahmad El Masri testified that he does not know what Mr. Safaei was speaking of regarding a former partner named Hasfar. He does not know such a person.

Regarding the 1994 Honda Accord sold to Neil Wells, Mr. Ahmad El Masri stated that the car had been involved in a fender bender with repairs required to the driver's side fender, the headlight and the left hub cap. Mr. Wells first spoke to Mohamad El Masri and then to him, and Ahmad El Masri wrote up the bill of sale. There was no representations to Mr. Wells about the car, and Mr. Wells did not ask him if the vehicle had been in an accident. The safety inspection of the car was done by Des Mathews. Ahmad El Masri stated that now he knows that whether or not the car is branded, he should disclose all information about the accident. He stated that it is his knowledge that all cars with airbags have computers and if the airbag is deployed the computer ensures that the car will not start. He drove it himself to the repair shop.

Regarding the inspection reports by OMVIC, Ahmad El Masri stated he did not sign the Inspection Findings report dated May 10, 2000, but he signed the ones dated December 11, 2000 and February 1, 2001. He remembers Brad Bond coming to Ultimate Fine Autos Inc. about two times per month. He said that Mr. Bond would call to make an appointment.

Regarding the comments by Ms. Cini and Ms Dempsey on the February 1, 2001 inspection, Ahmad El Masri stated that he had not been angry but that he had two customers waiting. He does not remember telling Mohamad that OMVIC was coming back to the dealership on February 2nd. He was not at home the night of February 1st.

Mr. El Masri stated that he has not driven since being told on May 11, 2001 that his licence was suspended. Also, he stated that he would fight the red light charge in court in November, 2001. He said he would get his father, who is retired to, drive the cars to the mechanic and would hire a salesperson to do the test drives. He had a quote of \$387.00 per month for insurance for Formula from Brookman Associates. He had a vendor's permit for Formula Fine Cars Ltd. at 129 Exeter Road, and he has been paying the rent on that location.

Mr. El Masri felt he and his brother Mohamad were treated differently by OMVIC due to cultural reasons. He thought it was unfair to have had his salesperson's registration revoked when the registration of Ultimate Fine Autos Inc. was revoked. Ahmad said he had the experience to operate his own dealership, would hire an accountant, and, if necessary, submit his records to OMVIC on a weekly basis.

Under cross-examination, Ahmad El Masri stated that he found out about the suspension of his licence on May 12, 2001 when he was given the offence notice. He had not been informed prior to that time. He did not know that the suspension had commenced as of September 13, 2000.

He stated that he had cooperated with OMVIC. His corporate lawyer had sent a letter regarding his licence suspension. He had gone to the London police to get the criminal record certificate after having a discussion with Mary Jane South of OMVIC.

Regarding his salesperson application of 1999, Ahmad El Masri stated that the form was completed by his corporate lawyer who asked him if he had any criminal record, to which he had said no. Mr. El Masri did not realize that the form was asking about charges, as there was an outstanding charge for assault at that time. Mr. El Masri stated that he accepted responsibility for that error.

Ahmad El Masri agreed that he did the majority of the buying and selling at Ultimate Fine Autos Inc. He had signing authority at the dealership for the banking. He agreed that he had sole authority up to \$3000.00 and then he would discuss a purchase with his brother. He stated that he did not know he was an officer and director of Ultimate Fine Autos Inc., but he only thought he was a salesperson. He acknowledged that his statement to OMVIC when applying in May, 2001 said that he had assisted the company in the positions of Secretary/Treasurer. He could not remember his brother Mohamad telling him three months after Ultimate was incorporated that he was the Secretary of the corporation. He stated that Mohamad did all of the paperwork for the corporation.

Regarding his licence suspensions, Ahmad El Masri testified that he knew of the first suspension and ultimately knew of the third suspension. He has had three suspensions. He did not know of one suspension and continued to drive after July, 2000. He has at least eight convictions.

Not having a driver's licence, he will get help from his father and hire a salesperson. He said that he pays \$1500.00 plus GST for rent for the dealership's location, and has about \$42,000.00 as capital for his corporation.

To determine the condition of a car, Ahmad El Masri testified that he looks at the car himself and asks about it from the seller.

Ahmad El Masri disagreed with the testimony of Mr. Safaei that Ahmad did not provide disclosure on the mileage of the Eagle. He supplied Mr. Safaei with a copy of the bill to replace the odometer via the fax. He did not know that the Regulations provide that when he replaced an odometer he must put on the bill of sale the last known highest reading.

He also disagreed that he said someone else put the lien on the Eagle. He placed the lien even though he had no property interest in the Eagle at that time because he was afraid the car would be lost to the auction house. That did happen, as was shown in the history of the Eagle. Ahmad El Masri later transferred the car to Ultimate Fine Autos Inc. and sold it to a

consumer. He provided full disclosure of 270,000 km on that bill of sale. Ahmad El Masri said it took 2 or 3 weeks to get rid of the lien on the car after that sale, but the lien was definitely off by September, 2001.

Ahmad El Masri disagreed with the testimony of Mr. Wells that Mr. Wells had asked if the car was in an accident. He stated that he thought he did not have to make disclosure if the car was not branded. Though Mr. Wells was concerned about the air bag light, Mr. El Masri thought the light would come on for the 120,000 km service because he knows that dealers will service air bags at a certain mileage. He himself had an accident where his airbags were deployed. When shown Exhibit 8, which is a letter from Honda stating that having the air bags deployed does not mean the car will not work, Mr. El Masri stated he was not a mechanic.

Ahmad El Masri stated that he had not signed the inspection findings report of May 10, 2000. He signed for the February 1, 2001 inspection. He thought he had told his brother about OMVIC, but he did not get the keys from him at that time.

Ahmad El Masri stated that both he and his brother are registered to buy cars at Impact Auto. He does not recall doing any of the paperwork required by Impact. He felt some cars at Impact Auto were on consignment.

Testimony of Najib Haymour:

Mr. Haymour is 35 years of age and owns his own business, an auto mechanic repair shop. He has had his business for about 2 years. He has prior experience working at Shaw's Auto Recycling as a mechanic. He is a licensed mechanic.

Mr. Haymour did repairs on an Eagle Talon on October 21, 2000 at the request of Ultimate. Fine Autos Inc. The complaint was that the needle was shaking. He was given a replacement odometer by Ultimate. That replacement odometer had 140,000 km on it. A few weeks after doing this repair, he got a telephone call from someone at London Deal a Wheel who asked if he had replaced an odometer. He said yes. There was no discussion of the reading of the odometer.

Testimony of Desmond Matthews:

Mr. Matthews is a licensed mechanic. He has had his own business, the Matthews Auto repair shop, for the past eight years. He was trained in Ireland and worked as a mechanic for over twenty-five years.

Mr. Matthews did the safety check on the 1994 Honda Accord. He did not remember the car but did check his records. His records showed an inner fender cover missing. The driver's window was tight and work was needed on the right CV boot on axle. This work was not required under the safety inspection. He did fix the right tie rod and installed the fender cover. He passed the rotors and drums.

His procedure is to test drive a vehicle, then put it on the hoist. He would check the lights and the framework. If the car had been welded and the welding was done properly, he would not have made a note of it. He only made notes if something was not right. He ensured the emergency brake was working, checked the tires and wheels and took measurements of the brakes and rotors. He would look at the ball joints which are difficult to measure in a Honda. He checks the power steering, looks at the seals on the wheel rear cylinders and the muffler. Not all oil leaks in cars are safety related. He does not check the air bags but does check the seat belts. If the air bag light was on, he usually would mark that down.

Mr. Matthews stated that after a car's air bag has been deployed, although the air bag pulls off part of the steering wheel, the vehicle can still be driven.

Under cross-examination, Mr. Matthews stated that the safety inspection contained the minimal requirements for a vehicle to be on the road. A car in a major accident could be repaired and then a safety inspection certificate could be obtained.

Mr. Matthews felt that if the inner fender cover was off, there must have been some bodywork done. He said that the repair to the left outer tie rod of the 1994 Honda Accord could be for wear and tear, although that is not normal for a 1994 car, or moisture damaged. Also, the driver's window could have problems due to an accident or if the car had not been used for a period of time.

Testimony of Christna Dookeren:

Mr. Dookeren is 43 years of age with a family. He bought the Eagle motor vehicle from Ahmad El Masri at Ultimate Fine Autos Inc. on January 5, 2001. His signature is on the retail bill of sale and his initials are on the conditions of sale and the optional equipment areas of that bill of sale. Mr. Dookeren did not remember seeing the information on the bill of sale under optional equipment as to mileage unknown. When he bought the car, he thought the mileage was that on the odometer, that being 140,000 km. After about one week of driving the car, the motor went on it. Ahmad El Masri said he could not help him.

Some months later, Mr. Dookeren went to his bank and was told there was a lien on the car which had been put on prior to its sale to him. He had not known of this lien.

Mr. Dookeren felt he had not been dealt with in an honest fashion by Ahmad and Ultimate. He would not have paid \$3450.00 for the car if he knew the mileage was 270,000 km.

Under cross-examination, Mr. Dookeren stated he could not find the original invoice for the car. He did not know what TMU meant. When he bought the car, he was most interested in the price, and he remembered the comment on the car being "as is". He signed the bill of sale and initialed it in the places he was told to by Ahmad El Masri.

Testimony of Brad Bond:

Mr. Bond is 30 years of age with a family. At the time of this hearing, he was employed by a company other than OMVIC. However, he had been an inspector for OMVIC and had inspected Ultimate Fine Autos Inc. He went with Amanda Dempsey who was training him. He was at the inspection of May 10, 2000, and he took notes. He saw Ahmad El Masri sign the inspection findings form for May 10, 2000.

When he would go to Ultimate Fine Autos Inc., he would telephone to ensure they would have the books and records there. It was his practice to complete his notes immediately after he did an inspection.

Mr. Bond stated that he went to Ultimate on December 11, 2000 after receiving a complaint from Mr. Safaei at London Wheel a Deal. He asked Ahmad El Masri why there was a lien on the Eagle, and Mr. El Masri replied that he was afraid the auction house was going to sell the car.

Mr. Bond stated that he would normally only visit a dealer once in an eight month period unless there were problems. He was assigned to the London/Windsor/Sarnia area.

Mr. Bond said that there being no books and records available of Ultimate Fine Autos Inc. on May 10th, and he went back on May 16th. He went back on another occasion as there had been some errors on bills of sale, wrong use of TMU and some items missing from the garage register. He remembered that Ultimate used TMU for other cars besides the Eagle. He remembered that in December 2000, the records were disorganized, but they were at the dealership.

Mr. Bond remembered Ahmad El Masri signing the May 10, 2000 inspection findings report. He recalled that Ahmad had several different signatures, and he would sign his name differently on the bills of sale.

Submissions:

By the Registrar:

Counsel for the Registrar stated that the *Motor Vehicle Dealers Act* is a public protection statute. It deals with past conduct which must be in accordance with law, honesty, and integrity. In reviewing an application for registration, the Registrar must consider all relevant evidence.

The Registrar wished to refuse the applications on four basis:

- 1) the applicants misrepresented the true kilometres travelled to consumers
- 2) there has been no fair and full disclosure to consumers
- 3) the Applicant Ahmad El Masri did not provide full access to the books and records when he was a salesperson, officer and director of Ultimate Fine Autos Inc.
- 4) there has been disregard for the law

On the issue of misrepresentation of the kilometres on the odometers, OMVIC got involved due to the complaints of consumers. Mr. Safaei of London Wheel a Deal stated he did not know the kilometres for the Eagle other than that provided on the bill of sale. That bill of sale stated the kilometers for the Eagle were 142,000, when in fact, they were over 162,000. The bill of sale document is consistent with Mr. Safei's testimony as TMU is only written beside the Oldsmobile.

The Applicant has stated that he provided Mr. Safaei with a copy of the repair bill for the odometer, but this was never put to Mr. Safaei in his testimony.

The Applicant did not comply with Regulation 801 section 19(2) which states that the dealer shall record the former kilometres on the old odometer and the new kilometres on the new odometer.

Despite the position of the Applicant that he made disclosure to Mr. Dookeren, there is the testimony of Mr. Dookeren that the disclosure was not put on his invoice.

Counsel relied on *1280953 Ontario Limited O/A Morato Cars and Radomir Miljkovic*, a decision the Tribunal released June, 2001. This was a case where the applicants bought cars at auction with odometer readings or TMU and sold them without disclosing the true odometer readings or saying the odometer readings were unknown. As well, the applicants in that case bought branded cars at Impact Auto Auctions and sold them without full disclosure to the consumer. The registrations were revoked.

Regarding the non disclosure of material facts, Mr. Wells was not told of the true condition of his motor vehicle and subsequently he had problems. The evidence of Mr. Wells is not inconsistent with that of Mr. Matthews as the safety inspection is minimal in its standards. Mr. Matthews said he would not have noticed the frame repairs if done properly.

Counsel for the Registrar submitted that the bill of sale to Mr. Wells did not adequately disclose the problems with the car. Both Ahmad and Mohamad El Masri testified that they knew the car had been in an accident but neither told Mr. Wells, although he had asked both of them. Ahmad El Masri testified that he did not know he had to disclose if the car was in a minor accident. Again counsel relied on the *Morato* decision. Though this car was not branded, Ms. Dempsey testified that branding is a voluntary program by insurance companies. Here, the purchase of the Accord had an adverse economic impact on Mr. Wells. Also, there is a safety issue, as Mr. Wells has stated that he does not trust the car.

Regarding the issue of books and records, Regulation 801 sections 9,10,11,15 speak of access to books and records of dealers. OMVIC needs to have such access in order to protect the consumer. Ahmad El Masri testified that he did not know he was an officer and director of Ultimate Fine Autos Inc. But when he applied in May, 2001 to be a salesperson, he stated he did know and did some of those responsibilities. His brother stated that Ahmad El Masri knew this about three months after the company was incorporated.

Ms. Cini and Ms. Dempsey testified that Ahmad El Masri refused to provide them with access to the dealer's books and records. Yet, when given an extra day to obtain that access, Ahmad El Masri does not tell his brother nor get the key to the cabinet from his brother.

Mr. Bond and Ms. Dempsey state it is the signature of Ahmad on the May 10th Inspection Findings Report document. Even his brother, when looking at the wrong tab, identified the signature as being that of Ahmad El Masri.

Ahmad El Masri said he had no control of the books and records, yet he did most of the buying and selling of cars and had signing authority on the bank account. He had authority to buy cars up to \$3000.00 in value before conferring with his brother. Ahmad El Masri was a controlling mind of the dealership.

As to disregard for the law, Ahmad El Masri put a lien on the Eagle motor vehicle when he did not own the vehicle and when he had no property interest in that car. Even after the car was sold to Mr. Dookeren, the lien remained on the vehicle, and Mr. Dookeren was told this by his bank. This violates the *Sale of Goods Act*.

The driving record of Ahmad El Masri shows further disregard for the law. Although Ahmad El Masri was not aware of the suspension when he first sent in his application in early May, 2001, he should have told the Registrar once he knew this, when he got his Notice of Offence on May 12, 2001. The driving record itself shows a disregard for the law with eight convictions since

1996 and four suspensions. The violations were not all minor ones and included fail to yield, fail to remain, unauthorized plate, and fail to stop at intersection. His licence is currently under suspension so there is nothing to show that his driving record has improved.

There is an impact on his ability to run a dealership without having a valid driver's licence. The Applicant spoke of having help from his father who did not testify. He spoke of hiring a salesperson but did not show his financial plan for that.

Counsel for the Registrar submitted that where the testimony of the witnesses and that of Mr. Ahmad El Masri differ, the Tribunal should prefer that of the witnesses. Mr. Ahmad El Masri's testimony, counsel submitted, has been inconsistent.

Counsel referred to the *Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* (1983) O.J.No. 1017. In that case the Ontario Supreme Court held that the test was a reasonable one and that the Tribunal before finding against the Registrar must find that the Registrar was wrong in his reasons for refusal of the registration.

By Counsel for the Applicants:

Counsel for the Applicants submitted that Mr. Ahmad El Masri has prior experience as a salesperson. He is experienced in buying and selling cars and is ready to operate his own used car dealership.

The Proposal deals with the financial responsibility of the Applicants in the conduct of business and that the past conduct of the Applicants shows them unable to carry on business in accordance with law and with integrity and honesty.

Here, the Applicant Ahmad El Masri has testified that he has over \$40,000.00 to use as capital for his dealership. This test deals with the financial position of the Applicants and their financial responsibilities. It is submitted there is no evidence under section 5(1)(a) of the Act.

Regarding the past conduct, it is the position of the Applicants that Mr. Ahmad El Masri did not show an inability to carry on business with honesty and integrity. At worst he showed some carelessness.

Regarding the issue of disregard to the law, the driving record of the Applicant is indicative of him obeying the rules as the block of offences are not recent. Most of the offences occurred in 1998. He has grown up since then and shows more responsibility.

Regarding the odometer of the Eagle motor vehicle, the issue is whether Ultimate Fine Autos Inc. told London Wheel a Deal of the odometer being replaced. It was replaced on October 21, 2000, and it is the testimony of Mr. Ahmad El Masri that he verbally and by paper told London Wheel a Deal of that. The bill of sale states true mileage unknown and it refers to both

cars, according to the testimony of Ahmad El Masri and his brother. Also, there is the evidence of Mr. Matthews that some weeks after replacing the odometer in the Eagle, he received a telephone call from someone at London Wheel a Deal, and he told them of the replacement. London Wheel a Deal was told verbally, got a repair bill with the mileage on it and spoke to the mechanic who replaced the odometer.

The lien on the Eagle motor vehicle was done at a time when Ultimate Fine Autos Inc. had a beneficial interest on the car as they had agreed to provide a full refund. They were concerned that the auction house would sell the car. The history on the Eagle shows that as of December 1, 2000 the auction house was the owner of the car. This was a way by which Ultimate could enforce its rights. Subsequently, Ultimate sold the Eagle to Mr. Dookeren on January 5, 2001. Mr. Ahmad El Masri says he told Mr. Dookeren about the TMU and there are the purchaser's initials beside TMU. Mr. Dookeren's signature is under the comments on the mileage of this car. Although Mr. Dookeren denies the comments were there, he has not supplied the Tribunal with a copy of his invoice. This is a question of credibility and the purchaser has been fully appraised of the mileage issue. The lien remaining on the Eagle was an oversight by Ultimate and it was taken off. That is an issue of carelessness not dishonesty.

Regarding the Honda Accord motor vehicle, Ahmad El Masri knew the car had been in a minor accident. He drove it to the repair shop. The vehicle was not branded. Mr. Ahmad El Masri was not aware that branding was a voluntary practice and thought that if the car had been in a serious accident, it would be branded. The vehicle was certified by Mr. Matthew and got its safety certificate. The vehicle was sold "as is", and Mr. Wells could have done his own inspection. It is the position of Mr. Ahmad El Masri that some vehicles bought at Impact Auto come from other dealers and are not in serious accidents. Counsel submitted that there is only hearsay evidence that the frame has been welded and the air bags deployed. No one was called to give evidence from London Honda. Even with this, Mr. Ahmad El Masri offered a refund but that offer was rejected. Although Mr. Ahmad El Masri did not know then that he should disclose the history of a vehicle, he would do so now.

Regarding the books and records, Mr. Ahmad El Masri was not in control of them at Ultimate Fine Autos Inc. He did not have access to the key to the cabinet. Although he was the secretary of the corporation, that was a fact in title only.

Regarding the February inspections, Ahmad El Masri felt he had informed his brother of the matter. His brother was to contact Ms. Dempsey. If they had scheduled an appointment, the books and records would be provided.

Counsel submitted that the defects do not justify the penalty of having the registrations revoked. There should be some middle ground.

Counsel referred to the cases cited by counsel for the Registrar.

In *Brenner* the court held there could be “no other conclusion”. However, in this case there are facts which justify a result other than the revocation of registration.

In the *Morato Cars* case the applicants had tampered with five vehicles and failed to disclose on a further five vehicles. They had altered records and had criminal convictions. There the dealer was not suitable, and his conduct went beyond carelessness. Here, there is one allegation of odometer non disclosure and one of non disclosure of a vehicle being in an accident. Here, Mr. Ahmad El Masri has provided reasonable explanations. If necessary, conditions could be put on the registrations.

Counsel referred to *Shahidi (c.o.b GTA Auto) (re)* (2000) O.L.A.T.D.no.278 whereby the Tribunal spoke of the balancing of entitlement to registration with the protection of the consumer. There, the Tribunal permitted the registration upon conditions.

In *Shine Cars Sales Inc (Re)* (2001) O.L.A.T.D.No. 286 the dealer was convicted of two provincial offences of odometer tampering, and the Tribunal permitted registration upon conditions.

Counsel submitted that this is a case whereby conditions should be imposed. The Applicants did not intend to deceive the public and should at best be given a warning, not a revocation.

Reply by Registrar:

The civil standard of balance of probabilities is the standard for these cases. It is the position of the Registrar that the allegations have been proven on this basis.

The cases relied upon by counsel for the Applicants dealt with revocations. Here, this is the case of a refusal. Statutory entitlement differs between refusals and revocations. There is a higher standard of entitlement for revocation than for refusals.

Counsel submitted that motor vehicle sales is a regulated industry and one cannot ignore the Act or its Regulations and operate in a vacuum.

One cannot put a lien based on a beneficial interest. The PPSA and the Sale of Goods Act are based on legal interests.

Counsel relied upon *K.W.Used Car Sales Ltd. and Krzystof Wawryka v Registrar, Motor Vehicle Dealers Act* LAT decision July, 2001. There the Tribunal revoked the registration. The Tribunal stated on page 16,

“A motor vehicle dealer or salesperson deals with members of the public who are purchasing products of substantial value. Customers depend on the motor vehicle dealer or salesperson not to withhold material information that would affect the value or quality of the vehicles . A dealer or salesperson who withholds material information about a motor vehicle that is crucial to potential purchasers is not conducting business with honesty and integrity.”

Counsel submitted that the testimony of the consumers in this case reflects that they feel they have not been given the information to allow them to determine the proper price or whether or not to purchase the vehicle.

LEGISLATION:

The relevant legislation is the *Motor Vehicle Dealers Act*:

Section 5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of the business: or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (iii) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

.....

Section 7 (4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 10(1) The Registrar or any person designated by him or her in writing may at any reasonable time enter upon the business premises of the registrant to make an inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts are being complied with.

.....

Section 11 (1) Upon an inspection under section 9 or 10, the person inspecting,

(a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection; and

Regulation 801

Section 16(2) Where a used motor vehicle is sold, the sales or purchase order shall show,

.....

(o) the distance travelled by the vehicle at the time of sale,

.....

Section 19(1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.

(2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of that motor vehicle the reading in miles or kilometres that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected.

ANALYSIS:

This case involves the refusal of the Registrar, *Motor Vehicle Dealers Act*, to register Ahmad El Masri as a salesperson and Formula Fine Cars Ltd. as a dealership under the Act.

As stated in the *Brenner* case, the Tribunal cannot substitute its opinion for that of the Registrar unless the Tribunal feels that the Registrar did not have reasonable grounds under section 5 of the *Motor Vehicle Dealers Act* to refuse to register the Applicants.

In considering the matter, the Tribunal can have regard to the evidence that was before the Registrar as well as that presented at the hearing. The Tribunal needs to look at the cumulative effect of this evidence in arriving at its decision. The standard of proof in these cases is the civil one, on a balance of probabilities.

There is case law which has distinguished between a refusal to register and the revocation of registration. The courts have held that it is more difficult to revoke a registration, an existing right, than it is to refuse a registration, a future privilege. There is a slightly greater burden on the revocation than on the refusal. The Tribunal agrees that there is a higher degree of onus when one takes away the right to earn one's livelihood in a regulated industry than when one does not permit someone commence work in a regulated industry.

The *Motor Vehicle Dealers Act* protects the consumer while providing regulatory criteria for those who wish to work within the motor vehicle industry. The Registrar and the Tribunal must consider the balancing of the ability to work within a regulated industry with the protection of those purchasing vehicles.

The Registrar has stated four reasons why he feels it is reasonable to refuse the registration of the Applicants: 1. Misrepresentation of mileage; 2. Failure to make full disclosure; 3. Not providing full access to books and records; 4. Disregard for the law. The Tribunal will review all of these reasons.

1. Misrepresentation of mileage:

The Registrar is concerned with the purchase of a 1991 Eagle Talon by London Wheel a Deal. The bill of sale listed both the Eagle and a 1992 Oldsmobile. The initials, TMU, appear beside the mileage of the Oldsmobile but not by the mileage of the Eagle. The Applicant Ahmad El Masri testified that the words written on the bill of sale “sold true mileage unknown broken not working (oldsmobile only)” apply as to the mileage comment to both vehicles and as to the broken comment to the oldsmobile.

The Tribunal disagrees with this characterization of the bill. The initials TMU are deliberately put beside the Oldsmobile. There was no need to put those initials beside the Oldsmobile if the words “true mileage unknown” as written were to apply to both vehicles. The mileage listed on the bill of sale for the Eagle is wrong. The 142,000 km was the mileage for the replacement odometer. The bill of sale from Toronto Auto Auctions shows the mileage as 261,154 km.

The Applicant Ahmad El Masri stated that he verbally told London Wheel a Deal of the correct mileage of the Eagle, that a copy of the repair bill for the replacement of the odometer has the true mileage listed on it, and that this repair bill was faxed to London Wheel a Deal. But no copy of the fax was produced at the hearing nor was this matter put to Mr. Safaei, owner of London Wheel a Deal, at his testimony at the hearing. Where there is a conflict between the testimony of either Mohamad or Ahmad El Masri and Mr. Safaei the Tribunal finds the evidence of Mr. Safaei to be more credible.

The Tribunal finds that Mohamad and Ahmad El Masri misrepresented to Mr. Safaei the mileage on the Eagle. It was only due to the dissatisfaction of a potential buyer of the vehicle that this discrepancy came to the attention of Mr. Safaei.

The evidence of Mr. Dookeren is not as compelling on this point. Though Mr. Dookeren stated that his copy of the bill of sale did not contain disclosure of the true mileage of the Eagle, he could not produce that copy at the hearing. He had initialed the bill of sale in several places. Without the disclosure being on the bill of sale, there would have been no purpose in putting his initials in those places. His evidence is of more value when considering the issue of disclosure.

2. Lack of full disclosure:

The Registrar states that Mohamad and Ahmad El Masri did not disclose to Mr. Wells that his vehicle had been in an accident and that failure to do so is a material misrepresentation. The Applicants hold that Mr. Wells bought his car “as is” and that his car came with a safety certificate. The car was not branded. It is still a voluntary process for insurance companies to brand such vehicles.

It would have been helpful to have heard the testimony from the repairman at London Honda as to his/her observations of the condition of this Honda Accord. The evidence of Mr. Wells on this point is hearsay and though the Tribunal can accept hearsay evidence, the weight to be given to the evidence of Mr. Wells on this matter is not great.

The safety certificate does not certify that the vehicle can be driven. It only certifies that certain pieces of equipment on the vehicle are working. The Tribunal accepts the evidence of Mr. Matthews that he did a proper safety check of the vehicle before issuing the safety certificate.

The evidence of Mr. Wells by itself is not sufficient to show a failure of full disclosure. But one needs to consider Mr. Wells evidence with that of Mr. Dookeren. Mr. Dookeren bought the Eagle and never was told it had a large lien against it. It was only when he wished to have it refinanced that his bank informed him of the existence of this lien.

Counsel for the Applicants states that the failure to remove the lien was evidence of carelessness not dishonesty. The Tribunal disagrees with that characterization. The lien had been attached by Ahmad El Masri some months previous to the purchase by Mr. Dookeren of the Eagle. It would have been prominent in the memory of Ahmad El Masri. Though Mr. Dookeren bought the vehicle "as is" it is not an unfair assumption for a consumer to expect that when he purchases a car from a motor vehicle dealer the car will not have a previous lien by that dealer still attached to it.

The cumulative effect of the evidence of Mr. Wells and Mr. Dookeren leads the Tribunal to the conclusion that Ahmad El Masri did fail to disclose material facts to consumers.

3. Access to books and records:

The evidence adduced at the hearing shows that Mohamad and Ahmad El Masri were subject to a number of inspections during the short life of Ultimate Fine Autos Inc. This dealership was registered less than two years. Throughout those two years Mohamad and Ahmad had problems providing the books and records at ad hoc appointments and the books and records still had deficiencies when viewed at arranged appointments. It is the evidence, accepted by this Tribunal, by Mr. Bond, Ms. Cini and Ms Dempsey that it took a number of inspections to obtain required information.

The *Motor Vehicle Dealers Act* and its regulations are clear that motor vehicle dealerships must maintain proper books and records and have them available so they can be inspected at will by the inspectors of OMVIC. The inspectors need not make an appointment. As Ms. Dempsey testified, it is necessary to have ad hoc appointments to be sure as to the true condition of books and records.

Ahmad El Masri is an officer and director of Ultimate Fine Autos Inc. He acknowledges that in his application to be registered as a salesperson for Formula Fine Cars Ltd. The Tribunal cannot understand why he did not have access to the books and records. Besides being an officer and director, he is the brother of Mohamad El Masri. They have testified that they worked closely together at the dealership, and it was evident that Mohamad trusted his brother in such vital responsibilities as being the main buyer and seller of the cars. It was Ahmad El Masri who had the full time responsibility at the dealership.

The Tribunal also cannot understand why Ahmad El Masri who lives at the same place as his brother, could not have obtained the key to the cabinet from Mohamad. Ahmad knew that Ms. Cini and Ms. Dempsey were making a return visit the next day. He had confirmation in writing. Yet he testified that he did not ask Mohamad for the key. The Tribunal finds the evidence of Ms. Dempsey and Ms. Cini credible. They both observed Ahmad El Masri to be angry that they had come to inspect the books and records. He stated that he did not want to provide them with the books and records. He was not cooperative with the inspectors at their visits in February.

The Tribunal finds that Ahmad El Masri did not provide access to the books and records of Ultimate Fine Cars Inc. as required by law.

4. Disregard for the law:

The Tribunal finds that the driving record of Ahmad El Masri shows a disregard for obeying the law. In less than five years Ahmad had accumulated four suspensions, and at least eight convictions. Currently his licence is under suspension. The Tribunal agrees with Ms. Dempsey that it would be extremely difficult for Ahmad El Masri to operate a dealership without a driver's licence. His plans to use his father or hire a salesperson are without corroboration.

The cumulative effect of Ahmad's driving record is that it shows a disrespect for the law. Another example of Ahmad's disregard for the law is the attachment of a large lien to a vehicle in which he had no proprietary interest at the time of the attachment. The Tribunal is concerned with the ability of Ahmad El Masri to work within the regulatory structure as set out in the legislation.

Counsel for the Applicants argued eloquently that the penalty of refusing to register the Applicants is disproportionate to their transgressions. The Tribunal is sensitive to the need to balance the desire to work in a regulated industry with the need to protect the public and provide the consumer with some assurances that those working in the industry are trustworthy.

The Tribunal finds in this case that the balance favours the protection of the car buying public. Ahmad El Masri through his past conduct has not demonstrated honesty, integrity and regard for the law. The Tribunal finds that the Registrar acted reasonably in refusing to register the individual and corporate Applicants. This is not an appropriate case to order terms and conditions on registration.

ORDER:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated May 25, 2001, to refuse to register Ahmad El Masri as a motor vehicle salesperson and to refuse to register Formula Fine Cars Ltd. as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley,
Vice-Chair

Released: December 27, 2001

BALSASSARRE, A.

ANTONIO BALSASSARRE

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: JOHN E. ORT, Member

APPEARANCES:

PAUL COOPER, Counsel, representing the Applicant
A. MICHAEL ROTHE, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

December 11 and 12, 2001

Toronto

ORDER

WHEREAS the Registrar, *Motor Vehicle Dealers Act* by proposal dated May 28, 2001 has proposed to refuse the registration of Antonio Baldassarre (the "Applicant") under the *Motor Vehicle Dealers Act*;

AND WHEREAS the Applicant requested a hearing before the Licence Appeal Tribunal to appeal the above noted proposal;

AND WHEREAS the Tribunal scheduled a hearing of this matter to commence at 9:30 a.m. on December 11 and 12, 2001 at the Tribunal's Chambers;

AND WHEREAS at the second day of hearing on December 12, 2001, the Applicant withdrew his request for a hearing before this Tribunal;

NOW THEREFORE this Tribunal orders that these proceedings are concluded before this Tribunal.

LICENCE APPEAL TRIBUNAL

John E. Ort, Member

Released: December 12, 2001

THE ONTARIO HISTORICAL SOCIETY

CEMETERIES ACT
Revised Statutes of Ontario, 1990 Chapter C. 4

IN THE MATTER OF an APPEAL by
THE ONTARIO HISTORICAL SOCIETY

AND IN THE MATTER OF the DECISION of
the Registrar of the *Cemeteries Act*,
dated June 8, 2001, made pursuant to sections 8(2) and 9(1) of the
Cemeteries Act

TO CLOSE A PORTION OF THE ST. ALBAN'S CEMETERY

AND IN THE MATTER OF a requirement for a hearing respecting
the said Order, pursuant to section 10(a)

THE ONTARIO HISTORICAL SOCIETY

Applicant

-and-

REGISTRAR, *CEMETERIES ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on February 4-8, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Monday, April 22, 2002 and to continue April 23, 24, 25 and 26, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

Released: December 17, 2001

THARMATHURAI

LOGATHASAN AND CELIA THARMATHURAI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

LOGATHASAN THARMATHURAI, appearing on his own behalf and on
behalf of Celia Tharmathurai

KAREN SPECTOR, Counsel, representing the Ontario New
Home Warranty Program

MAUREEN WHELTON, Counsel, representing Rosehaven Homes
Limited, the Added Party

DATES OF

HEARING: November 26, 2001 and November 28, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") by Logathasan and Celia Tharmathurai (the "Applicants") from a written decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated June 22, 2001.

The Program's decision letter dealt with seven claims of the Applicants. At the commencement of the hearing the Applicants abandoned their appeal in regard to their third claim set out in the Program's decision letter. The hearing was accordingly confined to six claims all of which were denied by the Program. The six claims together with the Program's observations/comments and its reasons for denying these six claims are set out hereunder:

1. **Claim:** Coloured brick mortar not used – throughout house – Builder denies that coloured mortar was used.

Observations/Comments: Schedule “A” of the Agreement of Purchase and Sale (the APS) reads in part “1.....and coloured mortar throughout.” The vendor/builder claimed that the trade used a small amount of red tint in the mortar mix. The owners claims that the mortar does not have the same amount of tint as the mortar in another subdivision that was to be representative of their mortar.

Reasons: Pursuant to Section 13 of the Act there is no defect in work, material or violation of the Ontario Building Code. Pursuant to Section 19, Regulation 892 the builder did not substitute an item of lesser quality, the mortar used is not defective in any manner and you did not pay a premium for a certain colour of mortar. Notwithstanding that any claims exists, pursuant to Section 14 subsection (3) (b) of the Act you did not suffer any damages and are not entitled to be paid out of the guarantee fund.

2. **Claim:** Shower head not properly installed – ensuite bath – Dissatisfied with Builder’s reply.

Observation/Comments: The shower stall is approximately 4 feet by 7 feet with 2 side walls intersected by an angled wall. The vendor/builder installed the shower head on the right hand wall. The owner wanted the shower head installed on the center (angled) wall. The APS does not specify the location of the shower head.

Reasons: Pursuant to Section 13 of the Act there is no defect in work, material or violation of the Ontario Building Code or any other warranty as prescribed by the Regulations. This matter is beyond the scope of warranty coverage. Notwithstanding that any claim exists, pursuant to Section 14 subsection (3) (b) of the Act, you did not suffer any damages and are not entitled to be paid out of the guarantee fund.

4. **Claim:** Pre-cast stones are damaged – exterior – Builder said work is done. But still outstanding.

Observation/Comments: The owners reported to the vendor/builder that the pre-cast architectural stones on the exterior of the home were damaged. The manufacturer of the pre-cast carried out a repair to the stones that included sandblasting of the surface to blend the repaired areas with the existing. The surface of the pre-cast was dulled by the process when comparing similar pre-cast work on other homes in the sub division. ONHWP did not inspect the home before the repair work was carried out.

Reasons: Pursuant to Section 13 of the Act there is no defect in work, materials or violation of the Ontario Building Code. The pre-cast stone work is acceptable and to industry standard.

5. **Claim:** Plumbing was done outside of the wall – July 17/00 – Dinette/family room - Dissatisfied with builder’s reply.

Observations/Comments: The ABS plastic wastes and vents and the copper water supplies for the first and second floor plumbing fixtures are located within a series of bulkheads in the kitchen and dinette ceilings. The owners claim that the design of the bulkheads are different from similar houses in the sub division. The bulkheads are constructed in a workmanlike manner and are free of defects in material.

Reasons: Pursuant to Section 13 of the Act there is no defect in work, material or a violation of the Ontario Building Code. This complaint is of a design nature and beyond the scope of warranty coverage. Notwithstanding that any claim exists, pursuant to Section 14 subsection (3) (b) you did not suffer any damages and are not entitled to be paid out of the guarantee fund.

6. **Claim:** Electrical box was installed in wrong side of house – exterior electric meter – Dissatisfied with builder's reply.

Observations/Comments: The exterior electrical service to the home is installed on the front wall of the home. The developer for the subdivision is responsible for the location of the municipal connection of the electrical service. The vendor/builder connects at the developer's location.

Reason: Pursuant to Section 13 of the Act there is no defect in work, material or a violation of the Ontario Building Code. This complaint is of a design nature and beyond the scope of warranty coverage. Notwithstanding that any claims exists, pursuant to Section 14 subsection (3) (b) you did not suffer any damages and are not entitled to be paid out of the guarantee fund.

7. **Claim:** Only 2 foot gap entrance to the living room – July 17/00 – Living room- Dissatisfied with builder's reply.

Observations/Comments: The interior front entry to the home is one step lower than the surrounding floor area. When entering the home one can proceed to the east or west into living area or directly ahead into the laundry room. When one is within the home and wishes to proceed east to west or vice-versa the distance from the edge of the landing step to the laundry room wall is 24 & ½ inches wide.

Reasons: Pursuant to Section 13 of the Act there is no defect in work, material or a violation of the Ontario Building Code. This complaint is of a design nature and beyond the scope of warranty coverage. Notwithstanding that any claim exists, pursuant to Section 14 subsection (3) (b) you did not suffer any damages and are not entitled to be paid out of the guarantee fund.

The Applicants appealed the decision of the Program to deny their claims and their appeal is based upon Section 14(1)(b) of the *Ontario New Home Warranties Plan Act* (the "Act") which reads as follows:

14.(1) Where,

.....

- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....
the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.
.....

The Applicants and Rosehaven Homes Limited ("Rosehaven") entered into a written Agreement of Purchase and Sale in which Rosehaven agreed to sell to the Applicants certain lands situate in the City of Richmond Hill, Ontario and to erect thereon a residential dwelling (the "home") for an agreed price of \$305,000.00. The date of the Agreement of Purchase and Sale was March 15, 1999 and the home was completed for possession on August 25, 1999.

Pursuant to the closing of the Agreement of Purchase and Sale and the Applicants taking possession of the home on August 25, 1999, the Applicants noted certain deficiencies and brought them to the notice of Rosehaven. The Applicants were not satisfied with Rosehaven's response regarding the deficiencies, and the Applicants accordingly enlisted the assistance of the Program and requested a conciliation inspection in an attempt to resolve the issues. The Program held the conciliation inspection at the home on January 26, 2001 and on January 31, 2001 issued its conciliation inspection report. That report dealt with nine complaints of the Applicants. The Program in its conciliation inspection report held that two of the Applicants' nine complaints were covered by warranty while the remaining seven were not. The Applicants, dissatisfied with the Program's conclusions in the conciliation inspection report, requested that the Program issue its formal decision letter. The Program accordingly issued its decision letter dated July 27, 2001. The Applicants having abandoned one of the issues when the appeal commenced, the hearing proceeded on the remaining six issues.

THE EVIDENCE:

The evidence in this matter was both oral and documentary.

The Applicants' evidence was the testimony of Logathsan Tharmathurai, ("Tharmathurai") the Program's evidence was the testimony of its warranty representative, Jim Fortune ("Fortune") and Rosehaven's evidence was the testimony of its construction manager, Michael Puzzolanti ("Puzzolanti").

A summary of the evidence follows.

ISSUE #1 – COLOUR OF BRICK MORTAR USED

At the commencement of his evidence, Tharmathurai produced a letter from Foley Restoration dated September 12, 2001 and tendered that letter as an exhibit. Tharmathurai advised the Tribunal he was not calling Mr. Foley the author of the letter to testify. Counsel for the Program and the Added Party objected to the letter's admissibility in the absence of testimony from Mr. Foley. After considering the submissions of the parties, the Tribunal, ruled that the letter was

admissible under Section 15 of the *Statutory Powers Procedure Act* R.S.O., and the Tribunal would give it the appropriate weight. (Exhibit 7)

Mr. Tharmathurai stated that he and his wife, Ms. Celia Tharmathurai, were shown a model home by Rosehaven prior to the sale being entered into (Exhibit 8). The mortar colour of the model shown to him (Exhibit 9) was not the colour of the mortar that he received on his home which he stated had no colour in it. Under cross-examination by counsel for the Program, Mr. Tharmathurai was referred to the Agreement of Purchase and Sale (Exhibit 1, Tab 2) and conceded that Schedule "A" to the agreement of purchase and sale stated "coloured mortar throughout" without specifying the colour of the mortar. Mr. Tharmathurai conceded that Schedule "X" to the Agreement of Purchase and Sale also contained clause 8 which states:

8. The Purchaser acknowledges that he has purchased the Dwelling on the basis of plans which he has viewed and not from a model. The Purchaser acknowledges that the model home, if any, are for display purposes only, and that same or all of the features contained therein may not be included in the Dwelling unless same is specifically provided for in any schedule forming part of this Agreement.

Mr. Fortune stated that he has been employed as a warranty representative by the Program since 1989 and has been conducting conciliation inspections since that date. Prior to joining the Program, he was a building inspector, and prior to that he had his own business doing home renovations.

Mr. Fortune went on to state that at the conciliation inspection, the Applicants told him that they were expecting a "redder colour similar to another subdivision". Fortune contended that there was no defect in the mortar as to work or materials and there was no violation of the Ontario Building Code. There was no question of a substitution pursuant to Regulation 892 as the Agreement of Purchase and Sale only stated "coloured mortar" was to be used and there was colour added to the mortar that was used on the Applicants' home. Mr. Fortune referred to Foley's restoration's letter of April 12, 2001 (Exhibit 7) where Mr. Foley stated that he explained to his client, the Applicant, "that there is a small amount of tint which has been added to the mortar".

Mr. Puzzolanti testified that he is employed as Construction Manager with Rosehaven and is responsible for construction operations at various sites where Rosehaven builds homes. Prior to holding his present position, he has been site superintendent at various subdivisions where Rosehaven has constructed homes. He has been a site superintendent for some eighteen years, and prior to that he had experience in masonry construction. He has attended numerous industry-related seminars and lectures.

Mr. Puzzolanti stated Rosehaven was not the developer of the subdivision upon which the Applicants' home was built. The developer was Rowena Developments, which had bought the raw land and had installed the infrastructure of the subdivision. Rowena had then sold serviced lots in the subdivision to three builders, one of which was Rosehaven.

Mr. Puzzolanti went on to refer to clause 3(a) of Schedule "X" to the Agreement of Purchase and Sale which reads:

The vendor will construct (if not already constructed) and complete upon the Property a dwelling (the "Dwelling") of the type hereinbefore indicated in accordance with the plans and specifications already examined by the Purchaser and filed or to be filed with and approved by the Municipality.

Mr. Puzzolanti referred to the ground floor and basement plans of the Applicants' home, which is referred to as the "Vienna" model. The plans are referenced in Schedule "X" to the Agreement of Purchase and Sale. (Exhibit 1, Tab 8, last 2 pages)

Mr. Puzzolanti stated that the Applicants could not have viewed a "Vienna" model prior to executing the Agreement of Purchase and Sale as there was then no model of a "Vienna" home that had been constructed. The first "Vienna" model home built by Rosehaven in the subdivision was the Applicants' home.

Mr. Puzzolanti, referred to claim 10 in Schedule "X" to the Agreement of Purchase and Sale which clause contained the following sentence:

There is no representation, warranty, collateral Agreement or condition affecting this Agreement or the Property, or supported hereby except as set forth herein in writing.

In dealing with the mortar colour, Mr. Puzzolanti stated that:

- die or colour pigmentation was added to the mortar by Rosehaven in all the homes that it built in the subdivision that required mortar colour;
- the amount of die or pigmentation in the mortar varied from home to home according to the shade or colour of the brick used in the home, with darker shade of brick having more die or pigmentation added while a lighter shade of brick required less;
- while no two mortars would be identical as to colour, all homes that required coloured mortar and received such coloured mortar; and
- the Applicants' home received mortar that contained die or pigmentation, which he confirmed when he reinspected the Applicants' home on November 24, 2001.

ISSUE # 2 – SHOWER HEAD

The evidence of Mr. Tharmathurai was that the shower head in the shower of a neighbour's home was in a more convenient location than in the Applicants' shower. He described the shower as being partly glass enclosed. Upon entering the shower cubicle one faces a wall directly ahead. Adjacent to this wall are two further angled walls. The shower head was placed, not on the centre wall, but on the adjacent left hand wall. The Applicants claimed this to be uncomfortable to use, and caused water to splash against the shower cubicle's glass door. Although there was no leakage of water due to the splashing of water on the door, the Applicants believe this may occur in the future. According to Tharmathurai, the position of the shower head is reflective of poor workmanship.

In his written report (Exhibit 7, page 1) Mr. Foley states that "the shower still functions properly, however, excessive water splashes onto the shower door and eventually could be the source of a water leak around the door itself". Mr. Foley continues that Mr. Tharmathurai "would like the shower head taps and spout moved to the centre wall" at an estimated cost of \$1,000.00 plus G.S.T.

Under cross-examination by the Program's Counsel, Mr. Tharamthurai confirmed his original complaint addressed to Rosehaven, dated July 17, 2000 read:

Shower head was installed all the way to the left (see picture). It should have been installed in the middle of the shower. It is inconvenient while taking shower and the bathroom looks weird.

Under cross-examination by Counsel for the Program, Mr. Tharmathurai conceded that in his written complaint dated July 17, 2000 to Rosehaven (Exhibit 1, Tab 11) he made no mention of water leakage or splashing and merely stated that "it is inconvenient while taking shower and the bathroom looks weird". He did state that the shower head functions properly.

Mr. Fortune testified in regard to this issue that on the Applicants' written request form, his complaint was:

Shower head not properly installed.

Mr. Fortune also stated that when attending the conciliation inspection he observed no defect in workmanship and no damage due to the location of the shower head. At the time of the conciliation inspection no mention was made by Mr. Tharmathurai of water splashing on the door. Mr. Fortune contended further that there would be no discomfort in using the shower cubicle.

Mr. Puzzolanti testified that it was his responsibility to determine the location of the shower head. It was not referenced on the plans. Placing the shower head on a wall that is not directly opposite to the door would result in less water being splashed onto the glass shower door. He stated that where the shower head was placed on an adjacent wall is standard practice within the industry and that the majority of homes have their shower heads installed as it was installed in the Applicants' home.

ISSUE #4 – PRE-CAST STONES

In his testimony, Mr. Tharmathurai referred to sixteen photographs that he took of the exterior pre-cast stone cladding to the home (Exhibits 3(a) to 3(p)). He claimed that after the pre-cast stone cladding had been installed by Rosehaven, it was sandblasted and the sandblasting removed the sheen finish of the stones and resulted in the chipping of the stones.

Mr. Tharmathurai referred in particular to two photographs (Exhibits 3(a) and 3(b)). He stated that Exhibit 3(a) showed the damage to the pre-cast stone which had been repaired by Rosehaven using cement filing and that Exhibit 3(b) showed the dulled surface of stone due to sandblasting. Both these photographs appear to have been taken within inches of the surface of the stones and magnify both the stones and the repair to the stones.

Mr. Tharmathurai also referred to a photograph, Exhibit 3(p), which he took of one pre-cast stone with a dark rust coloured mark on the edge of the stone where the mortar meets the stone and a streak of rust colour staining emanating from the dark rust coloured mark.

In his written report (Exhibit 7, page 2) Mr. Foley stated that the sandblasting "has definitely shortened the life expectancy of the stones as well as making them porous and susceptible to moisture pitting or spalding (sic) during the winter months". He recommended the pre-cast stones be replaced at a cost of \$2,000.00 plus G.S.T.

Under cross-examination by the Program's Counsel, Tharmathurai stated that the sixteen photographs taken by him of the home's pre-cast stones were taken two to five feet away from the stones. Photographs, Exhibits 3(a) to 3(j) were taken approximately two feet from the stones.

Under cross-examination by Counsel for Rosehaven, Mr. Tharmathurai stated that other homes in the subdivision were, like his home, sandblasted. He acknowledged that prior to the sandblasting of the pre-cast stones, he received written notification (Exhibit 22) from Rosehaven that sandblasting would be done to all homes constructed by Rosehaven in the subdivision so as to remove excess dirt and mortar.

Mr. Fortune testified that the Applicants' written request for conciliation stated that "the pre-cast stones are damaged". (Exhibit 1, Tab 13, item 16). At the conciliation inspection, Mr. Fortune's "Observation/Comments" note the following:

Prior to the expiration of the first year warranty it was reported that the Eagle pre-cast stones were damaged. The builder has since returned to the home and made repairs to small chips and imperfections in the stone. The stone was sand blasted. Much of the smooth shiny appearance of the stone has been removed.

Mr. Fortune was of the opinion that at the conciliation the Applicants' complaint was that sandblasting had removed the sheen on the surface of the pre-cast stones. He stated that it is typical of pre-cast stone that a shiny appearance does not last for more than one to two years and that weather dulls the shiny surface. He also stated that the Canadian Standards Association has determined that stone or brick should not be viewed from close up and that viewing should take place from no less than seven meters from the stone and brick. The Canadian Standards Association has also determined that when viewing and assessing brick or stone from seven meters away there is a 10% permissible allowance for apparent defects. Accordingly, with brick or stone viewed from seven meters, 10% of the brick or stone may reflect defects, such as chipping, and still be considered acceptable. Having regard to this standard, Mr. Fortune stated that the pre-cast stone in the Applicants' home meets the standard of the Canadian Standards Association.

Mr. Fortune went on to state that some defects are inherent to pre-cast stone. Unlike wood, where there is no "chippage" when cut, pre-cast stone can typically have "chippage" when it is handled or cut. The chippage of the pre-cast stone installed at the Applicants' home was satisfactorily repaired, after installation and there is presently no evidence of poor workmanship, defects in material or violation of the Ontario Building Code.

Mr. Fortune concluded his evidence by producing Exhibits 13 through 21 which were photographs of the pre-cast stone installed at the Applicants' home. All these photographs were taken by him in July/August 2001. Other than Exhibit 19, which was taken from a distance of approximately ten feet from the pre-cast stone, the remaining photographs were taken from between twenty and thirty feet from the pre-cast stone. All the photographs, according to Mr. Fortune, show an acceptable standard of workmanship and materials and when viewed from twenty feet the pre-cast stone is acceptable. In cross-examination by Mr. Tharmathurai, Mr. Fortune stated that some 17 months have passed since possession of the home, and it is to be expected that the natural effects of weathering, as far as surface sheen is concerned, would be evident at this stage. He also stated that the natural look of pre-cast stone is not intended to have a shiny appearance to its surface but to rather have a dull weathered look, which it attains from the effect of weathering over a period of one to two years of exposure to the elements.

The testimony of Mr. Puzzolanti followed that of Mr. Fortune. Mr. Puzzolanti stated that pre-cast stone, as used in the Applicants' home, is a manufactured product and contain a concrete-like mix. The mix is poured into fibreglass forms and left to cure. The pre-cast stone when newly manufactured has a sheen on the surface. In the manufacturing process, the stone is normally subjected to "knocks" and "nicks". After installation, the manufacturer of the stone hires a special team that do repairs where necessary and another team sandblasts the stone. Sandblasting is standard practice and was done to the pre-cast stone that had been installed at the Applicants' home. Sandblasting acts as an abrasive and removes the sheen. It is employed for a number of reasons; the main reason is to achieve a uniform weathering or texture to the stone's appearance and correct possible differences in the shade of the stone blocks.

Mr. Puzzolanti was referred to Foley Restoration's letter of September 12, 2001 (Exhibit 7) and disagreed with Mr. Foley's statement that:

The sandblasting has definitely shortened the life expectancy of the stones as well as making them porous and susceptible to moisture pitting or spalding during the winter months.

Mr. Puzzolanti explained that pre-cast stone is a porous material and sandblasting does not make it any more porous nor does sandblasting affect the life expectancy of the stone. He reinspected the Applicants' home's pre-cast stone on November 24, 2001. From that inspection, he came to the conclusion that the stone was perfectly acceptable, within the standards of the building industry and no better or worse than other homes in the subdivision, which he also viewed. He confirmed that pre-cast stone blocks, like bricks, are not designed to be viewed close up but from a reasonable distance.

Mr. Puzzolanti stated that there was one pre-cast stone block that exhibited what appeared to be a rust spot and streak on that block. (Exhibit 3(p)). He was of the opinion that the masonry brick tie used during construction to affix the pre-cast block to the mortar bed had become exposed to the air. Oxidization has set in and consequently rust is now exhibited on the face of the block. The tie should have been set in the mortar itself but was probably not, hence the rust. To rectify this problem Mr. Puzzolanti suggested removal and replacement of the existing pre-cast stone block with a new correctly set metal tie and new grouting. He conceded that the cause of the problem was defective workmanship due to the metal tie being installed too near the surface of the grout. Rosehaven was prepared to correct the problem by replacing the block.

ISSUE # 5 – PLUMBING DONE OUTSIDE WALL

Mr. Tharmathurai stated that he inspected a neighbour's home and noticed that the bulkhead in the Applicants' home's dinette/family room was different than his neighbours' home's bulkhead. The Applicants' home's bulkhead reflected sloppy work and was unsightly. (Exhibit 10(a)). The bulkhead in his neighbours home, which was the same model home as the Applicant's home, was neater in appearance. (Exhibit 10(b)). He also stated that someone from Rosehaven had told him the bulkhead's construction "was due to the duct in the upstairs bathroom having been installed on the wrong side" of the toilet. (Exhibit 10(c)). He referred to Foley Restoration's letter (Exhibit 7) which stated that the heat register in the upstairs bathroom was put on the left side of the toilet, rather than on the right side. If the register was placed to the right of the toilet, the bulkhead extension would be eliminated, and both his neighbour's bulkhead and his home's bulkhead would look the same. The cost of moving the heating duct would be \$1,050.00 plus G.S.T. according to Foley Restoration.

Under cross-examination by Counsel for the Program, Mr. Tharmathurai contended his complaint is poor workmanship and that he does not like the appearance of the bulkhead.

Under cross-examination by Counsel for Rosehaven, Mr. Tharmathurai stated that he was present when Mr. Foley inspected the home and noted that Mr. Foley "did not go into the bulkhead to inspect inside" in order to ascertain what services are contained within the bulkhead the services carried in the bulkhead.

Mr. Fortune testified that all homes contain bulkheads which take on different shapes. Bulkheads are designed to cover and contain "heating rims" or plumbing. The bulkheads that he observed in the Applicants' home did not evidence poor workmanship, were free from defects in material and their construction did not contravene the Ontario Building Code. He disputed the statement of Mr. Foley that the heat register in the bathroom was incorrectly positioned and contended that it could be situated on either side of the toilet depending on different factors.

Mr. Puzzolanti stated in his testimony that it was not always possible to place plumbing and heating rims within the wall cavity itself. The cavity may have limits due to wood beams in the wall cavity used to ensure the integrity of the structure. As Mr. Foley did not open the bulkhead to see what was contained within it, and he is not justified in concluding that the heat register in the bathroom is incorrectly situated.

ISSUE # 6 – ELECTRICAL BOX INSTALLED ON WRONG SIDE OF HOME

Mr. Tharmathurai stated that the exterior electric meter has been installed at the front of the Applicants' home and that he considers the installation to be insightful (Exhibit 11(a)). He stated that the Applicants' home is the only home in the subdivision where the meter has been so placed. The meters of all other homes are situated to the side or back of the homes. He also stated that during construction Rosehaven made a hole at the top of the foundation wall on the side of the home for the purpose of having the electric box positioned there. Prior to the Applicants' possession, this hole was closed by Rosehaven (Exhibits 11(d) and 11(c)). He contended the present location of the electrical meter at the front of the home is reflective of poor workmanship by Rosehaven.

Under cross-examination, Mr. Tharmathurai stated that Richmond Hill Hydro had told him that he had to have the electrical meter placed at the front of the home.

Mr. Fortune referred the Tribunal to clause 3(a) in Schedule "X" to the Agreement of Purchase and Sale which reads:

The vendor will construct (if not already constructed) and complete upon the Property a dwelling (the "Dwelling") of the type hereinbefore indicated in accordance with the plans and specifications already examined by the Purchaser and filed or to be filed with and approved by the Municipality.

The basement plan of the Applicant's home clearly indicated the position of the "proposed hydro service location", and this location is precisely where the electrical meter has been installed at the front elevation of the home. (Exhibit 1, Tab 8, second last page).

Mr. Fortune further stated there is no question of poor workmanship or defective materials having been used nor has there been any breach of the Ontario Building Code. The position of the meter is a question of design and as such is beyond the scope of the warranties under the Act.

Mr. Puzzolanti testified that the positioning of the electrical meter was in accordance with the basement plan submitted to and approved by the Municipality of Richmond Hill. (Exhibit 1, Tab 8, second last page) That basement plan indicated where the hydro service was to be located and the location of the electrical meter and meter base is in accordance with the plan.

Mr. Puzzolanti stated that the electrical meter was originally intended to be located at the side of the Applicants' home. In anticipation of such location, a hole was made through the home's side foundation wall. However, the Municipality of Richmond Hill objected to that location due to a previous experience where a meter was installed at the back or side of a home and access to such meter was often restricted due to the homeowner erecting a fence which interfered with the meter reader's access to the meter. The Applicants' home was the first

“Vienna” model constructed and occupied in the subdivision. Many complaints were received by the Municipality from subsequent home owners in the subdivision who did not wish to have their electrical meter boxes positioned at the front of their homes. Due to these complaints, the Municipality agreed that it would no longer enforce the requirement that electrical meters be on the front elevation of future homes and agreed, as far as future home’s were concerned, to the meter’s installation at the side or rear of homes. However, by the time the Municipality agreed to this , the Applicants and certain other home owners with meters located at the front of their homes were already in possession.

ISSUE # 7 – 2 FOOT GAP AT ENTRANCE TO LIVING ROOM

Mr. Tharmathurai testified that the interior foyer floor at the front door entry to the Applicants’ home is one step lower than the floor in the living room and other adjoining areas on that floor. He referred the Tribunal to photographs of the sunken entry floor in his home (Exhibit 12(a)) and in a neighbour’s home (Exhibit 12(b)). He considers construction of the sunken area of his neighbour’s home to be preferable to his own. He stated that the Applicants’ home is constructed in such a way that the width of the floor at the entry to the living room is only 2 foot and is a hazard for the Applicants’ children who could fall down the step into the sunken foyer. He states the design and construction of such a narrow gap is indicative of poor workmanship by Rosehaven.

Under cross-examination by the Program’s counsel, he was shown the plan of the home’s ground floor. (Exhibit 1, Tab 5 and Exhibit 1, Tab 8). He disagreed with counsel that a two foot gap is reflected on the plans of the Applicants’ home.

In his testimony, Mr. Fortune stated that there is no breach of the Ontario Building Code regarding this aspect of construction and that there is no defect in workmanship or materials used. He stated that normally the Municipality would ensure that the home is safe for occupancy. The fact that they inspected the home, approved the home’s plans and issued an occupancy permit is indicative of the fact that the Municipality had no concern.

Mr. Puzzolanti testified that the Applicants’ home was built precisely to the approved plans. In particular he referred to the ground floor plan of the Applicants home (Exhibit 1, Tab 8, last page) and indicated by reference to that plan why he was of the opinion that Rosehaven had constructed according to that plan. The Applicants’ home and its construction was inspected by the Municipality so as to ensure compliance with the plans and the Ontario Building Code. The Municipality would not have issued an occupancy permit had they believed there was non-compliance with the approved plans and if there was a safety issue. He concluded his evidence by stating that there was no defect in the workmanship or in the materials used and there was no breach of the Ontario Building Code.

FACTS FOUND PROVEN:

The following are the facts which the Tribunal has found proven:

1. The Applicants and Rosehaven entered into a written Agreement of Purchase and Sale dated March 18, 1999 in terms of which Rosehaven was to construct a residential home for the Applicants on a lot in the Town of Richmond Hill, Ontario.
2. The home was constructed in accordance with the terms of the Agreement of Purchase and Sale, and the building plans submitted to and approved by the Town of Richmond Hill, Ontario.
3. An occupancy permit respecting the home was issued by the Town of Richmond Hill, Ontario.
4. The Applicants took possession of the home on August 25, 1999.
5. A conciliation inspection of the home was held on January 26, 2001 and a conciliation report dated January 31, 2001 was issued.
6. Seven complaints were dealt with by the Program in its conciliation report under the heading "Items not covered by warranty".
7. The Program issued a written decision dated June 22, 2001 dealing with the aforesaid seven complaints and denied the Applicants' claims in respect of the seven complaints.
8. The Applicants appealed the Program's decision of June 22, 2001 to the Tribunal. At the commencement of the hearing before the Tribunal, the Applicants withdrew their appeal to complaint three in the Program's decision letter but proceeded with their appeal on the other six complaints.
9. The mortar for the exterior brickwork used by Rosehaven in the construction of the Applicants' home contained die or pigmentation sufficient for such die or pigmentation to colour the mortar.
10. The shower head installed in the bathroom of the Applicants' home was constructed and installed in a workmanlike manner, is free from defects in material and is not constructed or installed in contravention of the Ontario Building Code. The shower head as installed was fit for use.

11. The pre-cast stone installed on the exterior of the Applicants' home contained minor surface imperfections that were satisfactorily repaired by Rosehaven. The pre-cast stone is constructed and installed in a workmanlike manner and is free from defects in material save and except for one block of pre-cast stone which contains evidence of rust due to the incorrect installation of a metal tie by Rosehaven.
12. The bulkhead constructed by Rosehaven in the kitchen/dinette ceiling is constructed in a workmanlike manner and is free of defects in material. The bulkhead does not contravene the Ontario Building Code.
13. The electrical meter installed on the exterior front elevation of the Applicants' home has been installed according to the approved plans of the Applicants' home and the location specified by the Town of Richmond Hill. The installation of the electrical meter has been done in a workmanlike manner, is free from defects in material and does not contravene the Ontario Building Code.
14. The construction of the floor area of the Applicants' home at or near the front door entrance including the sunken floor at the front door does not contravene the Ontario Building Code. The construction of the ground floor of the Applicants' home, including the sunken foyer area of the home and the area leading from the foyer to the living room, conforms to the building plans submitted to and approved by the Municipality of Richmond Hill. The construction of the ground floor of the Applicants' home was done in a workmanlike manner, and is free from defects in material.

THE LAW:

The Act's relevant portions are:

14.(1) Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,

(3)(b) the person has a cause of action against the vendor or the builder, as the case may be, for damage resulting from the breach of warranty.

.....

13.(1) Every vendor of a home warrants to the owner,

(d) that the home,

- (i) is constructed in a workmanlike manner and is free from defects in material,
- (ii) is fit for habitation, and
- (iii) is construction in accordance with the Ontario Building Code;

.....

DECISION AND REASONS:

The onus of proof in this matter is upon the Applicants.

To succeed in their claims, the Applicants must prove that their claims fall into section 14(1)(b) of the Act, set out above.

The Applicants must prove;

- (a) they have a cause of action against Rosehaven, for damages resulting from a breach of warranty by the latter, and
- (b) they have suffered financial loss due to Rosehaven's breach of warranty.

The Tribunal finds that the Applicants have failed to discharge the onus of proof for the reasons that follow.

The Tribunal admitted to evidence the written report of Foley Restorations. This report was admitted by virtue of the authority given to the Tribunal by section 15 of the *Statutory Powers Procedure Act* R.S.O. as amended. However, the report was admitted subject to appropriate weight being given to such report. The Applicants, although being cautioned by the Tribunal at the commencement of the hearing as to the evidentiary value of the document in the absence of the oral testimony of its author, chose not to have Mr. Foley, the author, testify at the hearing.

Certain conclusions drawn by Mr. Foley and contained in his report were disputed by both Mr. Fortune and Mr. Puzzolanti. Both the latter persons testified as to their considerable experience in the construction industry.

The failure of Mr. Foley to attend at the hearing and to give oral testimony denied the Program and Rosehaven the opportunity of testing Mr. Foley's opinions and conclusions. Furthermore, Mr. Foley's qualifications and experience were not disclosed to the Tribunal.

Accordingly, in the absence of Mr. Foley's oral testimony at the hearing the Tribunal gives no weight to his conclusions and opinions in his written report where such conclusions and opinions contradict to those of Mr. Fortune and Mr. Puzzolanti.

ANALYSIS OF EVIDENCE:

ISSUE # 1- COLOUR OF BRICK MORTAR USED

The Agreement of Purchase and Sale which the Applicants signed did not specify the shade or amount of colour to be used in the mortar. All that was stated in the Agreement was that there was to be "coloured mortar throughout". The Agreement clearly states that the Applicants were not purchasing their home based on any model that they had viewed prior to the Agreement. According to the evidence of Puzzolanti, which the Tribunal accepts, there was no "Vienna" model in existence for viewing at the time the Applicants entered into the Agreement of Purchase and Sale or at the time they took possession.

The evidence of Puzzolanti was that there was dye or pigmentation in the mortar used in the Applicants' home. This was accepted by Mr. Foley in his report when he stated "there is a small amount of tint which has been added to the mortar."

The Tribunal finds that there is "colour mortar throughout" the Applicants' home and finds that there is no breach of warranty under section 13(1) of the Act. Accordingly, the Applicants have no cause of action against Rosehaven or the Program for damages resulting from breach of warranty.

The Applicants' appeal on this issue fails.

ISSUE # 2- SHOWER HEAD

The complaint of the Applicants relates to where the shower head was installed. They believe it should have been installed in the middle wall of the shower cubicle and not on a side wall which makes it "inconvenient" while showering and looks "weird". The Agreement of Purchase and Sale and the approved plans of the Applicants' home make no reference to where the

shower head was to be installed. The evidence of Mr. Fortune and Mr. Puzzolanti is that the shower operated without a problem. The Applicants agree that the shower operates properly but expressed concern that with water splashing on the glass door of the shower there may be future problems with leakage. At this stage they conceded there are no problems with water leakage.

Mr. Fortune and Mr. Puzzolanti said that from their inspections and observations there is no discomfort in using the shower. Furthermore, with the current location of the shower head, there is less likelihood of water splashing against the shower door than if the shower head had been located on the middle wall which directly faces the shower door.

The shower head is constructed in a workmanlike manner, is free from defects in material and is constructed according to the Ontario Building Code.

Accordingly, the Tribunal finds that there is no breach of warranty under section 13(1) of the Act and that the Applicants have no cause of action against Rosehaven or the Program for damages resulting from breach of warranty.

The Applicants' appeal on this issue fails.

ISSUE # 4 – PRE-CAST STONES

The Tribunal finds that there were chips and blemishes on some of the pre-cast stones installed in the Applicants' home. The Tribunal also finds that this is not an unusual occurrence and that such chips and blemishes were repaired. Further, it is common practice after installation of pre-cast stones and the repair of chips and blemishes, that the stones are sandblasted to achieve uniformity in the appearance of the different stones and correct any differences in the shade of the stones. The Tribunal further finds that the effect of weather on pre-cast stone is the same as the effect of sandblasting as both give the stone a more weathered and natural look and that sandblasting does not affect the life of the stone nor does it make the stone more porous.

The photographs tendered in evidence by the Applicants relating to the pre-cast stone do show imperfections. However, the photographs do not reflect what an average observer would see if he viewed the pre-cast stone from a reasonable distance. The Applicants' photographs were taken in close proximity to the stone and thereby greatly magnify minor blemishes and imperfections. The Tribunal finds that the blemishes and imperfections are only visible on an extremely close inspection and refers to the matter of *BREEN* (1999) CRAT released on April 15, 1999 in which it was held:

A microscopic examination is not the appropriate standard of testing. In law this type of mark could be considered "de minimus not curat lex" meaning that the law does not take notice of nor care about very small or trifling matters.

Furthermore, the Tribunal notes the principle set out in the matter of MARK TEITELMAN (1987) 16 CRAT at page 181:

The Teitelmans were not the authors of the defects and the Tribunal understands that they are a constant source of irritation to them. However, they must accept the fact that no house, new or old, is perfect or is warranted to be perfect. Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonable acceptable levels. The limited warranty provided by the Ontario New Home Warranties Plan Act recognized these facts, and this Tribunal is obligated to make findings in accordance with the statutory provisions and not otherwise.

The Tribunal also observes and associates itself with what is stated in the decision of *SAPORITA* (199) CRAT released on July 28, 1999.

Those few complaints that were not resolved and which have now come before this hearing to the Tribunal that the Applicants were seeking unrealistic standards of perfection and were not always reasonable in their expectations. Perfection and nothing less than perfection is not a reasonable expectation when dealing with what can be termed a standard home. One does not live in a perfect world and allowances must be made for minor imperfections. If imperfections exist in the Applicants' home they are, from the evidence tendered, minor in nature and do not result in aesthetically displeasing results.

While the evidence may not indicate absolute perfection in workmanship, the Tribunal accepts the evidence of Mr. Fortune that here both workmanship and materials meet the industry standards and were satisfactory except for the installation of the pre-cast stone.

The one pre-cast stone, with surface rust is to be removed and is to be replaced by Rosehaven installing a new pre-cast stone together with the necessary metal tie properly set in fresh mortar containing the necessary dye or pigmentation.

Save for one exception dealt with above the Tribunal accepts that the pre-cast stone in the Applicants' home was constructed in a workmanlike manner, is free from defects in material and that there has been no breach of the Ontario Building Code. Accordingly, the Applicants' appeal on this issue fails save for what is stated above.

ISSUE # 5 – PLUMBING DONE OUTSIDE WALL

The Tribunal does not accept that the heat register in the upstairs bathroom was placed on the incorrect side of the toilet and that the bulkhead's not aesthetically pleasing. No evidence has been placed before the Tribunal to satisfy the onus that rests on the Applicants.

The evidence was that the Applicants and Mr. Foley did not open the bulkhead to ascertain what was within the bulkhead. The only complaint of the Applicants was that they do not like the appearance of the bulkhead. The Tribunal has found no failure in the workmanship of Rosehaven in regard to the construction of the bulkheads. There is no defect in the materials used by Rosehaven in the bulkhead's construction. The construction of the bulkhead does not contravene the Ontario Building Code.

Having regard to the above and the evidence the Tribunal finds there has been no breach by Rosehaven of section 13(1) of the Act. Accordingly, the Applicants' appeal on this issue fails.

ISSUE # 6 – ELECTRICAL BOX INSTALLATION

The basement plan of the Applicants' home clearly indicates that the electrical meter is to be installed at the front of the home. The evidence of Mr. Puzzolanti is that the Town of Richmond Hill insisted on the front of the home being the location of the electrical meter. This leaves the Tribunal in no doubt that the meter is correctly located as specifically required by the Town. From the evidence adduced, the Tribunal believes the Applicants were aware that the Town had specifically required the meter to be installed where it is installed in the front of the home.

The Tribunal finds no failure in workmanship by Rosehaven, no defect in materials it supplied and no violation of the Ontario Building Code.

The Applicants' appeal on this issue accordingly fails.

ISSUE # 7 – 2 FOOT GAP AT ENTRANCE TO LIVING ROOM

The ground floor plan indicates that the sunken floor of the foyer was constructed according to that approved plan. This plan was available to the Applicants. This issue is an issue that relates to the Applicants being unhappy with the design of the sunken foyer floor. They are unhappy with the narrow two foot "gap" into the living room which they feel could have been better designed. It is possible that the foyer floor may have been designed differently. However, this is not an issue that falls within the ambit of the Act and is beyond the jurisdiction of the Tribunal. There is no evidence that the construction of the foyer or the sunken floor was not carried out in a workmanlike manner, used defective materials or contravened the Ontario Building Code.

The Applicants appeal on this issue is denied.

DECISION:

Accordingly, pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program:

1. as soon as weather permits and in any event no later than June 30, 2002, to remove the one pre-cast stone on the exterior of the Applicants' home that evidences rust and shall replace it with a pre-cast stone of the same or better quality, replace the mortar surrounding the stone with the same or similar colour mortar so as to match as closely as possible the colour of the original mortar used by Rosehaven, replace the existing metal brick tie with the installation of new metal brick tie; and
2. in all other respects to disallow the Applicants' claims in this matter.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: December 11, 2001

JOHN CANNON

TO REFUSE REGISTRATION

APPEARANCES:

DATE OF
HEARING:

December 4, 2001

Toronto

This hearing arises from a Notice of Proposal dated June 18, 2001, (the "Proposal"), issued by the Registrar of Collection Agencies (the "Registrar"), to refuse to register the Applicant as a collector under the provisions of Section 7(1) of the *Collection Agencies Act* R.S.O. 1990, Ch. C.14 (the "Act").

The Applicant by a notice dated July 22, 2001, (the "Appeal") requested a hearing before the Licence Appeal Tribunal (the "Tribunal") respecting the Proposal pursuant to the provisions of sections 8(2) and 8(4) of the Act.

A Prehearing Conference was held on October 21, 2001, and the Tribunal made an Order dated October 24, 2001, wherein the allegations and statements of fact contained in Section C, background, and in Section D, particulars, of the Proposal were agreed and the Respondent was not required to prove such allegations or facts at the hearing scheduled for December 4, 2001.

DECISION AND ORDER:

At the hearing, Counsel for the Applicant stated that as a result of recent discussions between the Parties, a settlement of the issues had been reached and Minutes of Settlement dated December 4, 2001, (the "Minutes of Settlement") had been executed and were tendered for filing with the Tribunal. It was proposed that no evidence would be produced or testimony given at the hearing save for the filing of the Proposal, the Appeal and Minutes of Settlement as exhibits.

Subsequent to hearing from Counsel and reviewing the Minutes of Settlement in light of the remarks made by Counsel, the Tribunal gave an oral decision subject to the release of this written order.

Accordingly, this Tribunal, pursuant to the authority vested in it by section 8(4) of the Act, makes the following Order:

1. The Applicant shall continue to perform an agreement made between the Applicant and the Crown whereby the Applicant agreed to make, in good faith, full restitution to his former employer as the alleged victim of the outstanding criminal charge laid against the Applicant in or about the City of Oshawa, Ontario, at the rate of at least Five Hundred (\$500) Dollars each and every month from the date hereof until full restitution to such victim has been made;
2. The Registrar shall refrain from carrying out the Proposal and shall grant the Applicant registration as a collector under the Act on or before August 24, 2002, (the "registration date") subject to the terms and conditions set out in section 4 hereof, provided that,
 - (a) the Applicant has, before the close of business on the registration date made full restitution as set out in section 1 hereof,
 - (b) the Applicant is not on the registration date charged with, or convicted of committing an offence other than a By-law offence, and
 - (c) the Registrar has, before the close of business on the registration date received confirmation satisfactory to the Registrar that the criminal charge set out in section 1 hereof has been withdrawn;

3. In case of default by the Applicant of any one or more of the three conditions set forth in section 2 of this Order, the Registrar shall carry out the Proposal to refuse the registration of the Applicant as a collector under the Act effective as at the close of business on August 24, 2002;
4. It shall be a term and condition of the Applicant's registration as a collector under the Act that for a period of two years subsequent to the registration date, the Applicant shall continue to be subject to the obligation to disclose to the Registrar any further charges of any kind, including a By-law offence, laid against the Applicant within 20 days of such a charge being laid, provided that in default of such disclosure, the Applicant's registration shall be revoked forthwith by the Registrar.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

Released: December 11, 2001

BRANDON DOHERTY

TO REFUSE REGISTRATION

APPEARANCES:

DATE OF
HEARING:

Toronto

This hearing arises from a Notice of Proposal dated June 18, 2001, (the “Proposal”), issued by the Registrar of Collection Agencies (the “Registrar”), to refuse to register the Applicant as a collector under the provisions of Section 7(1) of the *Collection Agencies Act* R.S.O. 1990, Ch. C.14 (the “Act”).

A Prehearing Conference was held on October 21, 2001, and the Tribunal made an Order dated October 24, 2001, wherein the allegations and statements of fact contained in Section C, background, and in Section D, particulars, of the Proposal were agreed and the Respondent was not required to prove such allegations or facts at the hearing scheduled for December 5, 2001.

DECISION AND ORDER:

At the commencement of the hearing, the Applicant requested an adjournment for the purpose of dealing with some of the issues, some of which were the subject matter upon which the Registrar based the Proposal, prior to the hearing of his Appeal. Counsel for the Registrar opposed the Applicant's request for an adjournment and stated that it would be more appropriate to proceed at this time with the issues as stated in the Proposal or otherwise withdraw the Appeal and make a new application for registration as a collector under the Act. In response, the Applicant concurred with Counsel for the Registrar and withdrew the Appeal.

The Tribunal, accordingly, refuses the Applicant's request for an adjournment and orders that, insofar as the Appeal has been withdrawn by the Applicant, the hearing is terminated and these proceedings are concluded.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop, Q.C.,
Vice-Chair

Released: December 11, 2001

BUYRITE AUTO SALES S.K. LIMITED and JEHAD NAZEM KADRI

BUYRITE AUTO SALES S.K. LIMITED and JEHAD NAZEM KADRI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: RICHARD C. DELANEY, Member

APPEARANCES:

JEHAD NAZEM KADRI, the Applicant representing himself and Buyrite
Auto Sales S.K. Limited
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF

HEARING:

November 23, 2001

London

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated July 17, 2001 proposed to revoke the registration of Jehad Nazem Kadri ("Kadri"), as a motor vehicle salesperson and the registration of Buyrite Auto Sales S.K. Limited ("Buyrite"), as a motor vehicle dealer under the provisions of the Act. Kadri and Buyrite (the "Applicants") appealed the proposal to revoke the registrations to the Licence Appeal Tribunal by Notice of Appeal dated July 27, 2001.

ISSUE:

The Registrar's Notice of Proposal to revoke registration of the Applicants stated that the Applicant's past conduct was inconsistent with the intention and objective of the Act, and therefore warranted revocation of registration under the Act. The requirements of the Act include that registrants be financially responsible in the conduct of their business and that they carry on business in accordance with the law and with integrity and honesty.

The Registrar issued a Notice of Further and Other Particulars on November 6, 2001 stating that Buyrite had sold vehicles which had liens registered against them without disclosing the existence of the liens to the consumers. The Notice also stated that Buyrite had been registered subject to Terms and Conditions. Buyrite is alleged to have breached those Terms and Conditions by selling the vehicles without disclosing the existence of the liens to the consumer.

There are two issues in this proceeding. The first is whether the Registrar had sufficient grounds to support the belief that the Applicant would not be financially responsible or carry on business in accordance with the law and with integrity and honesty. The second issue is whether the Applicants were in breach of a Term and Condition of their registration.

THE LAW:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

6. (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

EVIDENCE:

Several consumer witnesses, Walter Pevcevicius, and Mary Jane South presented the evidence of the Registrar. Mr. Pevcevicius is a Senior Collection Officer with the Ministry of Finance, who gave evidence regarding the outstanding monies owed to the Minister of Finance in respect of Provincial Sales Tax (PST). Mary Jane South is the Deputy Registrar of the Ontario Motor Vehicle Industry Council ("OMVIC") and gave evidence regarding the history of the Applicants and the reasons for the Registrar's proposal to revoke registration of the Applicants as a dealer and salesperson.

The Applicant, Kadri, gave evidence on behalf of the Applicants, as well as cross-examining the Registrar's witnesses. Mr. Kadri did not call any additional witnesses for the Applicants nor did he provide additional documentary evidence for the Tribunal.

FACTS FOUND PROVEN:

Based upon the oral and documentary evidence presented at the hearing, the following are the facts found by the Tribunal to have been proven:

1. The Applicant Kadri was registered as a motor vehicle salesperson on or about September 3, 1998.
2. The Applicant Buyrite was registered as a motor vehicle dealer on or about September 3, 1998.
3. The Applicant Kadri was the directing mind and sole officer and director of 001287125 Ontario Ltd. operating as Buyrite Auto Sales S.K. Limited which was incorporated on or about April 24, 1998.
4. The Applicant Buyrite consented to Terms and Conditions (Exhibit 4, Tab 18) with respect to its registration as a dealer. The Applicant Kadri on or about September 2, 1998 executed those Terms and Conditions on behalf of Buyrite.
5. Among the various terms and conditions of registration were the following:
 - l) The Dealer agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed...*
 - p) The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity of financial position.
6. The Applicant Buyrite has collected Provincial Sales Taxes on the sale of motor vehicles. As a result of an audit assessment conducted by the Ministry of Finance, Buyrite was found to owe \$71,010.53 for taxes collected and not remitted, penalties and interest as of July 12, 2001. Some collection activity and adjustments have resulted in that balance being reduced to \$46,132.22 as of the date of the hearing.

7. Any amounts received by the Ministry of Finance since July 12, 2001 on account of the outstanding balance have been obtained primarily through collection activities undertaken by the Ministry. The Applicants have made no serious attempts to negotiate a repayment schedule nor have the Applicants directly remitted any monies towards the reduction of the outstanding balance.
8. The Applicants have been current with their regular PST remittances since August 2001.
9. On November 30, 1999, the Ministry of Finance registered a blanket lien against the assets of Buyrite. The lien also specifically included eleven vehicles registered to Buyrite and identified by their vehicle identification numbers (VINs) (Exhibit 4, Tab 16).
10. On January 24, 2001, The blanket lien was amended to add a list of specific vehicles (Exhibit 4, Tab 16, page 13). Two of those vehicles were subsequently sold to Mr. Sertovic and Mr. Ng.
11. On March 1, 2001, The blanket lien was amended to add eleven specific vehicles (Exhibit 4, Tab 16, page 17). Three of those vehicles were subsequently sold to Mr. Spruyt, Mr. Armer and Ms. McLean.
12. It is the practice of the Ministry that the liens, including the initial blanket lien, are registered on-line into the Personal Property Security (PPSA) database from the Ministry Office. The original lien is received by the Ministry from the PPSA about 7 days later. Within 2 to 3 days thereafter, the lien is sent out to the owner of lien property. It is sent by Purolator to the property owner. In this case, none of the lien notices alleged to have been sent by the Ministry to the Applicant Buyrite were returned.
13. In early March, 2001, Richard Andrew Spruyt purchased a 1991 Plymouth Voyager from Buyrite. The VIN of the Plymouth bore the final six numbers 142339. At the time the vehicle was sold to Mr. Spruyt it was subject to the Ministry of Finance lien. Buyrite did not disclose this lien to the consumer and the Applicants made no efforts to assist Mr. Spruyt in removing the lien. The consumer would not have purchased the Chevrolet had he been made aware of the lien.
14. In March, 2001, Christopher John Armer purchased a 1995 Chevrolet Lumina from Buyrite. The VIN of the Chevrolet bore the final six numbers 336064. At the time the vehicle was sold to Mr. Armer it was subject to the Ministry of Finance lien. Buyrite did not disclose this lien to the consumer and the Applicants made no efforts to assist Mr. Armer in removing the lien. The consumer would not have purchased the Chevrolet had he been made aware of the lien.

15. On March 26, 2001, Amir Sertovic purchased a 1994 Ford Tempo from Buyrite. The VIN of the Ford bore the final six numbers 211897. At the time the vehicle was sold to Mr. Sertovic it was subject to the Ministry of Finance lien. Buyrite did not disclose this lien to the consumer and the Applicants made no efforts to assist Mr. Sertovic in removing the lien. The consumer would not have purchased the Ford had he been made aware of the lien. Mr. Sertovic also paid \$500.00 for a warranty that, according to the consumer, "is frozen". The warranty company advised the consumer that the dealer had not remitted the \$500.00 paid for the coverage.
16. On June 13, 2001, Rhona McLean purchased a 1990 Mazda MPV from Buyrite. The VIN of the Mazda bore the final six numbers 206045. At the time the vehicle was sold to Ms. McLean it was subject to the Ministry of Finance lien. Buyrite did not disclose this lien to the consumer and the Applicants made no efforts to assist Ms. McLean in removing the lien. The consumer would not have purchased the Mazda had she been made aware of the lien.
17. On June 26, 2001, Dick Leung Ng purchased a 1999 Acura from Buyrite. The VIN of the Acura bore the final six numbers 806775. At the time the vehicle was sold to Mr. Ng it was subject to the Ministry of Finance lien. Buyrite did not disclose this lien to the consumer and the Applicants made no efforts to assist Mr. Ng in removing the lien. The consumer would not have purchased the Acura had he been made aware of the lien.
18. The consumers Ng, Armer, McLean, Spruyt, and Sertovic were not aware of the existence of liens against their property until Ralph Bayley contacted each consumer. Mr. Bayley is a desk inspector at OMVIC. He contacted each of the consumers by letter from October 18 to October 28, 2001.
19. As sole officer and director and the controlling mind of Buyrite, the Applicant Kadri was personally liable for Retail Sales Tax collected and not remitted under the Retail Sales Tax Act.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to satisfy the Tribunal that he has reasonable grounds to believe that the registration of the Applicants ought to be revoked under Section 6(2) based upon their activities carried on in contravention of the Act and Regulations and that their past conduct afforded reasonable grounds for belief that the Applicants would not carry on business in compliance with Section 5 of the Act.

The leading authority, which has been followed in numerous cases, is the Divisional Court decision of *Brenner*, reported in 19 CRAT 58. This decision held that the Tribunal should only refuse to direct the Registrar to carry out his proposal if it is of the opinion that the Registrar was in error in concluding that the past conduct of an Applicant afforded reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty. The authority of the Tribunal under Section 7(4) of the *Motor Vehicle Dealers Act* respecting the proposal of the Registrar was reviewed by Southey J. where he stated at page 60:

The effect of Section 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

This Decision was confirmed by the Divisional Court in *Albert Fascenda* (1994) 26 CRAT Part II 1050, where it stated at page 1051:

. . . that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought the Registrar was in error in his belief.

As a result of the above and a line of cases following that reasoning, to overrule the decision of the Registrar, the Tribunal must conclude that the Registrar was wrong in his decision. It must find that the conduct of the Applicant does not afford reasonable grounds for the Registrar's belief that the Applicant will carry on activities in contravention of the Act and its regulations. The Tribunal must not concern itself with its own opinion of whether or not the Applicant has reformed. It must look at the past conduct of the Applicant and at the decision of the Registrar to come to a conclusion as to whether or not the past conduct of the Applicant would afford reasonable grounds for the Registrar's belief that such Applicant would not carry on business in accordance with law and with integrity and honesty in the future.

What is of concern to the Tribunal is that the Applicant collected Retail Sales Tax and then used it for the purposes of keeping his business running. The **Retail Sales Tax Act** provides at section 22(1) that any amount collected on account of tax under the Act is "...to be held in trust for Her Majesty in right of Ontario and held separate and apart from the vendor's property...". The vendor under that Act is the Applicant Buyrite and the controlling mind of Buyrite is the Applicant Kadri.

The funds collected and not remitted by the Applicant were trust funds held by the Applicant and were not funds to use for any purpose except to remit to the Government. The Applicant's use of trust funds for its own business purposes is a completely unsatisfactory and irresponsible approach to the conduct of business. Mr. Kadri testified that a family illness had preoccupied him during the relevant period. However, although the Tribunal is sympathetic to such crises in life, they offer no excuse for one person to misappropriate another person's funds. To do so is not acting with honesty and integrity or in accordance with the law.

The Registrar also presented further and other particulars to their proposal to revoke on November 6, 2001. These further allegations essentially dealt with the alleged contravention of the Terms and Conditions of registration signed by the Applicants and the sale of vehicles that were subject to *Personal Property Security Act* liens.

In that regard, while the Tribunal accepts that Mr. Kadri did receive some notifications from the Ministry, there was no evidence presented to establish which notices were actually sent and actually received. The Tribunal finds that the Registrar has not satisfied the evidentiary burden required to establish that the Dealer knowingly sold vehicles that were subject to liens.

However, upon all of the remaining evidence presented, the Tribunal concludes that the past conduct of the Applicants afforded the Registrar reasonable grounds for his belief that the Applicants would not carry on business in accordance with the law and with integrity and honesty.

Having carefully considered all of the evidence presented, this Tribunal finds no ground to interfere with the Registrar's proposal.

ORDER:

Pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated July 17, 2001 to revoke the registration of Jehad Nazem Kadri as a motor vehicle salesperson under the Act and to revoke the registration of Buyrite Auto Sales S.K. Limited as a motor vehicle dealer under the Act.

LICENCE APPEAL TRIBUNAL

Richard C. Delaney, Member

RELEASED: December 27, 2001

FLEWITT

GERALD FLEWITT

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE *COLLECTION AGENCIES ACT*

TO REFUSE REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES: BERNARD GASSEE, Counsel, representing the Applicant
JAMES STEBBING, Counsel, representing the Registrar,
Collections Agencies Act

DATE OF
HEARING: December 11, 2001 Toronto

REASONS FOR DECISION AND ORDER

This hearing arises from a Notice of Proposal dated July 17, 2001, issued by the Registrar of the *Collection Agencies Act* (the "Act") to refuse the registration of Gerald William Flewitt as a collector under the Act. By Notice of Appeal dated August 1, 2001, the Applicant requested a hearing before this Tribunal.

THE FACTS:

On the evidence presented before it, the Tribunal finds the following facts to have been proven:

1. The Applicant, Gerald William Flewitt, has been a collector from time to time since 1969.
2. For approximately ten years of that time he was employed by various private companies as a first party collector and, therefore, was not required to be registered under the Act.

3. October 6, 1992, the Applicant completed an application for registration as a collector under the Act. This was not the first time that the Applicant had applied for and been granted registration as a collector.
4. Question number 10 on the application contained a request for information regarding previous convictions. The question read as follows:

“Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars on a separate signed and dated statement.

Note: Where the Applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or changes which have not been previously disclosed.”

The Applicant answered this question by checking the box “No”.

5. The application filed by Mr. Flewitt contained a Certificate of Employer, which indicated that the Applicant intended to be employed by Total Credit Recovery Ltd. The Certificate was signed by the Controller of Total Credit Recovery Ltd. and contained the following certification:

“I hereby certify that I have personally and fully discussed the response to each question of this application with the applicant prior to executing this document and am satisfied that the information given by the applicant is to the best of my knowledge and belief true, and request that the application be granted. I further certify that I will not employ the Applicant as a registrant until I receive his/her certificate of registration.”

6. Relying upon the information contained in the application, the Applicant was registered as a collector on November 18, 1992.
7. On November 23, 1994, the Applicant’s registration as a collector was terminated as no application to renew the registration had been received by the expiry date of the then existing registration, November 18, 1994.

8. The Applicant was notified that his registration had expired by letter from the Ministry of Consumer and Commercial Relations dated November 23, 1994. That letter was returned to the Ministry with the notation that the Applicant was "not at this address".
9. On December 11, 1995, the Applicant completed an application for registration as a collector under the Act, which application was received by the Registrar on January 2, 1996.
10. Question 10 on the application form, relating to prior convictions and pending charges had the box marked "No" checked. The question and answer was the same as on the application of October 1992.
11. The application also contained a Certificate of Employer identical to the 1992 application and in this application it was signed by the manager of Common Collection Agency Inc.
12. The application signed by the Applicant certified that the information provided in support of the application was true to the best of his knowledge and belief.
13. In the course of processing Mr. Flewitt's application, the Registrar carried out a criminal records search of the Applicant. A reply to this inquiry was received from the Ontario Provincial Police which indicated that one, Gerald Wm. Flewitt, had the following record of criminal convictions:

DATE	LOCATION	OFFENSE(S)	DISPOSITION
December 3, 1970	Bracebridge, Ont.	Possession of narcotics	\$150.00 or 60 days
May 9, 1978	Oshawa, Ont.	Possession of narcotics	\$150.00 or 14 days
May 9, 1978	Oshawa, Ont.	Causing a disturbance	\$100.00 or 10 days
October 4, 1985	Toronto, Ontario	Driving with more than 80mgs of alcohol in blood	14 days intermittent and probation
September 20, 1993	Toronto, Ontario	Fail to comply with recognizance	\$200.00

September 24, 1993	Toronto, Ontario	Assault CBH	Suspended sentence and probation 2 years
December 21, 1993	Toronto, Ontario	Assault	Suspended sentence and probation 12 months

14. By letter dated February 13, 1996, the Ministry wrote to Mr. Flewitt asking if he was the same person who had those charges before the Court and if so, to explain why the information was not disclosed.
15. By letter dated February 15, 1996, Mr. Flewitt wrote back to the Ministry acknowledging that he was the same person referred to in the criminal record search.
16. On or about February 26, 1996, the Registrar registered the Applicant as a collector with terms and conditions. The terms and conditions were as follows:
 1. Gerald William Flewitt shall be employed by Common Collection Agency Inc. only. The registration shall not be transferable.
 2. Gerald William Flewitt shall be employed the supervision of Mr. Dennis Hickey, and during which he shall conduct himself in a professional and presentable manner at all times.
 3. Should Gerald William Flewitt leave the employ of Common Collection Agency Inc. both Gerald William Flewitt and Common Collection Agency Inc. are to advise the Registrar, in writing, within 3 days of the termination date.
 4. Gerald William Flewitt acknowledges that he has informed Common Collection Agency Inc. of the reasons why his reinstatement as a collector is subject to these terms and conditions and Common Collection Agency Inc. acknowledges the same.

5. Gerald William Flewitt acknowledges that he will inform the Registrar immediately, in writing, if he is convicted of any further criminal offence.
 6. Gerald William Flewitt acknowledges that he will notify both the Registrar and Common Collection Agency Inc., in writing, within 5 days or any change of his residential address and phone number.
 7. Common Collection Agency Inc. acknowledges that it is fully responsible for the actions of Gerald William Flewitt should the terms and conditions of registration not be complied with.
-
17. By letter dated April 25, 1996, the Applicant advised the Registrar that he had terminated his employment with Common Collection Agency Inc. effective April 18, 1996 and that the terms and conditions be transferred to his new employer, Collectcom Credit Inc..
 18. Collectcom Credit Inc. completed a Notice of Employee Change April 26, 1996 and sent same to the Registrar. It indicated a starting date of April 26, 1996.
 19. On June 4, 1996, Collectcom Credit Inc. wrote to the Ministry and advised that the Applicant, Gerald Flewitt, was no longer employed by that Company and that the application "abandoned".
 20. The Applicant was employed by Collectcom for a period of approximately one week in 1997 as the Applicant had produced a paystub from Collectcom for approximately \$600.00, but not indicating the length of time that he was employed.
 21. On June 22, 1996, the Applicant was charged with assault, resulting in a conviction on July 17, 1996 with the sentence being time served of 26 days, plus 12 months probation.
 22. On January 21, 1997, the Applicant was convicted of fail to comply with probation order with a sentence of 1 day, plus time served of 58 days, plus 3 years probation.

23. On December 4, 2000, the Applicant completed an Application for Employee Registration or Reinstatement as a collector. Paragraph 10 of the application was identical to the prior applications relating to the question regarding prior convictions and pending charges. The Applicant on this occasion checked the box "Yes" and indicated as "previously disclosed".
24. The Certificate of Employer, which was also identical to the previous applications was signed by the President of Motivation Collections Inc.
25. In the course of processing Mr. Flewitt's application, the Registrar carried out a criminal record search of the Applicant. In the response to the Registrar's inquiry, the Registrar was made aware of the convictions for assault in 1996 and fail to comply with probation order in 1997.
26. By letter dated December 19, 2000, the Registrar wrote to the Applicant requesting an explanation for non disclosure of the convictions subsequent to the expiration of his registration on November 18, 1994 and confirmation from his employer that material submitted by the Applicant in response to that letter had been reviewed and discussed.
27. On December 20, 2000, the Manager of Motivation Collections Inc. forwarded a letter to the Registrar requesting cancellation of their previous application with the Applicant until this matter was resolved.
28. By letter dated December 29, 2000, the Applicant responded to the Registrar admitting the subsequent convictions. The Applicant stated that in September of 1997 he was applying to be a collector with Collectcom Credit Inc. and disclosed all additional offences to them. He was of the impression that Collectcom Credit Inc. had been in touch with the Registrar and that Registrar, therefore, had notice of the subsequent convictions. He also stated that a copy of that letter had been sent to Motivation Collections Inc.
29. On January 22, 2001, the Registrar wrote to the Applicant advising that they had no application from Collectcom Credit Inc. in September of 1997 nor any record of a conversation with the Registrar. The Applicant was again required to address the issues with an explanation for each of the charges.
30. On January 25, 2001, the Registrant replied to the Registrar via facsimile. The Registrant stated that the July 17, 1996 assault conviction arose as the result of a domestic dispute with a former live in girlfriend and that there were no physical injuries. One of the terms of his probation was that he was to have no contact with this girlfriend without her written consent. After his release, the parties decided to carry on the relationship and his girlfriend provided him with a written consent which was given to

his Probation Officer. On January 21, 1997, a different Judge did not think that the consent was sufficient and he was convicted of failing to comply with Probation Order. He also noted that, as had been previously stated in his letter of December 29, 2000, those matters had been discussed and disclosed to Motivation Collections Inc. He also stated that he was applying for a Pardon.

31. The Registrar obtained Occurrence Reports from the Toronto Police Service which indicated, regarding the assault, that the Applicant had struck a female numerous times with a piece of driftwood causing significant bruising and lumps. Regarding the breach of probation, the report indicated that the Applicant had been removed from that female's residence once and later returned, entering through a locked window, and smashing a number of articles inside of the residence.
32. On May 11, 2001, the Registrar spoke with the Applicant by telephone and advised him that he was unwilling to register the Applicant as a collector.
33. On May 11, 2001, Motivation Collections Inc. wrote to the Registrar requesting that the application for a collector's licence for Gerald Flewitt immediately be cancelled and requesting a refund of their licence fee since the licence had never been approved.
34. On June 18, 2001, the Registrar received an application made on May 18, 2001, for registration of the Applicant as a collector under the Act. Question 10 on the application form, relating to prior convictions and pending charges had the box marked "yes" checked and the Applicant enclosed a letter from the York Regional Police attaching the complete list of convictions of the Applicant going back to December 1970.
35. The Registrar felt that the material facts upon which he originally was unwilling to register the Applicant had not changed and, therefore, the Registrar issued a Notice of Proposal to Refuse Registration on July 17, 2001. The Applicant requested a hearing before this Tribunal by Notice of Appeal dated August 1, 2001.

THE ISSUE:

The issue in this proceeding is whether the Registrar had sufficient grounds to refuse registration to the Applicant as a collector under the *Collection Agencies Act*.

THE LAW:

Under Section 6(1) of the *Collection Agencies Act*, an Applicant is entitled to registration by the Registrar, except where:

6.(1)(b) the past conduct of the Applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty.

Section 7(1) of the Act states as follows:

7.(1) Subject to Section 8, the Registrar may refuse to register an Applicant where in the Registrar's opinion the Applicant is disentitled to registration under Section 6.

Sections 8(4) and 8(5) set out the powers of the Tribunal at a hearing:

8(4) Where an Applicant or Registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

8(5) The Tribunal may attach such terms and conditions to its order or to the registration, as it considers proper to give effect to the purposes of the Act.

APPLICATION OF LAW TO FACTS:

In these proceedings, the Registrar proposes to refuse registration to the Applicant on the basis of Section 6(1)(b) of the Act. Specifically, the Registrar maintains that the past conduct of the Applicant affords the Registrar reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Registrar gave evidence in this hearing that it was not so much the criminal record of the Applicant which gave him concern, but it was the Applicant's failure to disclose his criminal record on his application in 1992 and 1995. As well, the Applicant misled the Registrar in his December 4, 2000 application where he stated "as previously disclosed" and the Registrar had no information that the 1996 and 1997 convictions for assault and breach of probation were disclosed. In addition, the Applicant had materially mistated the fact as they relate to those criminal convictions in 1996 and 1997.

The Registrar stated that it was his responsibility to decide if the type of offences related to business activities or not and if they should have an effect on the Applicant obtaining a licence. Generally, the Registrar will look for criminal charges that involve dishonesty and fraud or theft and that is what the Registrar is most interested in as it concerns the Applicant's ability to carry on business in accordance with law and with integrity and honesty. The Registrar will also consider crimes of violence because of the contact that a collector has with the public.

On behalf of the Applicant, Ellen Mae Sullivan, gave evidence regarding the convictions in 1996 for assault and 1997 for failure to comply with the Probation Order. She disagreed with the contents of the Police Occurrence Report, which stated that she was struck on the head with a piece of driftwood and suffered major bruises. Her evidence was that she has a very bad alcohol and drug problem and that she is very difficult to deal with while on drugs or intoxicated. It was her opinion that the bruises on her head were likely done by herself while in a drunken state and that the bruises on her arm were from Mr. Flewitt trying to restrain her. In relation to the conviction for failure to comply with the Probation Order, she stated that she had given Mr. Flewitt permission to see her again and that they had moved back in together and were trying to reconcile. On the night in question, Mr. Flewitt did not break in to the residence as the lock on the sliding door to the residence had already been broken and that the Applicant had a right to be there. Furthermore, the television that the Applicant broke was his own television.

The Applicant also gave evidence on his own behalf. The Applicant produced a transcript of the proceedings in criminal court on July 17, 1996. The Applicant's counsel, Mr. Gassee, represented to the Tribunal that a sentence in the transcript that the Court said "...there will not be a conviction on a finding of guilt" meant that there had been no conviction of Mr. Flewitt. The Tribunal does not agree with this submission of Mr. Gassee. It is evident on a reading of the transcript of the proceedings that the Crown had no evidence that a piece of driftwood was used during the assault and, therefore, they amended the charge by crossing out "causing bodily harm". There was, however, a conviction on common assault with a sentence of time served, which was twenty-six days and probation for twelve months. The Applicant on cross examination did not disagree with the 1996 conviction for assault, but maintained there was no driftwood involved and that it had occurred as Ms. Sullivan had testified.

Mr. Flewitt testified that he had been in the collection business since 1969. He had been licenced several times, but there were also many other times when he worked as a first party collector which did not require a collector to be licenced. Some of these times included five years with the Royal Bank and four years with Long & McQuade Music. He also indicated during all of the time that he was licenced that the Ministry had no record of any complaints on file about his conduct or performance. The Registrar had confirmed in his evidence that they had no record of any complaints against the Applicant.

The Applicant maintained that when he first started to be registered, the Registrar was not concerned about any criminal record except for those which involved fraud, theft or dishonesty.

When he had answered "no" to question 10 on the application regarding convictions, he thought that he was complying with the spirit of the law as the convictions which he had were non-industry related. It was only in 1995 that he became aware of his duty to disclose all convictions. Subsequent to that he did disclose all convictions.

The Applicant produced a paystub showing that he was employed for a short time in 1997 with Collectcom Credit Inc. and said while there he had filled out an application for registration and disclosed the 1996 and 1997 convictions. He maintained that there was a conversation between someone at Collectcom Credit Inc. by the name of Manju Jain and the then Registrar and that the application had been forwarded to the Registrar. That is why, when he completed the application on December 4, 2000, that he had marked "yes" as "previously disclosed". He had no knowledge that Collectcom Credit Inc. had not submitted the application. He stated that for the three months prior to this hearing he had been working as a trainer for Collectcom Credit Inc., teaching other collectors.

The leading case in this area is Brenner v. Registrar of Motor Vehicle Dealers and Salesmen 19 CRAT SCO Decisions and Orders (1971-1989) which was considered by the Divisional Court March 19, 1983, released on April 7, 1983. In overturning the Tribunal's granting of conditional registration to the Applicant and granting the Registrar's appeal, the Divisional Court stated, per Southey J.:

"The effect of Sec. 7 (4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic

concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself”.

The Divisional Court made it clear that the Tribunal is to review the Decision of the Registrar in order to determine whether or not he was in error coming to his conclusion. In the hearing before the Tribunal, the Tribunal steps into the shoes of the Registrar and makes a determination based upon all of the evidence produced at the hearing. The review includes an examination of the criminal record of the Applicant and a consideration of the explanations given by the Applicant regarding the prior convictions and may also take into account the reasons provided by the Applicant for his failure to disclose the prior convictions to the Registrar.

In the present case, the Applicant explained that he was of the opinion that he was complying with the spirit of the law in answering “no” to the question regarding prior convictions in his 1992 and 1995 application. It was his belief that since none of the convictions involved fraud, theft or dishonesty that the Registrar was not concerned with these convictions. It was a submission by the Applicant’s Counsel, Mr. Gassee, that the non disclosure was only a minor matter which should not affect the Applicant’s entitlement to registration. With this submission, the Tribunal does not agree. Non disclosure of a prior criminal record and misrepresentation in an application to that effect is a very serious matter. Because of the sheer volume of applications which are received by the Registrar, he may not always have the resources available to investigate every application. The Registrar, therefore, relies greatly upon the honesty of the applicants in answering the questions contained in the application. It, therefore, follows that if the Registrar grants registration to the an applicant based upon the applicant’s answers to the questions in his application, that non disclosure or misrepresentation becomes critical to the Registrar’s decision in granting or refusing registration.

The Applicant in the present case gave an explanation that he thought that he was complying with the law because at one time the Registrar may not have been overly concerned with any convictions that were not related to fraud, theft or dishonesty. The Tribunal does not consider ignorance of the registration procedure as an excuse for not complying with the requirements under the Act. Nonetheless, the Tribunal must balance this against other factors, such as, in this instance the absence of any complaints against the Applicant relating to his conduct and honesty in the industry. It will also take into account the Registrar’s position that he is not as interested in the Applicant’s record itself as he is in the non disclosure by the Applicant.

In the Applicant’s answer on the December 4, 2000 application, he answered “yes” to the question regarding prior convictions and included: as disclosed”. If the Applicant had not disclosed the 1996 and 1997 convictions, this would also have been considered as a very material misrepresentation by the Applicant. In the present case, however, the Applicant was under the belief that his previous employer had forwarded an application in 1997 which

disclosed both of these offences and convictions. The Tribunal is somewhat concerned that the Applicant did not produce a witness from Creditcom Collect Inc. to verify the application at that time, however, he did produce a paystub to show that he was employed by that Company for a short time during 1997. It was also noted by the Tribunal that the Applicant was forth right in all responses to the Registrar's letters in a timely manner. With no evidence to contrary, the Tribunal accepts that the Applicant was under the impression that he had fully disclosed the two subsequent convictions to the Registrar by filling out the convictions on his 1997 application and it was through his employer's neglect that the Registrar had not received that application.

The Applicant is not completely without fault as he was mistaken in his belief requiring complete disclosure of all criminal convictions, not following up completely in providing details of all convictions, not advising the Registrar within five days of his changes of address as required under the Act and not following up with his employer on his 1997 application. In consideration of all evidence presented at the hearing, however, the Tribunal is of the opinion that the Registrar erred in his complete refusal to register the Applicant on the basis that the Applicant's past conduct afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. On the evidence presented at this hearing, the Tribunal finds that the Registrar should have registered the Applicant on terms and conditions.

DECISION:

Pursuant to the authority vested in it by Section 8 (4) and (5) of the *Collection Agencies Act*, the Tribunal directs the Registrar to refrain from carrying out the Notice of Proposal dated July 17, 2001 and to grant registration to the Applicant upon the following terms and conditions:

1. Should the Applicant leave the employ of Collectcom Credit Inc., both the Applicant, Gerald William Flewitt and Collectcom Credit Inc. are to advise the Registrar, in writing, within three days of the termination date.
2. The Applicant, Gerald William Flewitt, will inform the Registrar immediately, in writing, if he is convicted on any further criminal offence.
3. The Applicant, Gerald William Flewitt, will notify both the Registrar and Collectcom Credit Inc. in writing, within five days of any change of his residential address and phone number.

4. Within thirty (30) days of being granted registration as a collector, the registrant shall certify to the Registrar, in writing, that he has studied the Collection Agencies Act and Regulation 74 and is familiar with all obligations of collectors and in particular sections 20 and 21 of Regulation 74.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair

Released: December 20, 2001

PROKOFIEW

EWARYST PROKOFIEW

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: PETER COPELAND, Counsel, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: December 10, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Ewaryst Prokofiew (the "Applicant") appeals the Notice of Proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of the Applicant as a motor vehicle salesperson. The Proposal was issued on July 30, 2001 pursuant to section 7(1) of the Act.

The reasons given by the Registrar in his Proposal for refusing the registration of the Applicant are as follows:

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Applicant's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act.

(Exhibit 4, Tab 1)

The particulars given by the Registrar in his Proposal to refuse the Applicant registration are as follows:

1. Ewaryst (Ed) Romuald Prokofiew submitted an application for registration as a motor vehicle salesperson to the Registrar on or about June 18, 2001.
2. Ewaryst (Ed) Romuald Prokofiew was convicted of possession of property obtained by crime on April 21, 1987.
3. There are currently 15 fraud charges pending against Prokofiew.

(Exhibit 4, Tab 1)

Subsequent to the Proposal, the Registrar issued a Notice of Further and Other Particulars dated November 27, 2001 which states as follows:

Paragraph 3 of the proposal dated July 30, 2001, is deleted and replaced with the following:
The applicant currently has the following charges pending:
Conspiracy to commit fraud x 2
Fraud x 8.

(Exhibit 4, Tab 2)

Counsel for the Applicant by written notice dated August 12, 2001, appealed the Registrar's Proposal in terms of Section 7(2) of the Act and gave as his reasons the following:

1. re: Refusal of Registration
There are no reasonable grounds to believe that the Applicant will not carry on business in accordance with law and with integrity and honesty.
2. The Applicant is prepared to consent to reasonable terms and conditions being placed upon his registration.

(Exhibit 4, Tab 3)

THE EVIDENCE:

The evidence of the Registrar consisted of the testimony of Detective Constable Carey Smith and Ms. Mary Jane South. The Applicant did not testify at the hearing, but Mr. Robert Semblay did testify on his behalf. In addition to the oral testimony, there was documentary evidence introduced at the hearing.

The testimony of Detective Constable Carey Smith ("Smith") was that for the past 24 years he has been with the Halton Regional Police Service and since 1998 has been the lead investigator in an investigation titled "Project Phantom". This investigation involves the joint forces of the Ontario Motor Vehicle Industry Council ("OMVIC"), the R.C.M.P., the O.P.P., Revenue Canada and the Halton Regional Police Service.

Detective Constable Smith stated that the investigation has resulted in a preliminary inquiry being held to consider charges of fraud and conspiracy to commit fraud contrary to the Criminal Code of Canada which were brought against the Applicant and others. Pursuant to the inquiry, the Applicant has been ordered to stand for trial on two counts of conspiracy to commit fraud and eight counts of fraud. The Applicant has been released pending trial on the charges, having entered into a recognizance in terms of which he provided securities of Margaret and Robert Semblay in the amount of \$300,000.00.

Detective Constable Smith described at some length the "Project Phantom" investigation which revolves around an alleged scheme to defraud the Federal Government of General Sales Tax (G.S.T.) on the sale of motor vehicles and heavy equipment. In support of these allegations, Detective Constable Smith described how the scheme operated and that the Applicant was a prime mover in the scheme.

Smith also testified that on April 21, 1987 the Applicant had been found guilty of possession of stolen property and was sentenced to pay a fine of \$400.00 and in default thereof imprisonment for 30 days.

Ms. Mary Jane South testified that she is the Deputy Registrar appointed under the Act and has been employed by OMVIC since January 1995. She described OMVIC as a non-profit organization that was established to administer the Act and in so doing, to oversee and regulate all applicants for registration.

Ms. South stated that the basis for the Registrar's Proposal was the pending fraud charges brought against the Applicant and the 1987 criminal conviction against the Applicant. She reviewed the Applicant's written application for registration dated June 12, 2001 and stated that the Registrar makes no allegations of non disclosure by the Applicant in his application for registration. She conceded that the 1987 conviction and the pending charges had been disclosed by the Applicant in his application for registration. (Exhibit 4, Tab 4)

Ms. South did state that her concerns were the pending criminal charges against the Applicant and his alleged conduct that led to the pending charges. She also stated that the Applicant was originally registered as a motor vehicle salesperson in 1982 (Exhibit 4, Tab 7) and that on December 4, 1996 that registration was terminated when it lapsed. She also testified that there have been no complaints concerning the conduct of the Applicant that have been directed to the Registrar.

Upon the conclusion of the testimony of Detective Constable Smith and Ms. South the Registrar closed his case and the Applicant's counsel called Mr. Robert Semblay to testify on behalf of the Applicant.

Mr. Semblay testified that he is the owner/operator of an auto parts supplier and also sells and repairs used motor vehicles. He is a registered salesperson under the Act. He confirmed that he is a surety for the Applicant's bail in the sum of \$300,000.00.

Mr. Semblay testified that he now employs the Applicant as a marketer of used auto parts. Mr. Semblay wishes to expand the scope and nature of his business. Subject to the registration of the Applicant as a salesperson, he wishes to utilize the services of the Applicant to generate used vehicle sales. He stated that he has previous dealings with the Applicant and his association with the Applicant spans close to 20 years, involving his selling motor vehicles to the firm or firms that employed the Applicant.

FACTS FOUND PROVEN:

The following are the facts the Tribunal has found proven.

- 1) The Applicant was originally registered as a motor vehicle salesperson under the Act on July 24, 1982.
- 2) The Applicant's registration as a motor vehicle salesperson was terminated on December 4, 1996 when his registration lapsed.
- 3) The Applicant applied to the Registrar for registration as a motor vehicle salesperson by written application dated June 12, 2001.
- 4) On April 21, 1987 the Applicant was convicted on a charge of possession of property obtained by crime and was sentenced to pay a fine of \$400.00 and in default of payment to 30 days imprisonment.
- 5) The Applicant, pursuant to a preliminary inquiry, has been ordered to stand trial on
 - (a) unlawfully conspiring to commit two indictable offences to defraud the Government of Canada of monies of a value exceeding \$5,000.00 contrary to sections 380(1)(a) and 465(1)(c) of the Criminal Code of Canada and
 - (b) defrauding the Government of Canada of monies of a value exceeding \$5,000.00 contrary to section 380(1)(a) of the Criminal Code of Canada.

- 6) No complaints have been directed to the Registrar regarding the conduct of the Applicant respecting his activities as a motor vehicle salesperson.

THE ISSUE:

The issue to be decided by the Tribunal is whether the pending criminal charges against the Applicant and the 1987 conviction against him constitute past conduct that affords the Registrar reasonable grounds in terms of section 5(1)(b) of the Act for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

THE LAW:

7.(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefore, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing before the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

.....

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

.....

6.(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

.....

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove the past conduct of the Applicant affords him reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

The two grounds upon which the Registrar basis his Proposal are:

- (a) The 10 pending criminal charges of fraud and conspiracy to commit fraud upon which the Applicant has been indicted, and
- (b) The April 21, 1987 criminal conviction registered against the Applicant when he was convicted of possession of property obtained by crime.

The Registrar does not allege that the Applicant failed to disclose the April 21, 1987 criminal conviction of possession of property obtained by crime. Further, the Registrar does not allege that the Applicant failed to disclose the criminal charges pending against him for fraud and conspiracy to commit fraud. Both the Applicant's 1987 criminal conviction and the pending charges against him were disclosed by the Applicant in his written application for registration dated June 12, 2001. (Exhibit 4, Tab 4)

The Tribunal should only refuse to direct the Registrar to carry out his proposal if it thinks the Registrar was in error in concluding that the past conduct of the Applicant afford reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. This was clearly stated in *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesman)* [1983] O.J. No. 1017, April 7, 1983. To overrule the decision of the Registrar, the Tribunal must conclude that he was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for belief that the Applicant will in the future carry on activities in contravention of the Act and its Regulations.

The Tribunal's conclusions and the reasons for its conclusions, based upon the evidence, follow.

CRIMINAL CONVICTION OF APRIL 21, 1987

This conviction was recorded against the Applicant more than 15 years ago. Since this conviction the Applicant has had no criminal convictions registered against him. There is no evidence to indicate whether or not this conviction is industry related. The evidence indicates that the Applicant was originally registered as a motor vehicle salesperson on July 24, 1982 and that registration continued until it lapsed in December 1996. During the period of his registration, some 14 years, there was no complaint made to the Registrar as to his conduct as a motor vehicle salesperson. Ms. South, the Deputy Registrar under the Act conceded in her testimony that there have been to the best of her knowledge no complaints concerning the Applicant's conduct in the industry. The Act is a consumer protection statute and its purpose is to protect consumers in their dealings with motor vehicle dealers and salespersons. There is no evidence to indicate that consumers have been placed in jeopardy due to the 1987

conviction of the Applicant. The Applicant's conduct as a motor vehicle salesperson within the industry does not indicate that he will not carry on business in accordance with law and with integrity and honesty. In fact, his conduct in the industry, while he was registered, indicates he acted without the Registrar having any cause for concern.

The Tribunal finds that the 1987 criminal conviction of the Applicant, does not provide the Registrar with a reasonable ground to conclude that the Applicant will in the future not carry on business in accordance with law and with integrity and honesty.

PENDING CRIMINAL CHARGES

There are presently 10 criminal charges pending against the Applicant. These charges relate to allegations of fraud and conspiracy to commit fraud.

According to the testimony of Detective Constable Carey Smith, these charges became the subject of a preliminary inquiry before Mr. Justice Morrison. The charges brought against the Applicant are of a serious nature with allegations that the Applicant participated a scheme to defraud the Government of Canada of general sales tax. Detective Constable Smith testified that prior to the various charges being brought against the Applicant and other co-conspirators, certain persons gave sworn and videotaped oral statements to the authorities. The transcripts of these statements were disclosed by the Registrar at the Tribunal's hearing into this matter.

None of the persons who made the sworn statements were called by the Registrar to testify at the hearing. The Tribunal was referred by the Registrar's counsel to certain pages of the sworn statements with the suggestion that it read such pages to familiarize itself with what was contained in the statements.

Neither the record of the proceedings at the preliminary hearing nor the Judge's reasons were given to the Tribunal. The Tribunal was only informed that at the conclusion of the preliminary inquiry the Applicant was committed for trial on 10 allegations of fraud and conspiracy to commit fraud. There have been no convictions registered against the Applicant in regard to any of the charges, they await trial. The fact that the Applicant has been committed for trial does not mean that there has been a finding of guilt on the charges. An order committing an accused for trial pursuant to a preliminary hearing establishes that there is evidence upon which a reasonable jury properly instructed could convict. A conviction may or may not follow.

There are various cases that have dealt with "directed verdicts" when an accused is committed for trial after a preliminary hearing. In the matter of *R v. Mezzo* [1985] 1 S.C.R. 802 the Court held that in deciding whether to grant a motion for a directed verdict, the trial judge must determine "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty". The Court went on to hold that a trial judge is not

entitled to withdraw a case from a jury where there is admissible evidence which could, if believed, result in a conviction, notwithstanding the frailties of the evidence.

At that point, it is not the judge's function to weigh or consider the quality of the evidence. The weight that should be given to the evidence, like questions of credibility, are matters for the jury only.

In the matter of *Monteleone v. The Queen* 35 C.C.C. (3d) 193 it was held that on an application for a directed verdict of acquittal the court is not concerned with the issue of guilt or innocence but merely whether there is before the court any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction. If there is, then the trial judge is not justified in directing a verdict of acquittal. It is not the function of the judge to weigh the evidence, to test its quality or reliability once the determination of its admissibility has been made. It is not for the judge to draw inferences of fact from the evidence before him.

Here, the Applicant's indictments following upon the preliminary inquiry are allegations which still have to be tested at trial. The charges under the indictments remain charges which will be dealt with at trial. Convictions may or may not follow.

The Tribunal is of the opinion that the Registrar has been incorrect in concluding that pending criminal charges which have not been proven in court give him reasonable grounds for belief that the Applicant will in the future not carry on business in accordance with law and with integrity and honesty.

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to refrain from carrying out the Registrar's proposal to refuse registration of the Applicant under the Act.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: December 24, 2001

ULTIMATE FINE AUTOS INC. AND MOHAMAD EL MASRI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ULTIMATE FINE AUTOS INC. AND MOHAMAD EL MASRI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: August 9, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ULTIMATE FINE AUTOS INC. AND MOHAMAD EL MASRI

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ultimate Fine Autos Inc. and Mohamad El Masri, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 19, 2001

TO: The Registrar
Motor Vehicle Applicants Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Mohamad El Masri
450 Sandringham Crescent, Apt. 609
London, ON N6C 5T9

AND FROM: Ultimate Fine Autos Inc
1609 Warncliffe Road South, Unit 6 & 7
London, ON N6L 1J9

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Mohamad El Masri and Ultimate Fine Autos Inc. (hereinafter referred to as "the Applicants"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Applicants acknowledge and understand that they will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicants.
2. The Applicants acknowledge that Ahmad El Masri will in no way, either directly or indirectly be involved with the operation or financing of the business. The Applicants further acknowledge and understand that Ahmad El Masri will not be permitted on the Applicant's registered premises.
3. The Applicants further acknowledge that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicants.
4. The Applicants agree to maintain a sign at the Applicants' registered premise that will be visible to the public stating the name and toll free telephone number for The Ontario Motor Vehicle Industry Council ("OMVIC") informing the public that they have the right to forward their complaints to OMVIC. The Applicants further agree to stamp a similar disclosure on all copies of their bills of sale.
5. The Applicants agree to operate exclusively from the location approved by the Registrar. The Applicants agree to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
6. The Applicants agree not to invite the public to deal at a place other than their approved location.

7. The Applicants will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
8. The Applicants will ensure that all advertisements placed by or on behalf of the Applicants will identify their registered name and the address of the location approved by the Registrar.
9. The Applicants will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
10. The Applicants will not purchase vehicles without ensuring that the vehicle is registered to the seller.
11. The Applicants agree to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
12. The Applicants acknowledge and understand that their registration will not be used to buy or sell motor vehicles where the Applicants know or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
13. The Applicants agree to provide full and accurate disclosure on any applications, documents, statements or other form of communication/information provided to the Registrar or her authorized representatives regardless of previous disclosure.
14. The Applicants agree that they are under a positive obligation to disclose all material facts in writing about the vehicles they sell to their customers. Material facts include but are not limited to salvage, previous salvage, frame and unibody damage, rebuilt, accident repair, theft recovery, prior use as a police cruiser or taxicab and branded vehicles. The Applicants agree to make reasonable efforts to research the history of all their vehicles prior to sale to ensure all material facts are disclosed. The Applicants agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Applicants have sold, the Applicants will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
15. The Applicants agree that where a vehicle's odometer reading is unknown the Applicant's are under a positive obligation to disclose in writing the last known mileage and that the true mileage is unknown. The Applicant's further agree that if they exchange or repair an odometer they will do so in accordance with the Motor Vehicle Dealers Act and ensure that the identical reading appears on the new odometer.
16. The Applicants will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.

17. The Applicants agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Applicants agree that all books and records relating to motor vehicles sold or leased by or on behalf of the Applicant before and after registration shall be kept at the Dealer's registered premises and be readily available for inspection. The Applicants further agree to provide free access to his books and records to any authorized representative of the Registrar without any prior notice being given.

Mohamad El Masri (Initials)

18. The Applicants agree that they will not be involved with the buying and selling of motor vehicles without the benefit of registration.
19. Mohamad El Masri agrees to immediately enrol in the Ontario Motor Vehicle Industry Council's Automotive Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that he will pass the certification course within 60 days of having his registration reinstated pursuant to this Order.
20. The Applicants acknowledge that the Registrar may take administrative action, including a proposal to revoke their registration as a motor vehicle salesperson arising from any matters that have occurred in the past or that may occur in the future related to their financial circumstances and their honesty and integrity.
21. The Applicants acknowledge that the Registrar may take legal action, including a Provincial Offences prosecution, arising from their actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
22. The Applicants agree and acknowledge that should they breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
23. The Applicants hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
24. The Applicants hereby withdraw their appeal to the Licence Appeal Tribunal.
25. The Applicants hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of London this day of December, 2001.

Mohamad El Masri (signature)

Officer/Director of Ultimate Fine Autos Inc (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

MAVROUDIS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PETER J. MAVROUDIS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 8, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PETER J. MAVROUDIS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 18, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, April 16, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 17, 2001

TEDROS

PREHEARING

AREGAI TEDROS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

AREGAI TEDROS, appearing on his own behalf
FIL CECE, Agent, representing the Ontario New Home Warranty
Program
MARY DORFMAN, Agent, representing Kradler Investments Inc., Added
Party

DATE OF

PREHEARING: December 3, 2001

Toronto

ORDER

FOLLOWING attendances on December 3, 2001 at a prehearing before this Tribunal of Aregai Tedros, appearing on his own behalf (the "Applicant"), and Fil Cece, Agent on behalf of the Ontario New Home Warranty Program (the "Program") and Mary Dorfman, Agent on behalf of Kradler Investments Inc. (the "Added Party");

The Tribunal makes the following Order:

1. The parties to the prehearing shall be the Applicant, the Program and the Added Party.
2. The prehearing that commenced on December 3, 2001 is hereby adjourned to 9:30 a.m. on Monday, January 7, 2002 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

3. The hearing of this matter that is scheduled to take place at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on January 7, 2002 and to continue if necessary, on January 8, 2002 is hereby adjourned, by consent of all parties, to a date to be arranged at the conclusion of the prehearing on January 7, 2002.
4. The Tribunal having determined that the Applicant, who informed the Tribunal at the prehearing on December 3, 2001 that he was not sufficiently proficient with English to fully understand the issues and the proceedings in this matter, makes no order on the simplification of issues or the settlement of any or all the issues.
5. The Applicant undertook at the prehearing on December 3, 2001 to immediately obtain the services of a Solicitor to represent him on January 7, 2002 when the prehearing is scheduled to continue.
6. The Applicant shall obtain, for the purposes of the prehearing due to be heard on January 7, 2002 and the subsequent hearing the services of an Interpreter in the Tigrina language which is used in Eritrea the country of origin of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: December 3, 2001

1017864 ONTARIO INC. O/A COMFORTS IN TRAVEL

1017864 ONTARIO INC. O/A COMFORTS IN TRAVEL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: JOHN ORT, Member

APPEARANCES: STEVEN EWING-CHOW, Agent, representing the Applicant
TREVOR BRANION, Counsel, representing the Registrar,
Travel Industry Act

DATE OF HEARING: November 29, 2001 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a Notice of Proposal (the "Proposal") issued by the Registrar of the *Travel Industry Act* (the "Registrar") pursuant to Section 6 of the *Travel Industry Act* (the "Act"). The Proposal, dated September 5, 2001, seeks to revoke the registration of 1017864 Ontario Inc. o/a Comforts in Travel (the "Registrant") under the Act. The Registrar alleges that the Registrant has failed to adhere to the trust accounting requirements of Regulation 806/93 made under the *Travel Industry Act* (the "Regulation"), has failed to meet its financial obligations to tour operators, has failed to submit its financial statements as required by the Regulation, and has a history of failing to comply with the Form 1 filing requirements of the Regulation.

ISSUE:

Does the Registrar have sufficient grounds for revoking the registration of the Registrant under the Act?

FACTS:

The evidence presented by the Registrar consisted of the testimony of Pamela Stout and Scott Alexander McBride as well as documentary evidence introduced through them. The Registrant introduced evidence through the testimony of Steven Ewing-Chow.

TESTIMONY OF MS. PAMELA STOUT:

Ms. Stout stated that she is a financial inspections coordinator and inspector for the Travel Industry Council of Ontario ("TICO"). She testified that on July 19, 2001 she received a complaint from Suvara Travels Canada Inc., a registered travel wholesaler, alleging that it was owed monies as a result of NSF cheques from the Registrant. Ms. Stout stated that she attempted to call the Registrant, but both the business and the home telephone numbers of the Registrant were out of service.

Ms. Stout also said that on July 23, 2001 she received a complaint from Skylink Holidays Ltd., a registered travel wholesaler, alleging that it had not received payment from the Registrant for a passenger that was due to depart Toronto on July 30. Ms. Stout reached the Registrant at its business telephone number and spoke to Mr. Ewing-Chow. When she asked Mr. Ewing-Chow where the money went, she was told: "I have to live.". Ms. Stout then scheduled an inspection of the Registrant by Mr. McBride for July 30, 2001.

Ms. Stout further testified that a complaint was received by TICO from G.G. Travel Agency Ltd. enclosing an NSF cheque issued by the Registrant to G.G. Tours dated July 11, 2001 for \$1,190.00. A copy of the cheque was provided to Ms. Stout.

Ms. Stout stated that she spoke to Mr. Ewing-Chow of the Registrant on or about July 31, 2001, after the inspection by Mr. McBride. She asked Mr. Ewing-Chow when he could look after the NSF cheques, and he replied that he would take care of them the week of August 6, 2001. Ms. Stout testified that on August 13 she saw Mr. Michael Pepper, Registrar, Travel Industry Act, sign the letter set out at tab 11 of exhibit 4. The letter states in part: "You advised Pamela Stout, of this office, on July 31, 2001, that you would replace any and all NSF cheques to suppliers, 'the week of August 6.' It has been brought to our attention that payment has not been received by the suppliers.". No response was received from the Registrant to that letter.

On August 16, Ms. Stout testified, she telephoned Skylink Holidays Ltd. to ask about the total owing from the Registrant. In response she received the printout set out at tab 12 of exhibit 4 showing \$1,891.57 as owing for over 21 days.

Ms. Stout said that she also telephoned Suvara Travels Canada Inc. and asked how much the Registrant still owed to them. She received a letter dated August 28, 2001 set out at tab 13 of exhibit 4 stating that \$2,835.55 is owed.

Ms. Stout further testified that TICO had received a cheque for \$100 improperly drawn on the trust account of the Registrant, apparently the fee for this appeal.

On May 22, 2001 and again on October 15, 2001, Ms. Stout sent letters to the Registrant requesting financial statements for the year ended June 30, 2001. Those financial statements have not been received to date.

On September 2, 2001, Ms. Stout faxed to the Registrant a request for Form 1 and the associated payment to TICO for the period ending May 31, 2001 that was due July 15, 2001. Neither the completed form nor the payment has been received to date.

Ms. Stout also stated that the Registrant has repeatedly filed Form 1 and the associated payment late in prior years. She submitted supporting computer printouts, set out at tab 18 of exhibit 4.

Ms. Stout further identified the document at tab 2 of exhibit 4 as the acknowledgement of terms and conditions of registration signed by Mr. Ewing-Chow on behalf of the Registrant. That document refers to various requirements including holding all monies that the Registrant receives from the public for travel services in trust, operating trust accounts in accordance with section 36 of Ontario Regulation 806/93, and filing financial statements in accordance with section 24 of the Regulation.

TESTIMONY OF MR. SCOTT ALEXANDER McBRIDE:

Mr. McBride stated that he is a Certified General Accountant and an inspector designated by the Registrar to conduct on-site inspections. He testified that he has done 300 - 400 inspections.

Mr. McBride said that on July 27, 2001 he performed an inspection of the Registrant. From information provided by Mr. Ewing-Chow, Mr. McBride stated that he concluded that the general account of the Registrant was overdrawn and was not being used. By comparing information on trust account cheque stubs with a computer printout of transactions in the trust account, Mr. McBride said that he found numerous instances of cheques to travel service providers being returned NSF. He also found cheques drawn on the trust account for operating expenses such as rent, payroll, and telephone charges. Mr. McBride drew these irregularities to the attention of Mr. Ewing-Chow. Mr. McBride testified that he was told by Mr.

Ewing-Chow that due to a cash shortage, all transactions were being processed through the trust account.

TESTIMONY OF MR. STEVEN EWING-CHOW:

Mr. Ewing-Chow stated that the Registrant employs two travel agents, including himself. He testified that he is the president and director of the Registrant.

Mr. Ewing-Chow admitted that he still owes about \$2,400 to travel service providers. He stated that he should be able to pay the outstanding sums in full by the end of spring.

Also, Mr. Ewing-Chow admitted that he wrote cheques on the trust account for operating expenses.

Mr. Ewing-Chow said that he still has not made a Form 1 filing and associated compensation fund contribution based on financial statements for last year. He stated that he does the book-keeping for the Registrant and that he is behind.

Mr. Ewing-Chow said that no customer was hurt by the irregularities in his trust account.

THE LAW:

Section 5(2) of the *Travel Industry Act* states:

"Subject to section 6, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 4 if he, she or it were an applicant, or where the registrant is in breach of a term or condition of the registration."

Section 4 of the Act states in part:

"An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where...

"the applicant is a corporation and, ...

"having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

"the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty...".

Section 24(1) of Ontario Regulation 806/93 states:

"Every registrant shall file with the Registrar the financial statements required by this section for each fiscal year."

Section 24(2) of the Regulation adds in part:

"If the registrant had sales of less than \$10 million during the pervious fiscal year, the registrant shall file, within three months of the end of the fiscal year,

"annual financial statements with a review engagement report...or annual financial statements with an audit opinion...".

Section 44 of the Regulation states in part:

"Every registrant shall participate in the Compensation Fund and shall comply with the terms of the Fund set out in this Part."

Section 47(1) of the Regulation sets out in part:

"A travel agent shall, twice a year, make payments to the Council in the amount that is the greater of the following...".

Section 47(5) adds:

"A payment under this section shall be accompanied by a completed return, in the form provided by the Council, indicating the sales of the registrant for the reporting period and the amount of payments owing to the Council." In other words, filing of Form 1 is required with the payment.

Section 36(1) of the Regulation partly states the following:

"A registrant shall maintain a trust account to protect customer funds...".

Section 36(3) adds:

"A registrant required to maintain a trust account under subsection (1) shall hold all customer funds in trust...".

Section 36(6) further adds:

"No registrant shall disburse or withdraw any money held in a trust account under subsection (1) until payment is made to the supplier of the travel services for which the money was received."

FINDINGS OF FACT:

The Tribunal finds that:

- 1) the Registrant failed to file financial statements in accordance with section 24 of Ontario Regulation 806/93,
- 2) the Registrant failed to file a return and failed to make payment in accordance with section 47 of the Regulation,
- 3) the Registrant did not operate its trust account in accordance with section 36 of the Regulation,
- 4) the Registrant breached its terms and conditions of registration,
- 5) the general account of the Registrant did not have sufficient funds to meet the Registrant's financial obligations,
- 6) the Registrant owes money to travel service providers, and
- 7) the Registrant used trust funds to pay operating expenses.

APPLICATION OF LAW TO FACTS:

Counsel for the Registrar appropriately referred to *Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen)*, [1983] O.J. No. 1017 as authority for the legal test to be used by the Tribunal being: "Was the Registrar in error?".

On the facts as found, the Tribunal finds that the decision by the Registrar was not in error. The Registrant is in breach of its terms and conditions of registration. The Registrar does have reasonable grounds for belief that the Registrant's business will not be carried on in accordance with law and with integrity and honesty, and that, having regard to the financial position of the Registrant, it cannot reasonably be expected to be financially responsible in the conduct of its business. Thus, under sections 5 and 6 of the Act, the Registrar does have sufficient grounds to revoke the registration of the Registrant.

DECISION:

Accordingly, by virtue of the authority vested in it under section 6(4) of the *Travel Industry Act*, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of 1017864 Ontario Inc. o/a Comforts in Travel as a travel agent under the Act.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: December 11, 2001

AUTO MART SUDBURY LTD. AND RICK TOULOUSE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
AUTO MART SUDBURY LTD. AND RICK TOULOUSE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: September 14, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

AUTO MART SUDBURY LTD. AND RICK TOULOUSE

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 9, 2002;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Monday, May 27, 2002.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 11, 2001

CHARLES MEEK DBA MEEK MOTORS AND CHARLES MEEK

PREHEARING

CHARLES MEEK DBA MEEK MOTORS AND CHARLES MEEK

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES
91(8)(a) and (e) AND CLAUSES 93(a) and (c) OF THE *HIGHWAY*
TRAFFIC ACT R.S.O. 1990, CHAPTER H.8 AS AMENDED

TO REVOKE CHARLES MEEK DBA MEEK MOTORS' LICENCE AS
A MOTOR VEHICLE INSPECTION STATION AND CHARLES MEEK'S
REGISTRATION AS A MOTOR VEHICLE INSPECTION MECHANIC

TRIBUNAL: STUART CORK, Member

APPEARANCES: JAMES K. deROUX, Agent, representing the Applicant

PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards

DATE OF
PRE-HEARING: November 30, 2001 Toronto

ORDER

Following attendances on November 30, 2001 at a pre-hearing before this Tribunal of James K. deRoux, Agent on behalf of Charles Meek DBA Meek Motors and Charles Meek (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at the Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Tuesday, January 15, 2002;

1. The Parties to the hearing are
 - (a) Charles Meek DBA Meek Motors;
 - (b) Charles Meek; and
 - (c) The Director of Vehicle Inspection Standards
2. The Respondent will present testimony and evidence from four witnesses, all of whom are MTO Inspectors: Officer John Tomasone, Officer Ron McGee, Officer Glen Mckee, and possibly former Inspector Helmut Beintner (retired). Each witness will testify as experts to give information regarding vehicle safety standards, vehicle inspections, annual inspection stickers, and facility inspections that led to convictions or cautions against the Applicant. The Respondent's witness will rely upon notes, Field Inspection Reports, and MTO records from the Ministry computerized data base.
3. The Applicant will call three witnesses: Mr. Charles Meek, Mr. Bev Matthews, and perhaps Michael matthews. Bev Matthews operates a business in conjunction with the Applicant. The Applicants' witnesses will testify that the circumstances of this case are not appropriate for the revocation of Charles Meek Motors licences as a motor vehicle inspection station and the revocation of the registration of Charles Meek as a motor vehicle inspection mechanic.
4. At issue for the Applicants is whether there are sufficient grounds for the revocations, and the Respondents position is that the body of evidence is sufficient for the revocation.

The parties present at the pre hearing recorded that there was no resolution of the issues between them.

5. It was confirmed at the Prehearing Conference that the Director has issued a Notice to Revoke Charles Meek d/b/a Meek Motor's licence as a Motor Vehicle Inspection Station pursuant to clause 91(8)(a) and (e) of the *Highway Traffic Act* (the "Act") and Charles Meek's registration as a Motor Vehicle Inspection Mechanic and clauses 91(8)(a) and (e) and clauses 93(a) and (c) of the *Highway Traffic Act*, the Notice to Revoke being dated August 15, 2001.

6. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before Friday January 4, 2002.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: December 11, 2001

PREHEARING

FERREL EQUIPMENT LEASING CO. LTD., 911136 ONTARIO LIMITED AND 1027149 ONTARIO LTD.

IN THE MATTER OF an application by Ferrel Equipment Leasing Co. Ltd., 911136 Ontario Limited and 1027149 Ontario Ltd. dated October 19, 2001 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Registrar of Motor Vehicles dated October 11, 2001;

AND IN THE MATTER of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration CVOR certificates 122-435-901, 103-175-042, 113-319-652, 095-016-124, 073-986-640, 103-742-245 issued to Ferrel Equipment Leasing Co Ltd., 909618 Ontario Ltd., 1027149 Ontario Ltd., 799030 Ontario Ltd., Lions Wrecking Ltd., and 911136 Ontario Ltd.;

AND IN THE MATTER of the plate portion of permits for all commercial motor vehicles issued to Ferrel Equipment Leasing Co. Ltd., 909618 Ontario Ltd., 1027149 Ontario Ltd., 799030 Ontario Ltd., Lions Wrecking Ltd., and 911136 Ontario Ltd.;

AND IN THE MATTER of the safety record of Ferrel Equipment Leasing Co Ltd. and Lions Wrecking Ltd.;

AND IN THE MATTER of the unpaid fines;

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
JOHN DARE, Counsel for the Applicants

DATE OF
PRE-HEARING: December 7, 2001

Toronto

ORDER

A Pre-hearing between the parties was held on December 7, 2001 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated November 27, 2001.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing date has been set for 9:30 a.m. on Monday, January 28, 2002 and to continue January 29, 2002, if necessary at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before Friday, January 18, 2002.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Louis Janetos. Officer Janetos will introduce all documents, and analyses on file with the MTO. His evidence will focus on the involvement of the MTO with the Applicant over the past two years, as well as the history of several related companies prior to 1995. The evidence will include the Applicant's CVOR record, facility audit results, and accident records.
4. The Applicant expects to present three witnesses, including Mr. Joe Nunes who is a principle of the company, a consultant from Canadian Safety Compliance Consulting, and possibly Mr. Victor Bento, a dispatcher for the Applicant.

Mr. Nunes will testify to the management of the company, and to the kinds of initiatives being done to improve the safety record of the Applicant. He will also explain the situation regarding the non-payment of fines, and to the history of the problems with the earlier companies.

The witness from the Canadian Safety Compliance Consulting firm will detail the plan implemented and the steps taken by the Applicant to bring the company into a higher state of compliance.

Mr. Bento will give evidence regarding his role as a dispatcher for the Applicant at the time of an accident, and the steps taken following the incident, including a summary of the processes and administrative procedures of the Applicant.

5. Among the issues to be raised by the Respondent will be the safety record of the Applicant as per the Notice, the unpaid fines, and the connections between the Applicant companies and the other companies related to the Applicant that had experienced earlier problems with compliance.
6. Among the issues to be raised by the Applicant is that in their view, the sanction being imposed upon them is overly harsh, and inappropriate, and that there did not appear to be any warning given by the MTO or any pro-active measures taken by the Ministry to justify the sanction.
7. The Applicant agreed at this pre-hearing to provide the Respondent with a letter detailing specifically what are the alleged factual errors on the Applicant's CVOR record, as referred to in the Notice of Appeal. This letter is to be provided to the Respondent as part of the Applicant's disclosure.
8. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
9. It was outlined at the prehearing Conference that:

The Registrar has issued a 21 day Suspension and Seizure Order dated October 11, 2001 pursuant to section 50(1) of the *Highway Traffic Act*, as of October 22, 2001 for Ferrel Equipment Leasing, and thereafter until such time as all out standing fines are paid.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: December 17, 2001

AMRAL'S TRAVEL CANADA LTD. O/A AMRAL'S TRAVEL CANADA LTD.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
AMRAL'S TRAVEL CANADA LTD. O/A AMRAL'S TRAVEL CANADA LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: October 9, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal
AMRAL'S TRAVEL CANADA LTD.
O/A AMRAL'S TRAVEL CANADA LTD.

- and -

Applicant

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Amral's Travel Canada Ltd. o/a Amral's Travel Canada Ltd., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

Released: December 17, 2001

BETWEEN:

AMRAL'S TRAVEL CANADA LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. Amral's Travel Canada Ltd. (hereinafter referred to as "the Registrant") has been registered as a travel agent (registration number 1549537/R) under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since March 21, 1983. The Registrant is also registered as a travel wholesaler (registration number 4542676/W). The Registrant's fiscal year end is December 31st.
2. The Registrant was late filing its Form 1 and making the corresponding payment to the Travel Industry Council of Ontario ("TICO") as summarized by paragraphs 3 through 8.
3. The Registrant's Form 1 filing for its fiscal half-year ended June 30, 2001 was due by August 15, 2001.
4. By August 15, 2001, the Registrant did not submit its Form 1 filing along with the corresponding payment to TICO.
5. By letter dated August 21, 2001, TICO advised the Registrant that it had failed to file its Form 1 for the period ended June 30, 2001. TICO also advised the Registrant to make the required filing and payment by September 4, 2001.
6. On September 7, 2001, TICO sent a second request, which gave the Registrant until September 21, 2001 to make its filing, failing which a proposal to revoke the Registrant's registration would be issued.

7. By October 9, 2001, the Registrant had failed to make its Form 1 filing. On that date, the Registrar issued a Proposal to Revoke the Registrant's registration.
8. On October 12, 2001, the Registrant made its Form 1 filing.
9. The Registrant has a history of late filing and failing to maintain minimum working capital as summarized by paragraphs 10 through 33.
10. By letter dated June 6, 1994, the Registrant gave an undertaking that shareholder advances to the Registrant would not be removed until such time as it could be done without creating a working capital deficiency.
11. The Registrant's financial statements for its fiscal year ended December 31, 1994, which were due by March 31, 1995, were received on May 2, 1995. These statements revealed a working capital shortfall of \$9,393.00 based on the Registrant's reported sales of \$1,228,744.00.
12. By letter dated May 2, 1995, the Ontario Travel Industry Inspections Office advised the Registrant of the working capital shortfall reflected in its December 31, 1994 financial statements and that the shortfall must be corrected.
13. On May 16, 1995, the Registrant provided evidence of a capital injection to correct the working capital shortfall reflected in its December 31, 1994 financial statements.
14. The Registrant's financial statements for its fiscal year ended December 31, 1995, which were due by March 31, 1996, were received on May 17, 1996. These statements revealed a working capital shortfall of \$37,461.00 based on the Registrant's reported sales of \$1,744,669.00.
15. By letters dated June 18th and July 10th 1996, the Ontario Travel Inspections Office advised the Registrant of the working capital shortfall reflected in its December 31, 1995 financial statements and that the shortfall must be corrected.
16. On July 27, 1996, the Registrant provided evidence of a capital injection to correct the working capital shortfall reflected in its December 31, 1995 financial statements.
17. The Registrant's financial statements for its fiscal year ended December 31, 1996, which were due by March 31, 1997, were received on May 13, 1997. These statements revealed a working capital shortfall of \$38,070.00 based on the Registrant's reported sales of \$1,881,005.00.
18. By letter dated May 15, 1997, the Ontario Travel Inspections Office advised the Registrant of the working capital shortfall reflected in its December 31, 1996 financial statements and that the shortfall must be corrected.
19. On June 16, 1997, the Registrant provided evidence of a capital injection to correct the working capital shortfall reflected in its December 31, 1996 financial statements.
20. On January 20, 1998, the Registrant consented to Terms and Conditions of Registration, which required, among other items, that the Registrant maintain a minimum working capital of \$15,000.00.
21. The Registrant's financial statements for its fiscal year ended December 31, 1997, which were due by March 31, 1998, were received on May 12, 1998. These statements revealed a working capital shortfall of \$33,898.00 based on the Registrant's reported sales of \$441,821.00.

22. By letters dated June 17th and September 16th 1998, the Travel Industry Council of Ontario ("TICO") advised the Registrant of the working capital shortfall reflected in its December 31, 1997 financial statements and that the shortfall must be corrected.
23. On September 18, 1998, the Registrant provided evidence of a capital injection to partially address its working capital shortfall. It required an additional injection of \$14,928.00 to comply with the working capital requirements as consented to by the Registrant on January 20, 1998.
24. By letter dated September 28, 1998, TICO advised the Registrant that its working capital still reflected a shortfall.
25. On November 27, 1998, the Registrant provided evidence of a capital injection to correct its working capital shortfall reflected in its December 31, 1997 financial statements.
26. The Registrant's financial statements for its fiscal year ended December 31, 1999, which were due by March 31, 2000, were received on May 30, 2000. These statements revealed a working capital shortfall of \$21,444.00 based on the Registrant's reported sales of \$1,160,433.00.
27. By letter dated June 6, 2000, TICO advised the Registrant of the working capital shortfall reflected in its December 31, 1999 financial statements and that the shortfall must be corrected.
28. On June 25, 2000, the Registrant provided evidence of a \$10,000.00 shareholder advance to partially address the working capital shortfall and advised TICO that interim financial statements would be provided.
29. By letter dated August 1, 2000, the Registrar advised the Registrant that TICO had not received evidence that the Registrant had corrected its working capital shortfall. If the Registrant did not present such evidence by August 11, 2000, the Registrar would initiate a proposal to revoke the Registrant's registration.
30. On August 14, 2000, the Registrant provided interim financial statements for the period ended June 30, 2000. The statements, as submitted, revealed a working capital shortfall of \$1,487.00. The Registrant also provided evidence of a capital injection to bring its working capital into compliance.
31. The Registrant's financial statements for its fiscal year ended December 31, 2000, which were due by March 31, 2001, were received on June 29, 2001. These statements revealed a working capital shortfall of \$51,484.00 based on the Registrant's reported sales of \$1,605,660.00.
32. By letters dated July 18th and August 8th 2001, TICO advised the Registrant of the working capital shortfall reflected in its December 31, 2000 financial statements and that the shortfall must be corrected.
33. To date, the Registrant has not provided satisfactory evidence that it has corrected the working capital shortfall reflected in its December 31, 2000 financial statements.
34. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

1. the Registrar refrain from carrying out the Proposal to Revoke Registration dated October 9, 2001;
2. the Registrant's registration is to be subject to the following terms and conditions:
 - (a) The Registrant shall correct any and all working capital deficiencies and provided proof of such correction to the Registrar's satisfaction by January 31, 2002;
 - (b) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time, for its fiscal year ending December 31, 2001, no later than March 31, 2002;
 - (c) The Registrant shall file complete financial statements as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time for its fiscal year ending December 31, 2002, no later than March 31, 2003;
 - (d) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (e) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2001 and make all applicable payments to TICO by February 15, 2002, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (f) The Registrant shall complete its Form 1 filing for its fiscal half-year ending June 30, 2002 and make all applicable payments to TICO by August 15, 2002, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (g) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2002 and make all applicable payments to TICO by February 15, 2003, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time;
 - (h) The Registrant shall complete its Form 1 filing for its fiscal half-year ending June 30, 2003 and make all applicable payments to TICO by August 15, 2003, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time; and
 - (i) The Registrant shall complete its Form 1 filing for its fiscal year ending December 31, 2003 and make all applicable payments to TICO by February 15, 2004, as required by section 47 of the Regulation or such subsequent provision as may be in force from time to time.
 - (j) The Registrant shall at all times maintain sufficient funds to cover its customer obligations. Such funds shall be maintained in a properly designated "Travel Industry Act Trust Account" and in accordance with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time.

3. Should the Registrant fail to comply with conditions listed in paragraphs (2) (a) to (j) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
4. This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of December, 2001

Mr. Kurt Hanoomansingh
Amral's Travel Canada Ltd.
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry Act*

CHRISTO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
BRUCE AND ZOE CHRISTO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

BRUCE AND ZOE CHRISTO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

MINTO YORKVILLE INC.

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a prehearing in the above matter on January 4, 2002 at 9:30 a.m. and a hearing on February 18-19, 2002, at 9:30 a.m. at Toronto, Ontario;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the prehearing *peremptory against the Respondent* to commence on Monday, February 18, 2002 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and adjourns the hearing to commence at 9:30 a.m. at the above noted address on Monday, April 29, 2002 and to continue April 30, 2002, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 20, 2001

PREHEARING

IN THE MATTER OF an application by Green Way Ltd. dated October 26, 2001 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Registrar of Motor Vehicles dated October 16, 2001;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration
CVOR # 128-193-377 issued to Green Way Ltd.;

AND IN THE MATTER of the safety record of Green Way Ltd.;

APPEARANCES: PATRICK MOORE, Counsel for the Respondent
RANDALL BURCH, Agent for the Applicant

A Pre-hearing between the parties was held on November 26, 2001 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated November 9, 2001.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for 9:30 a.m. on Wednesday, January 30, 2002 and to continue on January 31, 2002, if necessary at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before January 21, 2002.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present evidence and testimony from one witness, Carrier Safety Rating Administrator Brenadette McKenna. Ms. McKenna will evidence of all the Applicant's records and information, including the Applicant's CVOR, accident and conviction history, facility audit report and show cause meeting notes, as well as detail the procedural steps taken by the MTO.
4. The Applicant will present evidence and testimony from three witnesses: Mr. Alex Sheremtov, an owner of the Company, Mr. Alex Bluvshiteyn, the Safety Officer for Greenway Ltd, and Mr. Peter Suess, a transportant consultant.

Mr. Suess will present evidence that the Applicant has gone ahead with the installation of a computer system that will track internal safety and administrative functions of the Company, including driver training, maintenance, and records. Mr. Seuss will also present internal log audits, and DOT records.

Mr. Alex Bluvshiteyn will give testimony regarding the random audits and checks being done on drivers. He will also testify that as the company grew and drivers aquired new vehicles, they were unaware that the MTO did not automatically update the Applicant's CVOR records, and that the increasing number of trucks was not reflected in the CVOR records.

5. Among the issues to be raised by the Respondent will be the safety record of the Applicant as the basis of the Registrar's October 16, 2001 Order, including, conviction, out of service rates, and accidents.

6. Among the issues to be raised by the Applicant will be the point weighting of an accident, the calculation of the fleet size for the purposes of the CVOR, and the Applicants record since December of 2000.
7. It was outlined at the Prehearing Conference that:

The Registrar has issued a 21 day Suspension and Seizure Order dated October 16, 2001 pursuant to section 50(1) of the *Highway Traffic Act*, as of October 29 , 2001 for Greenway Ltd.
8. The parties present at the prehearing recorded that there was no resolution of the issues between the parties.
9. The Applicant will provide, at its own expense, a Certified Court Interpreter who is accredited through the Provincial Court System, to provide translation services in the English and Russian languages.
10. At the hearing of this matter, the Tribunal will be asked to review in detail a time period of approximately two years prior to the Suspension Order, from approximately January, 1999, until the date of the Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: December 13, 2001

WALSH, JOANNE MAY O/A ALPINE AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOANNE MAY WALSH O/A ALPINE AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: September 25, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOANNE MAY WALSH O/A ALPINE AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Joanne May Walsh o/a Alpine Auto Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 10, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, ON M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Joanne May Walsh
O/a Alpine Auto Sales
796 Simcoe Street South
Oshawa, ON L1H 4K6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, Joanne May Walsh o/a Alpine Auto Sales (hereinafter referred to as the "Dealer"), and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal based on the following terms and conditions:

1. The Dealer agrees to comply with any repayment arrangements entered into with the Ministry of Finance.
2. The Dealer agrees to comply with all aspects of the Retail Sales Tax Act, and with regards to filing, will ensure all future tax collections are accurately reported and remitted to the Minister of Finance when due and with payment.
3. The Dealer acknowledges and understands that she will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
4. The Dealer further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
5. The Dealer agrees to maintain a sign at the Applicant's registered premise that will be visible to the public.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.

7. The Dealer agrees not to invite the public to deal at a place other than her approved location.
8. The Dealer will not conduct any purchases with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.

Joanne Walsh (initials)

9. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify her registered name and the address of the location approved by the Registrar.
10. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
11. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
12. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
13. The Dealer acknowledges and understands that her registration will not be used to buy, sell or lease motor vehicles where the Dealer knows or ought to know that the purchase, sale or lease of those motor vehicles will facilitate an illegal or unethical practice.
14. The Dealer agrees that she is under a positive obligation to disclose all material facts in writing about the vehicles she sells or leases to her customers. The Dealer agrees to make reasonable efforts to research the history of all her vehicles prior to sale/lease to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold/leased, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
15. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice.
16. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to provide free access to her books and records to any authorized representative of the Registrar.
17. The Dealer agrees that all books and records shall be kept at the Dealer's registered premise.
18. The Dealer agrees that she will not be involved with the buying, selling or leasing of motor vehicles without the benefit of registration.
19. The Dealer acknowledges that the Registrar may take administrative action, including a proposal to revoke her registration as a motor vehicle dealer arising from any matters that have occurred in the past or that may occur in the future related to her financial circumstances and her honesty and integrity.

20. The Dealer acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from her actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
21. The Dealer agrees and acknowledges that should she breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
22. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

Joanne Walsh (initials)

23. The Dealer hereby withdraws her appeal to the Licence Appeal Tribunal.
24. The Dealer hereby acknowledges that she has obtained or has had the opportunity to obtain independent legal advice with respect to her consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of November, 2001.

Joanne May Walsh (signature)
O/A Alpine Auto Sales

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar, *Motor Vehicle Dealers Act*

WARNER

DAVID WARNER

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ELMER MERKLEY,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

DAVID WARNER, Applicant
by Written submission only

DATE OF HEARING: December 13, 2001

DECISION RELEASED: December 17, 2001 Written

REASONS FOR DECISION

A written hearing was held on December 13, 2001, at London, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	David Warner (the "Applicant")
Motor Vehicle:	1987 Ford Bronco II, plate no. 205 1HM (the "vehicle")
Date of Appeal:	November 13, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on December 13, 2001 and proceeded as a written hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My name is David Warner and my truck was impounded because a so called "friend" had a licence but didn't tell me it was suspended. I am licenced and insured. I had a few too many drinks so I didn't want to drive, so I figured I would let him drive. We got pulled over and he got arrested but I had no record and at the time there was nothing I thought I did wrong, only to find out that I shouldn't have let him drive. I'm staying at my parents and just starting working again and then this happened after telling my parents I should be out by the end of the month.

Nov. 4/01

Att. Hearing Co-ordinator

My name is David Warner and I own a 87' Bronco II which was impounded Nov 1/01. I went to get the release form from the police station only to find out that I couldn't, and that it was impounded in Oakville for 3 months unless I appeal. The driver of my vehicle was Rick Heemskerk and he was driving because I figured I had too much to drink. I am licenced and insured therefore I let him drive. I knew he had a licence but did not know it was recently suspended so I let him drive. I want to know what I did wrong when I felt I did the right thing. I would appreciate it if I could get my truck back instead of having to go through a tribunal and a 3 month wait which I cannot afford.

Sincerely Dave Warner.

Please send fax back to:
905-546-9508

The Applicant did not provide the Tribunal or the Respondent with any reply after receiving the Respondent's submissions and supporting evidence.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner.
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Richard Heemskerk;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 22, 2002

In reference to the grounds of due diligence, the Registrar submitted that the Applicant has not provided any evidence that would indicate that he took reasonable efforts to ensure that the driver of his vehicle, Mr. Richard Heemskerk, had a valid driver's licence. In the Owner's Position, Mr. Warner states, "I knew he had a driver's licence but did not know it was recently suspended, so I let him drive". Mr. Warner fails to mention what type of due diligence he exercised to determine that Mr. Heemskerk was not under suspension or that he held a driver's licence.

In reference to the ground of exceptional hardship, the Registrar submitted that the criteria to establish exceptional hardship are cumulative and therefore the Applicant must meet all the requirements of the Regulation before his appeal can be considered. Mr. Warner has failed to meet the conditions set out for demonstrating exceptional hardship, as prescribed in the Highway Traffic Act, Section 22(3) of Regulation 574, R.R.O., as amended by Regulation 632/98.

In the Owner's Position, Mr. Warner has presented no evidence that would indicate that there is no alternative to the impounded vehicle. He has not indicated whether the impounded vehicle would result in any financial, employment or educational loss, nor whether the loss would be immediate, significant and lasting. The Applicant fails to mention whether the impoundment would cause a threat to the health or safety of any person ordinarily transported by the impounded vehicle. In addition, no evidence has been provided that would demonstrate that the Applicant has inquired into any reasonable options that would adequately mitigate or eliminate any potential losses.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The first issue to be considered in the appeal is whether Mr. Warner, the motor vehicle owner, exercised due diligence to determine that the driver's licence was not suspended.

The onus of proof, based on the balance of probabilities, rests with the Applicant.

In the Owner's Position statement, Mr. Warner states, "I knew he had a licence but did not know it was recently suspended so I let him drive." The Owner's Position statement fails to mention what type of due diligence he exercised to determine that Mr. Heemskerk's driver's licence was not then under suspension.

The Tribunal finds that the owner of the motor vehicle in accordance with Section 50.2 (3)(c) of the *Highway Traffic Act*, did not exercise due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at that time in respect of which the order was made was not then under suspension.

The Applicant also requested an appeal on the grounds of exceptional hardship, in accordance with Section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

For the Applicant's claims to be considered under Section 22(2)(a), (b) and (c), he must demonstrate that all of Section 22(3) has been met. This has not been done by the Applicant. Furthermore, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has shown the Tribunal that he has considered options to the impounded vehicle. The Applicant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

With regard to the Applicant's ground of appeal that the impoundment will result in exceptional hardship, the Tribunal finds that the Applicant has not established exceptional hardship, as prescribed under Section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: December 17, 2001

1448833 ONTARIO CORPORATION O/APOWER AUTO AND
THAYABARAN JEYANATHAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
1448833 ONTARIO CORPORATION O/APOWER AUTO AND
THAYABARAN JEYANATHAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 6, 2001

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1448833 ONTARIO CORPORATION O/APOWER AUTO
AND THAYABARAN JEYANATHAN

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1448833 Ontario Corporation o/a Power Auto and Thayabaran Jeyanathan, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.

Released: December 11, 2001

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West
12th Floor
Toronto, Ontario M4V 1K6

FROM: 1448833 Ontario Corp.
O/a Power Auto
4379 Kingston Road, Unit 8A,7
Scarborough, Ontario, M1E 2M9

Thayabaran Jeyanathan
994 Fernandez Drive
Mississauga, Ontario, L5V 1W5

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereinafter the "Act") the parties to the proceeding, of 1448833 Ontario Corp. o/a Power Auto ("the Dealer"), and Thayabaran Jeyanathan ("the Salesperson") and the Registrar, *Motor Vehicle Dealers Act* (hereinafter the "Registrar") waive the requirement of a hearing and hereby consent to an Order of the Licence Appeal Tribunal (hereinafter the "Consent Order") based on the following terms and conditions to be attached his registration as a motor vehicle dealer and salesperson:

1. The Dealer and Salesperson agree, if either party is charged in the future, to immediately notify the Registrar in writing.
2. The Dealer and Salesperson agree, if either party is convicted under any law of an industry specific offence or if either party is convicted under the Criminal Code, the Registrar is directed to and shall carry out the proposal.
3. The Dealer and Salesperson agree to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
4. The Dealer acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
5. The Dealer further acknowledges that the restrictions concerning the activities of a salesperson referred to in these terms and conditions applies to buying, selling and leasing on behalf of a dealer. "Buying, selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase, sale or lease of a motor vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.

6. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to provide free access to the books and records of the Dealer to any authorized representative of the Registrar.
7. The Dealer agrees that all books and records shall be kept at the Dealer's registered premise, and shall be available to an inspector or investigator appointed by the Registrar, at all reasonable times.
8. The Dealer agrees to maintain a sign at the Dealer's registered premise that will be visible to the public.
9. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
10. The Dealer agrees not to invite the public to deal at a place other than his approved location.
11. The Dealer will not conduct any purchases with anyone who is in the business of buying, selling and leasing motor vehicles without confirming that the person is registered as a Dealer under the Motor Vehicle Dealers Act.
12. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
13. The Dealer will ensure that any vehicle sold is registered in the name of the purchaser in the records of the Ministry of Transportation before releasing the vehicle to the purchaser.
14. The Dealer will not purchase a vehicle without ensuring that the vehicle is registered to the seller in the records of the Ministry of Transportation.
15. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
16. The Dealer agrees that he is under a positive obligation to disclose in writing, on the bill of sale, all material facts about the vehicles he sells to his purchasers. Purchasers include both retail and wholesale buyers. Material facts such as, but not limited to: salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, previous daily rental, write off, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
17. The Dealer acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
18. The Dealer will comply with all aspects of the Retail Sales Tax Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.

19. The Dealer agrees he will not be involved in the process of buying, selling or leasing motor vehicles without the benefit of registration.
20. The Dealer will comply with the Ontario Motor Vehicle Industry Council's Code of Ethics and Standards of Business Practice. The Dealer further agrees to make full disclosure with respect to "AS IS" vehicles and to include the required disclosure as set out in the Standards of Business Practice.
21. The Dealer and Salesperson understand that the registrations will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.
22. The Dealer and Salesperson acknowledge that the Registrar may take further administrative action in the form of a proposal to revoke the registrations, arising from any matters that have occurred or may occur related to honesty, integrity, financial position and/or compliance with these terms and conditions.
23. The Dealer and Salesperson acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the purchase, sale or lease of motor vehicles that may have occurred in the past or that may occur in the future.
24. The Dealer and Salesperson agree and acknowledge that should either party breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal to revoke the registrations of the Dealer and Salesperson.
25. The Dealer and Salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2001.

1448833 Ontario Corp. O/a Power Auto
I have the Authority to bind the corporation.
(Signature)

Thayabaran Jeyanathan
(Signature)

These terms and conditions are acceptable to the Registrar, *Motor Vehicle Dealers Act*.

Date:

Carl Compton
Registrar

JOYCE

JODIE CHARLES JOYCE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: CHARLES J. SANDIFORD,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

JODIE CHARLES JOYCE, Applicant
unrepresented

DATE OF HEARING: December 12, 2001

DECISION RELEASED: December 17, 2001 ***By Teleconference***

REASONS FOR DECISION

A hearing was held on December 12, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Jodie Charles Joyce (the "Applicant")
Motor Vehicle:	1995 Mercury MGS, plate no. AFWR 422 (the "vehicle")
Date of Appeal:	November 22, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on December 12, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To Whom This May Concern,

I am appealing the impoundment of my car on the grounds that the loss of my vehicle will result in exceptional hardship and that I have exercised due diligence to determine that the license of the driver was valid.

If I was to lose my car for the entire impoundment term it will jeopardize my position at Q104 as my employer Scott Sexsmith indicates in the enclosed letter. My job in broadcasting is not only my career but also something I have worked at and loved for many years. Due to the fact that this is a very competitive field, jeopardizing my job may damage my entire career. I also do not currently do not have a doctor in Sault Ste. Marie and because I am on medication, I rely on the visits to my doctor in Sudbury, Ontario. It can be confirmed that I am a current patient of Doctor R H M Nanka-Bruce, 30 Durham St. Sudbury, (705) 674-0880. This also causes hardship because the majority of my family friends resides in Espanola, Ontario and with Christmas approaching it creates a strain on my finances to arrange for alternative transportation.

For my second defense, I have been friends and roommates with Ernest Skinner for a little over a year now. Since he is over the age of twenty-five I had no problem lending him my car to occasionally run small errands. I was under the impression that Ernest had a valid driver's license, as he produced one on numerous occasions including showing identification at the Canada/US border and when asked to prove age of majority at nightclubs. After this incident occurred I was shocked to learn that he did not have a valid license, because being close friends and roommates I had a lot of trust in him. Mr. Skinner has included a letter confirming my lack of knowledge that he did not currently have a driver's license.

The loss of my car due to the actions of Ernest Skinner is deeply impacting my life in a negative way. I ask that you take into consideration my plea for the return of my vehicle.

Thank You For Your Consideration.

“ “

Jodie Joyce

Q 104
Today's Country

EZ ROCK
100.5FM

November 20, 2001

To Whom it May Concern:

RE: Jodie Charles Joyce – Vehicle Requirements

Please accept this letter as written confirmation regarding Jodie Joyce and his need for a vehicle as a condition of employment.

As someone who is considered to be in the "public eye" as a result of being a radio personality, there are numerous occasions that take JC out of the office, representing the radio station. Although many of these community minded initiatives are done on his own time, his efforts still contribute to the overall success of Q104. At times there is a company vehicle that he has access to, but due to scheduling conflicts, it is not always at his disposal and therefore he requires another mode of transportation.

For JC to be without a vehicle puts an obvious strain on his capability to effectively do his job and represent the radio station in the capacity that is acceptable.

Best regards,

Scott Sexsmith
Operations Manager
Q104/EZ Rock 100.5

November 20, 2001

To Whom It May Concern,

I, Ernest Skinner, have been roommates and good friends with Jodie Joyce for the past year. Jodie occasionally let me use his car since we became roommates. During this period of time I lost my license and failed to inform him of it due to embarrassment. I have used an old license of mine, which I found for identification purposes for such places as nightclubs. I know Jodie saw the license from a distance, which gave him the impression that it was my current license. This indicates that Jodie had no idea that I had a suspended license. I would like to apologize for any inconveniences I caused Jodie due to these actions.

Thank you for your time.

Ernest Skinner.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ernest Skinner;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 25, 2002.

During the Respondent's examination of the witness it was determined that he and Skinner were visiting friends where there was alcohol available. Apparently Joyce had gone to sleep and it was at this juncture that Skinner left the scene in Joyce's vehicle. This suggests that Skinner had his own keys or he obtained them from Joyce in some manner. The car was stopped at 5:15 a.m. which would suggest a very long night.

The Respondent explored with the Applicant alternative vehicles. Rental cars were too expensive. His mother used her vehicle for her own job. The station manager would not let him service which would seem an ideal alternative given the size of Sault Ste. Marie.

The matter of his health problem identified his need for his visits to Sudbury where his doctor is monitoring him as he is on a prescribed but controlled drug. His effort to have his file moved to a doctor in Sault Ste. Marie did not match the urgency reflected in his submissions.

Joyce's own driving record was produced by the Respondent but it is deemed irrelevant to this hearing.

The Respondent elaborated on the means by which an interested party can confirm the validity of some one's driver's licence and the Applicant made note of the details.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed under section 50.2(3)(c) and (d) of the Act on the basis that he did exercise diligence before lending his vehicle and the impoundment of his vehicle will and has resulted in exceptional hardship and has caused him difficulty in doing his work. Section 22 of Regulation 632/98 is very specific and provides the Tribunal with clear criteria that must be met by the Applicant in order to establish as a result of the impoundment.

The Tribunal cannot consider any other factors arising from or directly related to the impoundment itself.

In order for the Applicant's claim to be considered under section 22(2)(c) and (d) the Applicant must have demonstrated that all 22(3) has been met. Furthermore, section 22(4) of the Regulation requires demonstration that every reasonable option to the impounded vehicle has been explored, including an alternative vehicle.

The burden to provide evidence to support the Applicant's appeal under the Act is that of the Applicant.

The Applicant offered no further evidence to support his argument that he exercised due diligence to determine that his roommate's driver's licence was valid except that he observed his roommate use his driver's licence certificate to show other's his identity. In fact, contrary to showing due diligence, the Applicant's evidence was that he was never close enough to his friend's driver's licence form to observe that it had expired. Also, given the closeness of the relationship as roommates, it is difficult for this Tribunal to accept that the Applicant would not have been aware of the driver's very poor driving record, particularly when his roommate's driver's licence was suspended while they were roommates.

While the loss of the Applicant's vehicle has been an inconvenience his attempts at an alternative vehicle have been limited. The Radio Station where he works has a company car which he can use when it is available. No mention of using a taxi to cover on the scene news items or other demands for his parents was mentioned which would seem to be a very economic alternative to his own vehicle. Car rental, public transit, or the assistance of friends was not dealt with by the Applicant. His direct financial loss can be recovered from his roommate who has admitted by his letter that the Applicant's loss was his fault.

Considering the above, the Tribunal finds that the Applicant has not proven due diligence or exceptional hardship as defined by the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Charles J. Sandiford,
Presiding Member

RELEASED: December 17, 2001

PELESHOK MOTORS (AJAX) LTD.

PELESHOK MOTORS (AJAX) LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NORMAN MEALING,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

PELESHOK MOTORS (AJAX) LTD., Applicant
HARRY PELESHOK, Agent for Applicant

DATE OF HEARING: December 13, 2001

DECISION RELEASED: December 13, 2001 Oshawa

REASONS FOR DECISION

A hearing was held on December 13, at Oshawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made a n order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Peleshok Motors (Ajax) Ltd. (the "Applicant")
Motor Vehicle:	1986 Pontiac LeMans, plate no. AHEA 287 (the "vehicle")
Date of Appeal:	November 15, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on December 13, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time i n respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

This vehicle was offered as a temporary means of transportation so that full time employment could be arranged by Dan Poirier.

The Applicant indicated that he had loaned the impounded vehicle to Dan Poirier in order that he might be able to travel to Toronto to seek full-time employment. The vehicle in question was an older car which was used as a "courtesy car" by Peleshok Motors. The Applicant also indicated that he had asked Mr. Poirier for his driver's licence number, and that Mr. Poirier had given him a number. He further stated, however, that he did not verify that the licence was in fact valid.

The Applicant also stated that the value of the impounded vehicle was "around \$400.00", and that it did not make sense to retrieve the vehicle from the impound yard since the cost of impounding the vehicle exceeded its value. His purpose in appealing was to regain the vehicle and eliminate the impound fee.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Joseph Daniel Poirier;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 13, 2001.

The Respondent's representative offered no additional evidence. She did, however, indicate that the Applicant had recourse to Small Claims Court and could proceed in that manner to attempt to recover the costs associated with the impoundment from Mr. Poirier.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(b).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42 or 43, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

APPLICATION OF LAW TO FACTS:

The evidence established that, although the Applicant asked Mr. Poirier for his driver's licence number, he did not ask to see the licence, nor did he attempt, in any way, to validate the information given. This is an interesting omission on the part of the Applicant given the fact that the car was normally used as a "courtesy car", and one assumes that, in those cases where the car was loaned for that purpose, more care would be taken to ensure the prospective driver was properly licensed. It is also interesting in light of the fact that a Private Licence Issuing Agency shares the showroom of P eleshok Motors. One can also assume that a check on the validity of Mr. Poirier's licence could have been done quite easily.

Also, the evidence offered by the Respondent was not in dispute, namely, that, on the date the vehicle was impounded, Mr. Poirier's licence was under suspension. The Applicant offered no evidence to contradict that fact. Accordingly, the Tribunal finds that the driver's licence was under suspension at the time of the impoundment and that the Applicant has not established its ground of appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Norman Mealing, Presiding Member

RELEASED: December 13, 2001

HECIMOVICH

VESNA HECIMOVICH

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the “Act”), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: SIMON DANN,
Presiding member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

VESNA HECIMOVICH, Applicant
JOHN BRACEWELL, Counsel for Applicant

DATE OF HEARING: December 14, 2001

DECISION RELEASED: December 20, 2001 ***By Teleconference***

REASONS FOR DECISION

A hearing was held on December 13, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Vesna Hecimovich (the "Applicant")
Motor Vehicle:	1990 Pontiac Bonneville, plate no. AJAX 398 (the "vehicle")
Date of Appeal:	November 26, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being drive and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on December 14, 2001 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Counsel for the Applicant, Mr. Bracewell asked if he could fax 12 pages of reference material to the Tribunal. There was no objection from the Registrar's Representative, Ms. Luba Neuwirth. The Tribunal permitted a short adjournment to allow for time to receive the fax pages.

When the hearing proceeded, Mr. Bracewell informed the Tribunal that the purpose of the fax information was to support his contention that the Tribunal's interpretation of "stolen" was "erroneous" in that it was based on Black's Law Dictionary, 6th edition (BLD-6th ed), whereas the 4th edition made no reference to 'stolen' and that the Criminal Code of Canada (CCC) used the term "theft" to define the offence. Mr. Bracewell advised he would refer to this material later in the hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- 1) I ordered my husband not to drive my car and I usually keep the vehicle with me but on the 3rd of October my boss stopped at my house before work for a discussion and my boss offered to drive me to work. This was an out of the ordinary event and it never occurred to me that my husband would be stupid enough to drive my vehicle.
- 2) It is an extreme hardship for me not to have my car because I work full time at a delicatessen's. Public transit is limited and I suffer from back pain which limits my ability to use the public transit that is available.
- 3) I ask for an extension because I did not understand the details of this impoundment. My first language is Croatian and I tried to get a lawyers appointment but was unable to see him until today.

Mrs. Hecimovich testified that she was aware that her husband, the driver at the time of the impoundment, had lost his licence through suspension and that she generally tried to hide or keep the car keys with her. She confirmed she had asked her husband to not drive the car and he had never taken it before October 3rd, the date of impoundment.

The Applicant, through her interpreter, confirmed that she unusually took the car to work but on the morning of October 3rd when she had called her employer to say she was having difficulty with her back, he offered to come by and pick her up. Mrs. Hecimovich confirmed she worked at a Croatian delicatessen as a meat slicer and received a minimum wage salary. She further

confirmed she had been there for about 5 years and during this period her employer, though he lived in an opposite end of town, had driven her to work on 5 or 6 other occasions. When asked by her counsel if the Applicant considered it unusual for her employer to drive her to work, she replied that it was not.

When Mrs. Hecimovich returned home, her husband told her about the impoundment of her car. He never told her he would take the car. She said she never called the police to report that the car had been stolen at the time it was impounded because she did not want to have her husband charged.

Mrs. Hecimovich said her husband was retired, living on a pension of about \$20-25,000 a year and was not looking for work.

The Applicant testified that she suffers from arthritic back pain and is under a doctor's advice to limit her walking. She thought her doctor could provide a letter saying she should not be walking too much if she asked for such a letter. Her counsel, Mr. Bracewell said that it was difficult to obtain such a letter in the time available.

Mrs. Hecimovich confirmed she takes two types of medication daily for her back pain and it is a half kilometre walk to and from the bus stop. She feels this extra walking has had a detrimental impact on her health.

The Applicant confirmed she works 30 hours a week and earns a minimum wage. All of her income goes into the family's living expenses. She said she was unable to afford the impound fee of \$1,303.26 but managed to borrow it from a friend though she is unsure about how she will pay it back on her income. She confirmed that she and her husband own their home, that there is no mortgage outstanding and that he would not help her pay the impound fee. She explained their affairs are separate and she does not know what he has.

Mrs. Hecimovich confirmed she did not miss any work during the impound period. She took the bus each day because she could not afford to miss any work. She said that she did not have the option of obtaining rides from anyone else nor was she able to rent a vehicle.

When the Registrar's Representative, Ms. Luba Neuwirth, asked why Mrs. Hecimovich had not called the police to charge her husband with stealing the vehicle, the Applicant replied that he was her husband. Ms Neuwirth then asked why the Applicant was appealing on "stolen" if no charges had been placed. At this point, the Applicant's counsel argued that the word "stolen" required a different definition than that implied by the question asked by the Respondent's representative. Counsel argued that the Criminal Code of Canada's use of the term "theft" was the proper guide. Counsel's argument is set out in more detail later in this decision.

Based on questions from the Registrar's Representative, it was established that on the day Mr. Hecimovich took the car, the keys had been in plain sight, on the fridge where the Applicant had left them when she took a ride with her employer. The Applicant said that in future she would always keep the keys with her. Mr. Bracewell stated that because the Applicant had taken medication, she was a bit dizzy and not thinking about the car keys on the fridge when she left.

There were no other witnesses for the Applicant.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Peter Hecimovich;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 MGS Alcohol in Blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 9, 2002.

APPLICATION OF LAW TO FACTS:

The Applicant appealed the impoundment of her vehicle on the grounds that it was stolen and that the impoundment caused exceptional hardship.

(a) The Appeal Ground of "Stolen"

The *Highway Traffic Act* does not define the term "stolen" used in section 50.2(3)(a). In its interpretation of the word "stolen", the decisions of this Tribunal, to date, have relied upon the definition of "stolen" as found in the Oxford Dictionary and Black's Law Dictionary.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transportation of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

The Respondent's representative relied on the foregoing definition to show that the Applicant's motor vehicle was not stolen by the Applicant's husband, and accordingly argued that the Applicant had not established the ground of appeal under section 50.2(3)(a) of the *Highway Traffic Act*.

Counsel for the Applicant, in the other hand, argued that the foregoing definition was not the correct one. Mr. Bracewell argued that the meaning of "stolen" is defined by the Criminal Code of Canada's term "theft". He referred to the material he had faxed to the Tribunal (a copy being provided to the Registrar's Representative). The material consisted of an excerpt from Martin's Criminal Code 2001, 's.2 – "steal" means to commit theft;' and s.322 "Theft" and a copy of the QUICKLAW report of the Supreme Court of Canada, *R. v. LaFrance*, [1975] 2 S.C.R. 201. Counsel submitted that the use of the word "permanently" in the definition of "stolen" in Black's Law Dictionary (6th ed) ignored the reference to "temporarily" in the definition of "theft" in the Criminal Code of Canada.

Counsel argued that the meaning of the word "stolen" in section 50.2(3)(a) of the *Highway Traffic Act* should be the same as the definition of "theft" in section 322 of the Criminal Code of Canada. His argument is that "theft" in the Criminal Code includes a temporary taking, "stolen" in the *Highway Traffic Act* is the equivalent of "theft" in the Criminal Code, therefore "stolen" in the *Highway Traffic Act* must include a temporary taking. He argued that since the vehicle has been taken on a temporary basis by her husband, therefore it must have been stolen by her husband.

The Tribunal has considered the argument of counsel, but it disagrees that the meaning of “theft” under section 322 of the Criminal Code of Canada (the “Code”) should govern this Tribunal’s interpretation of the word “stolen” under section 50.2(3)(a) of the *Highway Traffic Act*.

The word “theft” in the Code and the word “stolen” in the Act are different words. Had the provincial Legislature wished to use the same words, it would have done so. Also, the Criminal Code of Canada and the *Highway Traffic Act* are separate statutes, the Criminal Code being a federal statute and the *Highway Traffic Act* being a provincial statute. There is no cross-referencing in section 50.2(3)(a) of the Act to the term “theft” in the Code. In certain sections of the Act, reference is made to the Code, such as section 50.1 of the Act, but that is not done in section 50.2(3)(a). This leads the Tribunal to the conclusion that not referring to the Code was intentional.

An ancillary argument of counsel was that the word “stolen” did not appear in the 4th edition of Black’s Law Dictionary and therefore the Tribunal should give it little weight when it appears in the 6th edition as its use in the 6th edition is erroneous. The Tribunal sees no merit in this argument. It must proceed on the basis that it should rely on the updated version. The Tribunal also notes that the reference in Black’s Law Dictionary (6th edition) to the word “theft” is defined as follows:

Theft. A popular name for larceny. The act of stealing. The taking of property without the owner’s consent. *People v. Sims*, 29 Ill.App.3d 815, 311 N.E.2d 178, 179. The fraudulent taking of personal property belonging to another, from his possession, or from the possession of some person holding the same for him, without his consent, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of the person taking.

It is also said that theft is a wider term than larceny and that it includes swindling and embezzlement and that generally, one who obtains possession of property by lawful means and thereafter appropriates the property to the taker’s own use is guilty of a “theft”. *Kidwell v. Paul Revere Fire Ins. Co.*, 294 Ky. 833, 172 S.W.2d 639, 640; *People v. Pillsbury*, 59 Cal.App.2d 107, 138 P.2d 320, 322.

Theft is any of the following acts done with intent to deprive the owner permanently of the possession, use or benefit of his property. (a) Obtaining or exerting unauthorized control over property; or (b) Obtaining by deception control over property; or (c) Obtaining by threat control over property; or (d) Obtaining control over stolen property knowing the property to have been stolen by another.

Were “stolen” omitted from the 6th edition and only “theft” were left, that definition also contains the element of “intent to deprive the owner permanently of the possession, use or benefit of his property...”.

On reviewing the facts, the Tribunal finds no evidence the vehicle was stolen. While there is evidence to suggest it was used without specific consent of the Applicant, there is also no evidence regarding the intent of the driver to deprive the Applicant of the use of her motor vehicle. The evidence before the Tribunal is that

- (a) the relationship of the Applicant to the driver is that of a married couple living together,
- (b) the key to the motor vehicle was in plain sight on the fridge in the kitchen, when Mr. Hecimovich decided to use the vehicle while the Applicant was at work,
- (c) Mr. Hecimovich was at home to tell the Applicant of the impoundment on her return home from work, and
- (d) the Applicant never called the police to request charges be laid against her husband.

The reasonable conclusion to draw from this is that the Applicant's husband temporarily borrowed the vehicle. There is no evidence of intent to deprive her of its use, permanently or otherwise.

On the evidence before it, the Tribunal finds that the Applicant has not established that the vehicle was stolen at the time of the impoundment.

(b) The Appeal Ground of "Exceptional Hardship"

With regard to the Applicant's appeal on the basis of exceptional hardship, counsel for the Applicant contended that the loss of her vehicle placed a substantial physical strain on the Applicant due to an arthritic back problem as well as a financial burden due to her having to borrow monies for the impound fee, which she did not have and would have difficulty to repay on her income.

The Registrar's representative contended that the criteria of hardship had not been met as alternative transportation through public transit had been available and the Applicant had not missed any work. The Applicant also had the option of suing her husband for the costs.

Under section 22(1) of Regulation 632/98, amending O. Regulation 574 under the *Highway Traffic Act*, if no alternative to the impounded vehicle is available, the Tribunal shall consider whether the impoundment will result in a threat to the health or safety of any person ordinarily transported in the motor vehicle. In this case, an alternative was available to the Applicant and there was no evidence of loss to any other person. She used public transit to get to work and did not miss any work. Even were there no alternative, there is little evidence that would support the Tribunal drawing the conclusion that the impoundment caused any threat to the health to the Applicant or any other person.

In the evidence presented, counsel for the Applicant described how the Applicant suffered from back pain and took 2 types of medication on a daily basis. Counsel also argued that as Mrs. Hecimovich was under a doctor's advice to limit her walking, the vehicle's loss forced her to walk a half kilometer twice a day, to and from the bus stop. While counsel confirmed, through questions to the Applicant, that her doctor would provide a letter to confirm his advice to limit her walking, no such letter was available as evidence. Mrs. Hecimovich also confirmed her feeling that having to do this extra walking had a detrimental effect on her health. There was no supporting evidence.

Under section 22(2) of Regulation 632/98, the Tribunal may consider financial or economic loss under section 22(2)(b) if all of the requirements of section 22(3) are met. One of the requirements of section 22(3) is that no alternative to the impounded vehicle is available, and section 22(4) requires that the Applicant demonstrate that no alternative is available by demonstrating that she has considered any inquired into every reasonable option. This has not been demonstrated by the Applicant in this case. In any event, as stated above, there was an alternative to the impounded vehicle.

Further, the evidence of financial loss given by the Applicant is not a full account of her situation. Mr. Bracewell reviewed the Applicant's financial hardship as working a 30 hour week at minimum wage and using her entire income for the family's living expenses. However, there was no evidence of any debts or obligations or evidence that would permit the Tribunal to assess the Applicant's overall financial status. No specific details were presented regarding the financial impacts resulting from the vehicle impoundment, beyond the facts that the Applicant and her husband owned their home, there was no mortgage, that he had an annual income of \$20-25,000 and that he was not looking for work.

Also, counsel referred the Tribunal to the Tribunal's decision of September 11, 2001 in the case of *Winant*, in which the burden of the impound fees was considered. That case has a number of differences from this case. For example in the *Winant* case, Mr. Winant lost his employment, the family had no income and were at risk of losing their home, there was illness and there was no local transit to transport the children to school.

The evidence given by the Applicant does not establish a financial loss that is exceptional. The evidence showed the Applicant had been able to get to work every day. Although the Applicant may not wish to do so, she has the option of financial help from her husband to meet the impound costs if she so chooses.

On the evidence given by the Applicant to support the claim of exceptional hardship, the Tribunal finds that the Applicant has failed to prove exceptional hardship as required by the Act and Regulations.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Simon Dann, Presiding Member

RELEASED: December 20, 2001

DOLBER

JENNIFER DOLBER

**Appeal under section 50.2 of the *Highway Traffic Act*,
R.S.O. 1990, Chap.H.8 as amended (the "Act"), from
the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: ELMER MERKLEY,
Presiding member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

JENNIFER DOLBER, Applicant
No Show

DATE OF HEARING: December 27, 2001

DECISION RELEASED: December 31, 2001 London

REASONS FOR DECISION

A hearing was held on December 27, at London, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Jennifer Dolber (the "Applicant")
Motor Vehicle:	1990 Pontiac Transport, plate No. AAWB 162 (the "vehicle")
Date of Appeal:	December 7, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on December 27, 2001 and proceeded as an oral hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

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To Whom It May Concern,

- 1) First of all I would like to say that as you noticed on the previous or preceding form that it was neither my husband nor myself that was driving while under suspension, but family friend Rick Heckman. My husband and I were both under the impression that Mr. Heckman has a valid driver's licence. Mr. Heckman had received an impaired driving charge some time ago, but had called us at home after his court date and explained to us that through a technicality he had beaten the charge and that his licence would not be revoked. Mr. Heckman is a friend and we had no reason to doubt his story. He has repeated this story to us both time and time again, which gave us both no real reason to suspect any suspensions. We obviously were misled through no fault of our own and in my opinion should not be held responsible for and suffer for Rick's deception.
- 2) Also regarding the "exceptional hardship" resulting from the impoundment, I am 8 ½ months pregnant with my fourth child. My husband and I live in a small community about 25 minutes from our family doctor, and the hospital where I will be delivering our child in Strathroy. My husband has a vehicle he can drive, however he works shift work as well as being a part-time farmer. His job is the same distance away as the hospital (Strathroy), which once again is about 25 minutes away. I am prone to deliver my babies early, as the previous three have all been early. Our last child being 15 days early. Also in the last pregnancy my water broke 7 weeks early and there were complications resulting in hospitalization. With the loss of the use of the van I have no way to get to doctor's appointments, to take my son to his pre-school or to re-act to any emergencies which may occur while having small children in a household. Also as I mentioned, we are miles away from the nearest hospital or doctor, not to mention grocery store or pharmacy. If I were to have problems near the end of this pregnancy as in the past, I hate to think of what may happen without the use of a vehicle to respond to problems etc., while my husband is at work with our only other vehicle. Please understand our concerns about the good health of our family and re consider this impoundment. My children are 9, 3, 1 ½ years old.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Rick Heckman;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Licence Suspended under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 1, 2002.

In reference to the grounds of due diligence, the Registrar submitted that the Applicant has not provided any evidence that would indicate that she took reasonable efforts to ensure that the driver of her vehicle, Mr. Rick Heckman, had a valid driver's licence. In the Owner's Position, Ms. Dolber states, "Mr. Heckman had received an impaired driving charge some time ago, but had called us at home after his court date and explained to us that through a technicality he had beaten the charge and that his licence would not be revoked". "Mr. Heckman is a friend and we had no reason to doubt his story". Ms. Dolber fails to mention what type of due diligence she exercised to determine that Mr. Heckman was not under suspension or that he had a driver's licence.

In reference to the ground of exceptional hardship, the Registrar submitted that the criteria to establish exceptional hardship are cumulative and therefore the Applicant must meet all the requirements of the Regulation before her appeal can be considered. Ms. Dolber has failed to meet the conditions set out for demonstrating exceptional hardship as prescribed in the *Highway Traffic Act*, Section 22(3) of Regulation 574, R.R.O., as amended by Regulation 632/98.

In the Owner's Position, Ms. Dolber mentions that her husband has a vehicle, however he works shift work along with part time farming. The Registrar submits that routine doctor visits, trips to the grocery store and pharmacy could be scheduled around her husband's shift work. Ms. Dolber has not indicated whether the impounded vehicle would result in any financial, employment or educational loss, nor whether the loss will be immediate, significant and

lasting. She merely speculates that an emergency could develop during her pregnancy or due to her other children requiring medical aid during the impoundment period. The Registrar further submits that there is no evidence to demonstrate that the Applicant has inquired into any reasonable options to show that no alternative to the impounded motor vehicle is available that would adequately mitigate or eliminate any potential threat or loss.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The first issue to be considered in the appeal is whether Ms. Dolber, the motor vehicle owner, exercised due diligence to determine that the driver's licence was not suspended.

The onus of proof, based on the balance of probabilities, rests with the Applicant.

In the Owner's Position statement, Ms. Dolber states that she was aware that Mr. Rick Heckman, the driver, had an impaired driving charge some time ago but was under the impression, based on Mr. Heckman's comments, that the charges had been dropped due to a technicality. The Owner's Position statement fails to mention what type of due diligence she exercised to determine that Mr. Heckman's driver's licence was not then under suspension.

The Tribunal finds that the owner of the motor vehicle in accordance with Section 50.2(3)(c) of the *Highway Traffic Act*, did not exercise due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at that time in respect of which the order was made was not then under suspension.

The Applicant also requested an appeal on the grounds of exceptional hardship, in accordance with Section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment.

For the Applicant's claims to be considered, she must demonstrate that all of Section 22(3) has been met. This has not been done by the Applicant. Furthermore, Section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has not provided any evidence to the Tribunal to show that every reasonable option has been considered and inquired into as required under Section 22(4).

With regard to the Applicant's ground of appeal that the impoundment will result in exceptional hardship, the Tribunal finds that the Applicant has not established exceptional hardship as prescribed under Section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: December 31, 2001

SKOF

VERA SKOF

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

VERA SKOF, Applicant
SUSANNE SKOF, Agent for Applicant

DATE OF HEARING: December 28, 2001

DECISION RELEASED: December 31, 2001 Ottawa

REASONS FOR DECISION

A hearing was held on December 28, 2001, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Vera Skof (the “Applicant”)
Motor Vehicle:	1991 Chevrolet GM4, plate no. YC6 230 (the “vehicle”)
Date of Appeal:	December 12, 2001

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on December 28, 2001 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Prior to the commencement of the Hearing the Respondent provided the Tribunal with original certified copies of the documents on file.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Due to my health and my husbands health we require the use of our only vehicle. To make doctor's appointments, get medications or even to go to the grocery store for living we need the use of a vehicle. My husband and I both have retired, we are both in bad health and rely on the impounded vehicle for our transportation.

I suffer from asthma and never know if I need to go to the hospital for treatment. My son the driver of the vehicle at the time of impoundment is 33 and did not inform us of the status of his licence.

At the Hearing the Applicant was represented by her daughter Ms Susanne Skof. The Applicant explained that she allowed her son to driver the vehicle as on the day he was stopped she did not trust herself to be on the road due to a "...terrible migraine..."

In evidence the Applicant reiterated the statements made in the Notice of Appeal, that the vehicle is essential in order to enable the Applicant, to seek treatment in case of emergency, as she is an asthma sufferer.

Both the Applicant and her husband are retired and on small disability pensions. The Applicant is not able to afford the cost of rental, nor to take taxis to go into town to do her grocery shopping.

The Applicant's two daughters do not live near the Applicant's trailer Park.

The Applicant is able to ask her neighbour to lend her his vehicle but does not want to impose.

In cross-examination, the Applicant asserted the fact that she and her husband have missed several medical appointments due to the impoundment, and that this has affected her health adversely. Her asthma is getting worse. The Applicant is using the "puffers" but requires treatment. In fact she feels she should have gone to the hospital on Christmas Eve but did not want to bother anyone. The cost of the ambulance is prohibitive as it costs around \$ 40 to \$45.

Public Transportation is available to the Applicant but the bus stop is twenty minute walk, and the cold aggravates the Applicant's asthma. Further it is necessary, for the Applicant to take two buses in order to visit her physician.

In closing, the Applicant requested the return of her vehicle, although she is able to ask her neighbour to lend her his car, she feels that he does so unwillingly. He does not like the vehicle to be driven in icy conditions. She is also concerned that sometimes he does not open the door, and in the case of an emergency, she would not want to disturb him during the night. All the neighbours are older people.

The Applicant's agent, her daughter, Ms Susanne Skof further commented that her brother had assumed no responsibility for the incident, and that he had not even provided his parents with the \$100.00 appeal fee. She noted that her mother has no one near by to assist her in case of an emergency.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Michael Skof;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Blood/Alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 12, 2002.

The Respondent offered no viva voce evidence at the hearing but relied on information previously submitted to the Tribunal.

In closing, the Respondent agreed that asthma is a severe illness, but argued that the Applicant has not proven the exceptional hardship ground for appeal. The Respondent suggests that the Applicant may avail herself of an alternate vehicle. Further, as long as the Applicant has an alternate means of transportation, her health is not at risk, thus the health and safety grounds may not be considered.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11), as amended December 6, 2000. "Owner" is defined as:

"Owner" means each person whose name appears on the certificate of registration for the vehicle but in subsection (4) "owner" means the person whose name appears on the plate portion of a permit in cases where the certificate of registration consists of a vehicle portion and a plate portion and different persons are named on each portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the [Tribunal] shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The [Tribunal] may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship grounds of appeal as provided in subsection 50.2(d) of the Act.

Section 22 of Regulation 574, R.R.O. 1990 as amended by Ontario Regulation 632/98 is very specific, in that it provides the Tribunal with criteria the Applicant must demonstrate to determine that exceptional hardship will result from the impoundment.

Section 22(1)(a) of the Regulation allows consideration in circumstances which could pose “a threat to the health or safety of any person ordinarily transported by the motor vehicle”. Nonetheless, in order for the Tribunal to apply subsection 22(1)(a), the criterion must be met that “no alternative to the impounded motor vehicle is available”. To show this, subsection 22(4) requires the owner to demonstrate that “every reasonable option has been considered...”.

Is there no alternative to the impounded vehicle?

Public transportation is a twenty-minute walk from the Applicant's home in a Trailer Park. The Applicant is on a disability pension and does not own another vehicle. She has no nearby family that could assist her in the case of an emergency. The Applicant is able to ask to borrow her neighbour's car, but the Applicant is very reluctant to do this and the neighbour will sometimes not open the door. According to the Respondent, this would preclude the Tribunal from considering Section 22(1)(a). The Respondent suggested that the Applicant missed appointments by “choice”, as she could have continued to rely on her neighbour's car.

The Tribunal does not concur. The Applicant has no right to use her neighbour's vehicle. The availability of the vehicle is tenuous and not a reasonable option considering the Applicant's vulnerable medical condition.

The Applicant and her husband are on a Disability pension. The rental of vehicle or the continuous use of taxis would be a severe burden.

Is there "a threat to the health or safety of any person ordinarily transported by the motor vehicle"?

The person ordinarily transported by the vehicle is the Applicant, and the Tribunal finds that there is enough evidence to substantiate a decision of exceptional hardship. The Applicant has missed several physician's appointments. Further, asthma is a condition worsened by anxiety. It is natural for the Applicant to feel more secure having a vehicle in the driveway, particularly since she worries that she may not have the cash necessary to pay for an ambulance if one were needed.

Thus, the Tribunal finds the Applicant has no alternate means of transportation, the impoundment is a threat to the health of the Applicant and the Applicant has met the criterion of Section 22(1)(a).

After assessing the evidence presented, the Tribunal finds that the Applicant has established the exceptional hardship ground for appeal, as required under section 50.2(3) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 31, 2001

859 – SEVERE GAGGING

ADLS – 859 – SEVERE GAGGING

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: December 5, 2001

Toronto

DECISION

A hearing was held on December 5, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: December 6, 2001

ADLS – 859 – SEVERE GAGGING

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: December 5, 2001

DECISION
RELEASED: December 6, 2001 Toronto

REASONS FOR DECISION

A hearing was held on December 5, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on December 6, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated November 8, 2001, and was received by the Tribunal on November 13, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Counsel for the Applicant presented a letter from the Applicants' employer and requested it to be added to the documents submitted. There was no objection from the Representative for the Respondent and the document was added to the file. The Representative for the Respondent also submitted the true and certified copies of the Notice to Registrar, Vehicle and Drivers' abstracts. These documents were added to the existing MTO submissions. The documentary file was then entered as exhibits with the consent of both parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar Dated November 1, 2001.
- b) Exhibit # 2 Notice of Appeal Form received by the Tribunal Dated November 13, 2001.
- c) Exhibit # 4 Letter from Atripco received by the Tribunal December 5, 2001.

By the Respondent:

- a) Exhibit # 3 MTO Submissions, received by the Tribunal November 30, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
 - (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was sworn and took the stand. He testified that on November 1, 2001 at approximately 1:30 a.m., he was driving home from work and he was stopped by police. He testified that he had entered onto the 401 Eastbound at Weston Rd. and was stopped by OPP just west of Keele St. Once he was pulled over he produced his identification to the officer and the driver was identified as the Applicant. According to the Applicant, he was asked by the officer if he had been consuming any alcohol that evening, to which he replied no. He was asked to accompany the officer back to her cruiser. He was placed in the front of the cruiser. He was read the demand for a breath sample and the road side screening device was demonstrated to him by the officer.

According the Applicant's testimony, he attempted to provide a sample and after two times he started gagging or choking. He then testified that he asked to officer to take him to the hospital to get a blood test to prove that he had not been drinking. After his failed attempts to provide a suitable sample, the Applicant was charged with failure to provide a sample, and he was released. His motor vehicle was hooked up to a tow truck. He asked the tow truck operator to take him to the hospital so that he may get a blood test. The operator instead took him home, and the Applicant subsequently returned to the hospital. According to the Applicant

he was seen by the duty nurse and when he explained his situation, the duty nurse contacted the duty doctor, Physician # 1 who in turn ordered the blood work. The Applicant left the hospital at 5:00 a.m. with the results.

The Applicant testified that he had provided reports with regards to his gagging or choking. Two "medical: " letters that were submitted. These letters were both written by Dentists. The first report by Physician # 2, indicated that the Applicant was seen between November 1998 through January 1999, Physician # 2 has not seen the Applicant since that time. The report indicated that on documentary review of the file it was noted that the Applicant was a severe gagger and it proved difficult to examine his mouth and subsequent surgery. Physician # 2 stated that the Applicant was admitted to the hospital where he underwent extensive oral surgery. Physician # 2 goes on to say that the Applicant stated to him that "any time an object comes near his lips or oral cavity it results in severe gagging." The second report, written by Physician # 3 confirms that the Applicant suffers from severe gagging reflex when objects are placed in his mouth making routine check-ups and cleaning very difficult. Physician # 3 comments that based on "the Applicant's history of gagging, it is my belief that his might physically prevent him from blowing properly on the roadside breathalyzer test. His failure to blow properly might be due to this physical disability." There was no other medical evidence presented to the Tribunal

The Applicant was asked by the Representative for the Respondent if he could demonstrate to the Tribunal, how he attempted to provide the sample by blowing into the mouthpiece which was provided to him. The Applicant took the mouthpiece and proceeded to make a seal with his lips and blow into the mouthpiece. This action alone did not cause an increase gag reflex. Upon blowing, the Applicant made a slight coughing sound. He indicated to the Tribunal that this was the choking that happens. However, the Applicant further testified that he is able to smoke cigarettes, eat, place a fork in his mouth and brush his teeth without invoking this gagging response. The Applicant said he could do this because these objects were not in his mouth for a long time. The Applicant was asked if he has sought an medical attention for this condition. The Applicant testified that he had not consulted his family physician nor had he had been seen or referred for a specialist's consultation. The Applicant was asked by the Representative for the Respondent "how long did the officer ask you to blow into the device?" The Applicant replied, "20 seconds" The Applicant had nothing further to add and was excused from the stand.

The next witness, Police Officer # 1 of the OPP Toronto detachment. The officer testified that on November 1, 2001 she was working the R.I.D.E. team. The officer testified that she was on patrol eastbound on Highway 401 when she observed a red Pontiac sunbird switch lanes and weave in and out of the lane. The officer testified that she followed the vehicle which was travelling at 80km per hour in a 100 km/h zone. The vehicle again changed lanes and was again weaving in and out of the lane. The officer testified that she believed that this may have been a sign that the driver was either fatigued or impaired. She activated her lights and the Applicant pulled off on the right side of the shoulder of the road. The officer also testified that

the driver had not completely pulled on the shoulder and had to instruct him to pull completely off of the roadway. Upon speaking with the driver, the officer testified that she observed two things. First, the driver's eyes were bloodshot and glassy. Secondly, there was a distinct odour of an alcoholic beverage coming from the driver. Police Officer # 1 asked the driver if he had been drinking, to which the Applicant replied no. The officer requested the Applicant's drivers' licence and he was identified as the Applicant. The officer then read the demand for a breath sample. The Applicant accompanied the officer back to her cruiser where he was placed in the front passenger seat. The officer then demonstrated the use of the Dragger alcotest 7410GLC road side screening device. The Applicant stated that he understood the instruction. The officer then set the machine, placed a new mouth piece into the device and proceeded to blow into the machine. She blew for approximately 6 seconds. A tone was heard and a reading of 000 was obtained indicating that a suitable sample was retrieved and that there was no alcohol in her system.

The device was reset and a new mouth piece was placed in the machine. The officer then gave the Applicant 7 opportunities to provide a suitable sample. On each occasion, in spite of her continuous coaching to blow until told to stop, the Applicant each time began to blow, the machine sounded which indicated sufficient volume of air was entering the machine, however the Applicant stopped blowing before a suitable sample could be retrieved. According to the testimony of the officer, on the last two attempts, the Applicant began to blow, which lasted approximately 3 seconds, stop blowing and then continue again for another 3 seconds without removing his lips from the mouth piece. However, once the flow of air has stopped, an EO was registered which means unsuitable sample and the machine again had to be reset. The officer cautioned the Applicant about the repercussions of not providing a suitable sample. The Applicant was subsequently charged and released. The Applicant asked the officer to take him to the hospital for blood tests to prove he was not drinking. However, the officer testified that she did not see any reason why he could not perform the breathalyser test as demanded and saw no medical reason why he should have his blood drawn. The officer testified that she believed the only time that a blood sample would be taken was if the driver of a vehicle was unable to provide a breath sample due to injury.

The officer had no other testimony and was excused from the stand.

The Tribunal after very careful review of the evidence and after much deliberation, accepts the evidence of Police Officer # 1.

Counsel for the Applicant argued that the reports submitted over that of the Applicant to the Tribunal were sufficient to substantiate the Applicant's medical condition and that the testimony provided by the Applicant and the reports provided, met the onus on the Applicant to establish the merits of his appeal.

In an appeal of this kind, the onus is on the Applicant to substantiate his position. The Tribunal finds that the documents submitted by the Applicant do not substantiate his claim that he had a medical condition which precluded him from providing a breath sample.

The report from Physician # 2 and Physician # 3, fails to meet the very specific requirements of Section 15(1) of Regulation 574 of the *Highway Traffic Act*, namely that the report be from and signed by a legally qualified medical practitioner, which Physician # 2 and Physician # 3 are not. Further, both reports are address “to whom it may concern”, but section 15(1)(c) requires a statement that the “medical practitioner has prepared the report, or is aware that the report may be used in support of an appeal to the Board from the suspension of a driver’s licence under section 50.1 of the Act. Further, neither of these two reports indicate any current clinic testing. They provide no results of testing the Applicant’s condition or how this condition precludes the Applicant from providing a breath sample. The Tribunal finds that the reports submitted in support of the Applicant’s position fails to meet the requirements of section 15(1), and the Tribunal attaches very little weight to these reports.

APPLICATION OF THE LAW TO FACTS:

Reviewing the foregoing facts, the Applicant did not relate his medical condition to the requirements of Regulation 574 and section 50.1(2) of the *Highway Traffic Act*.

The evidence is clear that the Applicant refused to provide a breath sample, but for no stated medical reason. The evidence submitted of the actions of the Applicant suggests that the Applicant had no intention of giving a proper sample. The evidence presented by Police Officer # 1 was quite clear in that the Applicant was able to form a tight seal with his lips around the mouthpiece of the screening device and began to provide adequate amounts of air into the machine but started and stopped. This stopping and then continuing to blow rendered an error message each time. At no time did the Applicant indicate to the officer that there was a medical problem which made it impossible to provide an adequate sample.

The Applicant has not discharged the onus to establish a valid medical reason for his failure to provide a breath sample when a demand was made under section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 1, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee,
Presiding Member

RELEASED: December 11, 2001

880 – HYPERVENTILATION

ADLS – 880 - HYPERVENTILATION

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: December 10, 2001

Orillia

DECISION AND ORDER

A hearing was held on December 10, 2001, at Orillia, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated November 8, 2001 imposed by the Registrar pursuant to Section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to Section 50.1(5).

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: December 11, 2001

ADLS – 880 - HYPERVENTILATION

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: December 10, 2001

DECISION
RELEASED: December 11, 2001

Orillia

REASONS FOR DECISION

A hearing was held on December 10, 2001, at Orillia, Ontario, to consider the appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA") of the Applicant.

The Tribunal released its Decision on December 11, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated November 9, 2001, and was received by the Tribunal on November 20, 2001, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Representative of the Ministry provided the Tribunal with original certified copies of Ministry of Transportation documents previously submitted.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar Dated November 8, 2001.
- b) Exhibit # 2 Notice of Appeal Form – received November 20, 2001.
- c) Exhibit # 4 Medical Report from Physician # 1 – received November 29, 2001.

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – received December 4, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's Driver's Licence was suspended "November 8th, 2001" as set out in her Notice of Appeal (Exhibit # 1)

Applicant's Evidence -

Page two of Notice of Appeal refers to a short typewritten note addressed "To Whom It May Concern", dated November 14, 2001, under the signature of Physician # 1.

Physician # 1 states that he has been the Applicant's family physician since 1987 and has "...been acquainted with ...medical history... of psychiatric disturbances characterized by depressive and panicky affect. Stressful situations, both physical and emotional, have been known to cause anxiety, hysteria and hyperventilation. When excessive, hospitalization and medication have been necessary..." (Exhibit # 1)

At the Hearing, the Applicant testified that she is asking for the return of her licence, as she did not refuse to blow. She was unable to provide the demanded breath sample due to her inability to breathe.

The Applicant explained that as set out in her doctor's statement, stressful situations are upsetting and cause panic attacks and anxiety, which instigate hyperventilation. The cell doors closing behind her, made her feel uncomfortable and she "begged" to be let out for air. The Applicant also called for a female officer, but was told that none was available.

In these situations the Applicant would normally use an inhaler, but the inhaler she carries with her was on the floor in the car, by the roadside.

In both in chief testimony and in cross-examination, the Applicant attested that she did not ask for medical assistance as she felt that if she was given some "...space and some air..." she would compose herself and be "fine".

The Applicant believes that she was pulled over because the car weaved as she was trying to take off her shoes. The Applicant attested that she is aware of how much alcohol she can consume as she has taken the "Smart Serve" Course. The "Smart Serve" Course "...is something that most people who serve alcohol have to take... to notice the signs of impairment and body weight vs alcohol limits...". The Applicant serves alcohol twice a year when she volunteers with the Lyons Club.

The Applicant "...knew..." that she was not over the limit, and therefore believes it would be "...stupid..." to refuse to provide a breath sample.

In cross-examination, the Applicant reiterated her previous testimony that at the time she was suffering from: "...hysteria, anxiety and hyperventilation...". The Applicant clarified her definition of "hysterical" by describing her behaviour as "...begging ...to be out of the room, for air ...for a female officer ...curling up into a tiny ball ...in the cell".

Once out of the cell, the Applicant endeavored to control herself, but the fact that the officer was "...being rude to the point of being ignorant..." did not help the situation.

During the breath test session the Applicant asserted that she "...repeatedly..." told the officers that she was not refusing, but that she could not breathe, but that they just kept telling her "...to do it right...".

The Applicant remembers speaking to the Duty Counsel "...haltingly..." and not going into diatribes during the sessions, as she was not able to speak too much.

As for being able to create a seal around the mouthpiece, the Applicant maintains that she was hyperventilating and therefore attempting to gasp for air. Thus, she felt it difficult to close her mouth around the mouthpiece.

The Applicant did visit her family physician on the same of the incident, but it was just for conversation. There was no need at the time for further tests or medication.

In reply to the Ministry's Representative question as to when the last time a similar incident of hyperventilation occurred, the Applicant described an occasion in "...1998 or 99..." when, while waiting for the physician, in a small room with the door closed, she had to be taken directly to the hospital.

With respect to asking for medical assistance, the Applicant stated that she believes assistance would not have been provided a "...one cannot expect anything from anybody...".

In her closing remarks, the Applicant was adamant in her assertion that that she did not refuse to provide a breath a sample but that she was not able to do so due to the circumstances at the time.

The Applicant explained that she "...cannot handle being trapped...", but what was making her feel anxious was not just the fact that she "...was sitting in a police cell, at night...". "...More stress..." was being exerted by what was going on in her mind. She "...needed to get home ...get children to school ...get babysitter home ...get to a job just gotten ...already late ...babysitter angry".

The Applicant reiterated her previous statement, that the presence of a "...female officer would have made the male officers less intimidating..." and that she would have been "...calmed down...".

Respondent's Evidence

The Respondent provided the following Documents:

1. Notice to the Registrar, certified November 23, 2001.
2. Driving Record of the Applicant, certified November 23, 2001.
3. Vehicle record of occurrence date, certified November 23, 2001

The Respondent called Police Officer # 1a Detachment as a witness. Police Officer # 1 has been a police officer for twelve years.

During examination in chief, Police Officer # 1, testified as to the grounds that led up to the demand for a breath sample.

Police Officer # 1 noticed that when the Applicant was stopped, she had at least one shoe off, and that she had to do the buckles of her shoes, prior to getting out of the car.

There is not a lot of room in the back of the patrol car, but the Applicant did not appear "...excited..." She was crying, and cried "...through out the investigation...".

In his notes, Police Officer # 1 noted: "...hesitation...". It appeared to Police Officer # 1, that the Applicant "...did not want to be put into the cell...". Police Officer # 1 added that the "...cell area is about the size of the table ...maybe a little less...".

Police Officer # 1 was present during the breathalyzer session. He testified that the Applicant was "...crying ...upset ...but at no time hyperventilating ...or breathing excessively...". The Applicant was not making a seal around the mouthpiece. She puffed her cheeks, but no air went through the instrument, except for one brief moment, when the machine sounded a brief note, but stopped.

Police Officer # 1 confirmed the Applicant's testimony that no medical assistance was requested. In his opinion, the Applicant was able to provide a breath sample.

The Respondent also called as a witness, Police Officer # 2 of the Ontario Provincial Police. Police Officer # 2 has been with the Orillia Detachment of the Ontario Provincial Police since June of this year, previously having been with the Toronto Police Services since 1988. Police Officer # 2 became a qualified intoxilyzer technician in October 2000.

Police Officer # 2 testified that he checked the machine prior to the breathalyzer session, and that he instructed the Applicant on the proper procedure for the provision of an adequate breath sample.

The Applicant was given five opportunities to provide a breath sample and Police Officer # 2 described each attempt separately.

In her first attempt the Applicant took a deep breath "...put her mouth around the mouthpiece, without making a seal and blew completely past the mouthpiece...".

Police Officer # 2 testified that in his opinion, the Applicant in subsequent attempts deliberately blocked the mouthpiece with her tongue to prevent air from going into the machine. During one of the attempts, a brief tone was heard, indicating that some air was flowing into the instrument, but it was not enough to register an adequate breath sample.

Police Officer # 2 stated that he did not observe the Applicant to be under physical distress, although "...she seemed visibly upset...". Asked whether he felt that the Applicant could communicate easily, Police Officer # 2 replied that the Applicant did not speak much but "...she did say the odd thing ...request for a female officer..."

Police Officer # 2 did not remember the Applicant crying during the session, but mentioned an incident where the Applicant "...jumped up from her chair ...to get a roll of paper towels from the wall to blow her nose...".

As for requesting a blood sample, Police Officer # 2 stated, that this measure is totally discretionary and is to be used only in instances where the individual is physically incapacitated. This was not a situation he believed warranted such a request.

In reply to the Applicant's question as to how he knew that she was blocking the mouthpiece with her tongue, Police Officer # 2 replied, that he based his opinion on the fact that he "...could somewhat see...".

The Applicant asked Police Officer # 2, if he remembered being intimidating and using the words: "Blow ...surely you know how to blow...". Police Officer # 2 responded that he behaved in a "professional" manner and stressed that he did not recall, "...if ...used those specific words..." but acknowledged, "...I probably used words to that effect..."

In his closing remarks, the Ministry's Representative contended that at no time during the ride to the detachment nor at the detachment did the Applicant request medical assistance nor inform either of the officers that she was in any physical distress.

The Ministry's Representative, Mr. Biel suggested that Physician # 1's report is inadmissible in that it fails to conform with the requirements of "...section 13 of Regulation 574...".

Mr. Biel further pointed out the report's deficiencies: does not describe specific incidents; does not relate the condition to the incident; is not corroborated by a psychiatric report; gives no indication of treatment or medication required and "...speaks in the past...". Mr. Biel suggests that the last panic attack occurred in 1999 and there is no indication of a recurrence, the inference being, it is safe to assume that panic attacks are now "...behind her...".

The Tribunal was asked to accept the evidence of both officers which according to Mr. Biel, was "...consistent and forthright..." in specifying that the Applicant was visibly upset but "...not hysterical nor hyperventilating...".

Mr. Biel suggests that the Applicant's behaviour was no different than anyone in her situation, who knowing they had been drinking did not wish to incriminate themselves by providing a breath sample.

The Ministry's Representative urged that the Tribunal confirm the Registrar's decision to suspend the Applicant's driver's licence, as there was no visible indication that the Applicant was unable to provide a breath sample for any other reason than the fact that she blocked the mouth piece with her tongue.

Prior to the conclusion of the hearing and in reply to Mr. Biel's comments about the medical report, the Applicant provided the Tribunal with a copy of a new report from Physician # 1. According to the Applicant this report was faxed "...12:44 November 29 ...". As Mr. Biel had no objection, a copy of the report was accepted and filed as Exhibit # 4.

APPLICATION OF THE LAW TO FACTS:

The Applicant alluded to the fact that a blood sample could have been obtained. Subsection 48.3(3)1 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H-8 as amended is clear in its provision, the concentration of alcohol in the blood may be obtained "...by an analysis of the person's breath sample or blood taken..." However, the decision to request a blood sample is at the discretion of the officers, according to established policy. At the time, the Applicant showed no visible signs of respiratory impairment, such as wheezing or choking. Thus, the issue of a blood sample is inconsequential.

Throughout the hearing, evidence was introduced by the Respondent to suggest that the Applicant was driving under the influence. Determination of impairment is not an issue for this Tribunal, nor does the Applicant's state of sobriety have any bearing on this Tribunal. The Tribunal's mandate rests with Section 50.1(2)(b) of the *Highway Traffic Act*, states:

"...person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason..."

Thus, at issue is did the Applicant have a medical condition that could cause the Applicant to fail or not comply with the breath demand.

The Applicant contends that she was not able to provide a breath sample due a medical condition. She supports her grounds for appeal referring to Physician # 1's report. The Respondent argued that Physician # 1's report does not comply with the requirements of section 15 of Regulation 574 under the *Highway Traffic Act*.

Sections 15(1) and (2) of Regulation 574 provides:

15(1)(c)

" that the medical practitioner had prepared the report or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's license under section 50.1 of the Act."

15(2)

“The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests.”

The Tribunal concurs with the Respondent’s argument in that the Tribunal not give significant weight to the report. The report entered as Exhibit #4, conforms with the provisions of Section 15(1)(c), but its general nature and does not fully comply with the requirements of Section 15(2).

Nonetheless, the condition attributed to the Applicant cannot be considered as a typical respiratory deficiency, where the patient is commonly referred to a respiratologist, and where there are recognized and accepted tests available, such as the Pulmonary Function Test.

The Applicant is diagnosed by Physician # 1 with a disorder characterized by panic attacks and anxiety. The condition diagnosed by Physician # 1 is one that is unpredictable and can manifest itself with or without apparent reason, but does usually occur during stressful situations. This statement is corroborated by description found in the Glossary of Technical Terms on page 769 of the Diagnostic and Statistic Manual of Mental Disorder – DSM IV:

“**panic attacks** Discrete periods of sudden onset of intense apprehension, fearfulness ...during the attacks there are symptoms such as shortness of breath.... Panic attacks may be **unexpected** (uncued), in which the onset of the attack is not associated with a situational trigger (“cue”); and **situationally predisposed**, in which the panic attack is more likely to occur on exposure to a situational trigger...”.

Further information provided by the Diagnostic and Statistic Manual of Mental Disorder – DSM IV, confirms that panic attacks can vary in severity and incidence.

Not being provided detailed information by Physician # 1’s report, the Tribunal must rely on the evidence presented with respect to the events that transpired on the night in question, as well as on visual observation of the Applicant’s demeanour during the hearing.

Both officers testified steadfastly that the Applicant was not hysterical nor hyperventilating. The Applicant gives her version of “hysterical” as “begging”. Police Officer # 1 observed “...hesitation...” as he was placing the Applicant in the cell. He noticed that the Applicant “...did not want to be put into the cell...”. This behaviour is consistent with the fear of “being trapped.”

There is a discrepancy in the testimony of the two officers. Police Officer # 1 remembers the Applicant as crying "...through out the investigation...", Police Officer # 2 emphatically stated that he would not perform a breathalyzer test on someone crying, but described an incident where the Applicant "...jumped up from her chair...to get a roll of paper towels from the wall to blow her nose...". There is no evidence that the Applicant had a cold, blowing a nose is a common reaction of someone crying. In fact, throughout this hearing, the Applicant did not stop tearing and had the constant need to blow her nose.

The Representative of the Ministry noted that if the Applicant had been hyperventilating for a solid two hours, she would have passed out. This assumption is accurate. DSM IV confirms that one of the symptoms of panic is "shortness of breath". This fact, together with the fact that the Applicant cried "...through out the investigation...", makes it feasible to accept that her breathing would be altered to some extent.

The Applicant also provided several reasons as to why the situation she found herself in was particularly stressful. In her testimony and in her closing remarks, the Applicant stated: she was worried about her children, the babysitter, her job; she was upset and "...repeatedly..." told the officers that she could not breathe; she "begged" to be let out of the cell; she alluded to the rude treatment by Police Officer # 2. It is evident that the Applicant with or without reason, felt intimidated by the male officers, and asked for a female officer.

It is quite conceivable that the combination of events that took place on the night in question, could bring on anxiety and panic. As the degree of manifestation varies, it is quite possible that the officers were not aware of what was happening. Nonetheless, the Tribunal is satisfied that the Applicant was suffering from a condition at the time of the incident which precluded her from providing an adequate breath sample.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Appellant meets the criteria of Section 50.1(2)(b), in that she was able to demonstrate that she suffers from a medical condition which would prevent her from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 8, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 12, 2001

843 – NO MEDICAL CONDITION

ADLS – 843 – NO MEDICAL CONDITION

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: December 7, 2001 Toronto

DECISION

A hearing was held on December 7, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: December 10, 2001

ADLS – 843 – NO MEDICAL CONDITION

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: December 7, 2001

DECISION
RELEASED: December 10, 2001 Toronto

REASONS FOR DECISION

A hearing was held on December 7, 2001, at Toronto, Ontario, to consider the appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA") of Senthil Kumaran Subramaniam (the "Applicant").

The Tribunal released its Decision on December 10, 2001, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated November 2, 2001, and was received by the Tribunal on November 5, 2001, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the hearing proceeded. The hearing was delayed as the Applicant failed to attend. The Tribunal adjourned for 30 minutes and the Applicant was called by telephone. The hearing re-convened at 10:00 a.m. As the Applicant was not present, the documents which had been filed with the Tribunal were entered into evidence. The hearing continued with the representative for the Respondent calling a witness to the stand. The witness was sworn and proceeded to give testimony. The Applicant arrived at 10:40 a.m. The hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension notice dated October 30, 2001.
- b) Exhibit # 2 Notice of appeal form dated November 5, 2001.

By the Respondent:

- a) Exhibit # 3 MTO submissions received December 4, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Police Officer # 1, Toronto Police Service was sworn and gave the following testimony. Police Officer # 1 testified that on October 25, 2001 he was in the curb lane on Finch Ave at Markham Rd. in the City of Toronto. He observed a vehicle in his rear view mirror. This vehicle approached his vehicle, changed into the bus lane and proceeded to go through the intersection against a red light. Police Officer # 1 activated his roof lights, caught up to the vehicle and pulled the vehicle over. The vehicle was a 1996 Acura Integra licence plate number AHYE748 and driven by the Applicant.

Police Officer # 1 testified that he detected an odour of an alcoholic beverage on the drivers' breath. He read the driver the breath demand from the back of his note pad. The Applicant accompanied the officer back to his cruiser where he provided a sample into the approved roadside screening device. The Applicant failed that road side test. He was arrested and transported to the police station whereby he was turned over to the breath technician, Police Officer # 2.

The Applicant was again read the demand for breath and explained what was going to take place. The Applicant replied that he understood and would co-operate. The Applicant provided an adequate breath sample and blew 106mg which was over the legal limit. The Applicant was able to have a sustained expiration which lasted at least 10 seconds. This was evidenced in the video tape provided. The Applicant was told that he would be required to provide another adequate sample after a 15 minutes hiatus. The Applicant was brought back into the breath room and attempted to provide a further breath sample. The Applicant on each attempt either blew for short periods of time or inhaled from the tube thus causing the machine to register an error message. Police Officer # 2 after the third failed attempt, concluded that the Applicant was not going to comply and supply an adequate sample and he was subsequently charged.

The Applicant had no questions of the officer. The officer was excused from the stand.

The Applicant took the stand and was affirmed. He testified that he suffered from a medical condition, i.e. he had trouble breathing. He also testified that he was unable to give the officer a breath sample because of his breathing problems. The Applicant was asked if he had seen the video tape provided by the Representative for the Respondent. He said no and was shown the tape. The tape clearly indicated that the Applicant did in fact provide an adequate breath sample and was able to expire his air continuously for 10 seconds. However, he stated that on the next attempts he had trouble with his breathing.

The Applicant provided a "medical letter" in support of his position. The Notice of Appeal form, page 2 was not completed by the physician. Instead a letter was attached to the form. Upon questioning, the Applicant acknowledged that the physician was not made aware that the letter was going to be used in an Appeal brought before the Tribunal nor had the Applicant informed the physician that he had been charged with impaired and refusal to provide a proper breath sample.

The Applicant continued to state that he needed his licence as his father could not see out of one eye and had to be taken to the hospital regularly for treatment. The Applicant had no further information to add and was excused from the stand.

The Tribunal finds as fact the documentary evidence presented by the representative for the Respondent as well as the testimony presented by Police Officer # 1.

The Tribunal does not accept the evidence as presented by the Applicant.

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a medical condition which precluded him from providing a breath or blood sample.

The report from Physician # 1 the Applicant's medical practitioner, fails to meet the specific requirements of Section 15(1) of Regulation 574 of the *Highway Traffic Act* in the following respects. Physician # 1 does not indicate 1) if he is family physician or specialist 2) there is no history of present medical condition 3) there is no indication of any treatments afford to this patient 4) there is no indication that the physician is unaware that this report will be used in a hearing before the Licence Appeal Tribunal; and 5) the report does not provide any details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report

This report does not meet the requirements of section 15 of Ontario Regulation 574 and therefore the Tribunal can give this report little weight.

Also, the Tribunal finds that the Applicant's testimony lacked credibility.

APPLICATION OF THE LAW TO FACTS:

The onus of proof is on the Applicant in this appeal to establish that he did not provide a breath sample because of a medical reason. The evidence before this Tribunal does not establish this.

The Tribunal after weighing all of the evidence presented can only conclude that the Applicant was not suffering from any medical condition that would have precluded him from providing a proper breath or blood sample.

The Applicant has not discharged the onus to establish a valid medical reason for his failure to provide a breath sample when demanded under section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order dated October 26, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: December 12, 2001

890 - ASTHMA

ADLS – 890 - ASTHMA

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: KYLE M. BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: December 19, 2001

Toronto

DECISION

A hearing was held on December 19, 2001, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C., Presiding Member

RELEASED: December 20, 2001

ADLS – 890 - ASTHMA

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE, D.C.,
Presiding Member

APPEARANCES: LUBA NEUWIRTH,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant

DATE OF
HEARING: December 19, 2001

DECISION
RELEASED: December 20, 2001 Toronto

REASONS FOR DECISION

A hearing was held on December 19, 2001, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on December 20, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 30, 2001, and was received by the Tribunal on November 26, 2001, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

Counsel for the Applicant asked that his client be able to have an interpreter present. There was no objection from the representative for the Respondent. The interpreter was identified as Mr. Manbreet Dhillon. Mr. Dhillon was affirmed. Both parties gave consent to having the documents submitted entered into evidence. The hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice to Registrar.
- b) Exhibit # 2 Notice of Appeal received by the Tribunal on November 26, 2001.

By the Respondent:

- a) Exhibit # 3 MTO Submissions received by the Tribunal December 12, 2001.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

- 50.1(1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,
 - (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
 - (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The [Tribunal] may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

- 15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
 - (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the [Tribunal] from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant was called to the stand and was affirmed. He testified that on October 20, 2001 he was stopped by police. He thought that the police had stopped him because of a broken tail light which had apparently happened early that day. The Applicant testified that the police asked him if he had anything to drink to which he responded no. He then testified that he was put into the police cruiser and asked to provide a breath sample. He stated that he tried to provide a sample but could not because of his asthma.

According to the Applicant, he was arrested then placed in handcuffs. The Applicant testified that he started to have a viral infection earlier that day and was not feeling well. He also testified that he had a "rash and pimples" start that day as well. The Applicant testified that he has seen Physician # 1 since 1993 and has stated that he has had asthma since early childhood and is currently taking two puffers and tablets. The Applicant testified that he has asthma attacks, "sometimes once per week or 3 to 4 times per week or once every few weeks". The Applicant was asked what happened when he attempted to provide the breath sample?. The Applicant stated that he "began to choke and cough". The Applicant testified that he asked the officer if he could do other tests such as "walk a chalk line or count backwards from 100 to prove he was not drinking"? According to the Applicant, the response

of the officer was that he relied on an approved screening device to determine if he had alcohol in his system or not. He was asked by counsel if he had told the officer that he suffered from asthma or any other medical conditions? The Applicant responded, "no". The Applicant also testified that during his attack while trying to provide a breath sample, he was suffering from "shortness of breath" and was coughing and he went on to state that he "did not want to throw up in the car".

The Applicant testified that he did not see Physician # 1 until the 24th October as it was the weekend. The Registrar's representative pointed out that the 24th of October was a Wednesday and again asked why the Applicant did not see his physician on the Monday, October 22, 2001? The Applicant responded that he went home and "treated himself" with his puffers and a "machine with a mask". He testified that he has had asthma since childhood as well his wife and children also "suffer from asthma and everyone is on medication." He also testified that he did not see the physician immediately because he is "told the same thing every time, that is to continue with his medications". The Applicant testified that he had not seen a specialist or Respiriologist in the past but had gone for tests on December 6, 2001. However, the Applicant did not provide any confirmation that he attended such testing nor were there any results of PFT submitted to the Tribunal.

Counsel for the Applicant asked the Tribunal to consider the medical evidence provided by the Applicants' Physician # 1. Counsel pointed out that Physician # 1 states that the Applicant has a history of asthma, is on medications for this asthma and that asthma is exacerbated by viral infection or by acute emotional stress. According to Physician # 1, "when he was pulled over by the police he got anxious and it triggered his asthma, this prevented him from giving an appropriate breath test." The Applicant had nothing further to add and was excused from the stand.

Police Officer # 1 was called to the stand, was sworn and gave the following testimony. Police Officer # 1 testified that he has been with the Toronto OPP since January of 2001. Police Officer # 1 testified that he was travelling northbound on Highway 427 south of Derry Road. He observed a green jeep Cherokee plate number 210 XKK travelling in lane four cross onto the shoulder and then correct back into the lane. Police Officer # 1 observed this three more times. The police cruiser's lights were activated and the vehicle was stopped. Police Officer # 1 exited his vehicle from the passenger's side and approached the jeep on the driver's side. He testified that he detected the odour of an alcoholic beverage. As well, the driver's eyes were red and glassy. Police Officer # 1 asked the driver, who was identified as the Applicant if he had anything to drink that evening? The driver responded, "No, only a coke". The officer asked the driver to get out of the vehicle and to step to the rear of the jeep. According to the testimony of Police Officer # 1, he again asked the Applicant "did you have anything to drink?", to which, according to Police Officer # 1, the Applicant responded, "Two beers". Police Officer # 1 again stated that he smelled an alcoholic beverage on the driver's breath and at that point he formed an opinion that the Applicant had alcohol in his system. Police Officer # 1 read the demand for breath to the driver and the driver responded "yes, OK". The Applicant was placed

in the rear of the cruiser. At approximately 12:32 a.m. the demand for breath was again made to which Police Officer # 1 asked the Applicant if he understood to which the driver replied, "yes".

Police Officer # 1 explained the test to the Applicant. He then demonstrated what the Applicant had to do and what was expected to happen. The Applicant indicated to the Officer that he understood and would comply. The Applicant was given eight opportunities to provide a breath sample. On these attempts, the Applicant either puffed out his cheeks and blew no air into the machine, or failed to form a seal around the mouth piece thus allowing air to escape and not enter the device.

According to Police Officer # 1, only on two of the eight attempts was there an audible tone emitted from the machine; however, on both of these attempts, the tone lasted no more than 2 seconds which caused the machine to register an EO code, which indicates an insufficient sample of air. At one point, the Applicant was given a mouth piece and asked to blow, to which he did and air was felt exiting the mouth piece. The mouth piece at this time was not in the machine. Once placed into the device, an insufficient sample was provided. Police Officer # 1 testified that at no time did the Applicant indicate to him that he had a medical condition or that he was in need of medication or medical attention. Police Officer # 1 testified that on the 7th attempt, the Applicant began to cough which lasted a few seconds. The Applicant was provided an 8th attempt; again the Applicant's breath sample unable to register on the device. It was at this point the Applicant was arrested and charged with failure to provide. Police Officer # 1 was excused from the stand.

The Tribunal accepts the evidence of Police Officer # 1 that he did not observe the Applicant having any difficulty breathing or talking and that he was not wheezing or gasping for air.

The Applicant's physician has indicated that the Applicant has a long history of asthma and is on "inhaled steroid and bronchodilators". The physician also stated that "Patient is presently stable".

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The Tribunal has examined the medical evidence submitted by the Physician #1. The document submitted by Physician #1 does not substantiate the Applicant's claim that he had a medical condition at the time of the breath demand which precluded him from providing a breath sample. Physician #1 stated that 'the asthma was triggered by anxiety when his patient was pulled over by police'. However, the Applicant stated to the contrary that "I had virus, which started in the morning" and that is what caused me to have an asthma attack". According to Physician #1, the Applicant has had asthma since childhood but has not felt it necessary to refer him to a specialist or to have specific pulmonary function tests until after the Applicant had been charged when an appointment was made to have testing done. This test was to be

conducted on December 6, 2001. The Tribunal did not receive any results of this test.

The Tribunal after very careful review gives little weight to the medical report of Physician #1 with respect to the Applicant's failure to provide a breath sample when demanded by Police Officer # 1.

After reviewing the foregoing facts, the Tribunal finds that the Applicant has not established that his medical condition is that required by Regulation 574 and Section 50(1)(2)(b).

The evidence is clear that the Applicant attempted to provide a sample, however an adequate sample was not provided for no apparent medical reason.

The Tribunal finds that the Applicant's medical status was within acceptable and normal functional limits and can only conclude that the actions taken by the Applicant were actions taken by someone who was unwilling to provide an adequate sample. The evidence of Police Officer # 1 that the Applicant consistently repeatedly puffed out his cheeks and blew no air into the instrument or failed to provide a tight seal around the mouth piece repeatedly do not show the actions of someone having difficulty providing a sample because of a medical reason.

The Applicant has not discharged his onus under section 50.1 of the HTA to establish a valid medical reason for his failure to provide a breath sample when demanded by P.C. Barker under Section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order dated October 21, 2001 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.,
Presiding Member

RELEASED: December 24, 2001

CHRISTIANSEN

BRIAN CHRISTIANSEN

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Brian
Christiansen to seek an extension of the time to
commence an appeal from an impoundment order
of the Registrar under Section 55.1 of the *Highway
Traffic Act*;

AND IN THE MATTER of

BRIAN CHRISTIANSEN

APPLICANT

-and-

REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: NIVES MONTANO, Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

BRIAN CHRISTIANSEN, Applicant

DATE OF
MOTION: November 29, 2001

By teleconference

ORDER

A motion was heard by teleconference on November 29, 2001, at Toronto, Ontario, to consider the request of Brian Christiansen (the "Applicant") for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

SUBMISSIONS OF WRITTEN MATERIAL:

The Applicant submitted the following documents:

1. Copy of Notice to Registrar dated October 4, 2001, as issued by the Ministry of Transportation, relating to the impoundment of the motor vehicle for 45 days (Exhibit # 1).
2. Original Notice of Appeal, including Applicant's position on Appeal, dated October 26, 2001, received by the Tribunal on October 30, 2001 (Exhibit # 2).
3. Copy of letter from the Applicant dated November 8, 2001 and received by the Tribunal on November 14, 2001 (Exhibit #3).

THE FACTS:

The Applicant is the owner of a motor vehicle impounded for a period of 45 days pursuant to section 55.1 of the *Highway Traffic Act*. The Applicant is a long-distance highway truck driver.

The motor vehicle was ordered impounded on October 4, 2001 while being driven by James F. Canning, whose driver's licence was under suspension at the time of the impoundment. The Applicant's girlfriend and Mr. Canning, one of the sons of the Applicant's roommate, took the vehicle without the knowledge or consent of the Applicant. The vehicle was stopped by the OPP just south of North Bay and the driver and occupant were arrested for being impaired. The vehicle was then impounded.

The Applicant's Notice of Appeal to the impoundment was dated October 26, 2001 and was received by the Tribunal by mail on October 30, 2001, 26 days after the vehicle was impounded. The motion presently before the Tribunal is for an Order requesting an extension of the time for the filing of the Notice of Appeal.

The following is the Applicant's affirmed testimony and explanation for not filing an appeal of the impoundment of his vehicle within the required 15 days.

The Applicant testified that he left the keys to his vehicle with his girlfriend to give to his ex-wife so she could bring their ill son to the doctor for some tests.

The following is the Applicant's chronological itinerary for the month of October 2001:

DATE	DESCRIPTION
October 2, 2001	Applicant drove to Winnipeg.
October 4, 2001	As Applicant is leaving Winnipeg to return to Toronto, receives a phone call from his girlfriend advising that his vehicle had been impounded in North Bay.
October 5, 2001	Applicant arrived in North Bay. Was informed by the impound facility of the phone number for the Licence Appeal Tribunal to obtain package for filing an appeal. Applicant obtained a photocopy of the Notice to Registrar (front page only) from the OPP. The Tribunal is unclear when the Applicant received the original Notice to Registrar.
October 6, 2001	Applicant was picked up in North Bay to proceed to his next destination.
October 12, 2001 10 a.m.	Applicant drove to Winnipeg.
October 12, 2001 3 p.m.	Appeal package from Licence Appeal Tribunal arrived by mail at the Applicant's home.
October 19, 2001 3 p.m.	Applicant returned to Ontario. Applicant's roommate provided Applicant with his mail. Applicant testified he saw the package, but did not have a chance to review and complete the forms.
October 20, 2001 9 a.m.	Applicant left for Moncton, New Brunswick. Before his departure, the original Order to Impound was not yet received by the Applicant.
October 22, 2001 4 a.m.	Applicant returned to Ontario and stayed in Toronto until truck was loaded for departure at 1 p.m. (approx.)

DATE	DESCRIPTION
October 22, 2001 1 p.m. (approx.)	Applicant left for Winnipeg (single run).
October 25, 2001 6:30 p.m.	Applicant arrived at Toronto Pearson and took a taxi home to Barrie.
October 26, 2001	Applicant reviewed, completed and forwarded appeal forms to the Licence Appeal Tribunal.
October 30, 2001	Appeal forms received by the Licence Appeal Tribunal (Exhibit #2).

THE LAW:

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Tribunal under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Tribunal within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Tribunal may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

APPLICATION OF LAW TO FACTS:

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that he, acting in good faith, was unable through accident, illness or other cause beyond his control, to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. Though the Tribunal acknowledges the desire of the Applicant to accept fault in this matter, the Tribunal is precluded from considering other factors not arising from or directly related to these criteria.

The criteria listed in Section 20(7), which the Tribunal should consider in granting an extension, are matters outside the Applicant's control.

The owner of a vehicle must expeditiously inquire and/or file the necessary paperwork for an appeal process as stipulated on the reverse of the Notice to Registrar. A complete copy of that form inadvertently was not provided to the Applicant by the Ontario Provincial Police in response to the Applicant's inquiry respecting the impoundment. There is no evidence before the Tribunal that the Applicant received original Notice to Registrar which sets out the Applicant's appeal rights. In his testimony, the Applicant provided a number of reasons that precluded a timely filing.

As outlined above, the Applicant is a long-distance highway truck driver. The appeal package was received on October 12th after the Applicant left for Winnipeg. The Applicant arrived home at 3 p.m. on October 19th to leave again at 9 a.m. October 20th for New Brunswick. He returned to Ontario in the early morning hours of October 20th to once again leave a few hours later for a one-way trip to Winnipeg, flying back to Toronto on October 25th. Therefore, the Applicant was not home long enough to sit down, read, complete and file the necessary appeal forms until October 25th, 13 days after the receipt of the appeal package.

The Applicant testified that he made his best effort to pursue the matter and file the appeal as quickly as possible as there are no fax machine at truck stops or weight stations along the route.

Based on the foregoing, the Tribunal finds that the Applicant was acting in good faith and to the best of his ability in filing his appeal.

The Tribunal is of the view that the Applicant has provided a satisfactory reason beyond his control to explain his delay in completing and filing the appeal within the prescribed fifteen days, as required under section 20(7) of Ontario Regulation 632/98.

ORDER:

Accordingly, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is granted.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: December 4, 2001

CONTINENTAL LEASING SERVICES INC. AND PETER CARL VERBEEK

CONTINENTAL LEASING SERVICES INC. AND PETER CARL VERBEEK

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: JOHN ORT, Member

APPEARANCES: PETER CARL VERBEEK, Agent, representing himself
and on behalf of Continental Leasing Services Inc.,
Applicants
A. MICHAEL ROTHE, Counsel, representing the
Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: November 22, 2001 *Via Teleconference*

REASONS FOR RULING AND ORDER

BACKGROUND:

A motion was heard by the Licence Appeal Tribunal by teleconference on November 22, 2001, at Toronto, Ontario. Continental Leasing Services Inc. and Peter Carl Verbeek (the "Applicants") have filed an appeal with this Tribunal from a Notice of Proposal (the "Proposal") by the Registrar of the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act", respectively). The Proposal dated August 3, 2001, seeks to revoke the registrations of Continental Leasing Services Inc. as a motor vehicle dealer and of Peter Carl Verbeek as a motor vehicle salesperson. The Registrar's position is that the Applicants failed to request a hearing before this Tribunal within the prescribed time. The Applicants' position is that they have filed within the prescribed time or alternatively request an extension of time under section 7 of the *Licence Appeal Tribunal Act*, 1999.

ISSUES:

Have the requirements for service of a notice requiring hearing under section 7 of the *Motor Vehicle Dealers Act* been met in this case?

If the Notice of Appeal was not filed with the Licence Appeal Tribunal within the time prescribed by statute, is this an appropriate case for an extension of that time pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*?

THE FACTS:

The Registrar submitted the affidavit dated November 7, 2001 of Amanda Lee-Dempsey, including attached exhibits "A" to "E". Paragraph 2 of that affidavit states in part: "I have been advised by Yovanka McBean and do verily believe that on August 3, 2001 Ms. McBean sent a Notice of Proposal to Revoke the Registration of Continental Leasing Services Inc. and Peter Carl Verbeek ... to the latest address for service appearing on OMVIC's records...". Further, paragraph 3 of that affidavit states in part: "On or about August 7, 2001 I had a telephone conversation with Peter Verbeek at which time he confirmed that he was in receipt of the Proposal...".

The Applicants, Continental Leasing Services Inc. and Peter Carl Verbeek, submitted Notice of Application for Extension of Time for Appeal together with Statement of Facts in Support of Application for Extension of Time for Appeal, both dated October 11, 2001. In paragraph 1 of his affidavit Mr. Verbeek claims: "The Notice of Proposal to Revoke Registration was received by the Applicant by way of registered mail, on or about the 17th day of August, 2001, being the date that it was picked up by the Applicant at the postal station in Brampton." Mr. Verbeek did not present any evidence of absence, accident, illness or other cause beyond his control as a reason for not picking up the registered mail letter sooner.

TESTIMONY OF PETER CARL VERBEEK

The Applicant, Peter Carl Verbeek, stated that he delivered the Notice of Appeal to the Licence Appeal Tribunal (the "Tribunal") by personally sliding it under the locked door of the Tribunal on August 21, 2001, at 4:45 p.m. Through inadvertence, the Applicant failed to enclose a cheque to the Tribunal for the required fee. The cheque was delivered to the Tribunal by a process server on August 22, 2001.

THE LAW:

Rule 4.2 of the Rules of Practice of the Licence Appeal Tribunal states in part: "For documents other than a summons issued by the Tribunal as provided in Rule 4.1, the following rules apply: ... (2) Documents delivered after 4:00 p.m. shall be deemed to have been served on the next day that is not a holiday."

Section 20 of the *Motor Vehicle Dealers Act*, R.S.O. 1990, states:

"(1) Any notice or order required to be given or secured under this Act or the regulations is sufficiently given or served if delivered personally or sent by registered mail addressed to the person to whom delivery or service is required to be made at the latest address for service appearing on the records of the Ministry of Consumer and Commercial Relations.

"(2) Where service is made by registered mail, the service shall be deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control receive the notice or order until a later date...".

Section 7 of the *Motor Vehicle Dealers Act*, R.S.O. 1990, states:

"(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

"(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing....".

Section 7 of the *Licence Appeal Tribunal Act*, 1999 states:

"Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

"(a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and

"(b) give the directions that it considers proper as a result of extending the time.".

APPLICATION OF LAW TO FACTS:

The Tribunal accepts the statement in the affidavit of Ms. Lee-Dempsey that the Notice of Proposal was sent on August 3, 2001, and the statement in the affidavit of Mr. Verbeek that the Notice of Proposal was received by registered mail. Section 20(2) of the *Motor Vehicle Dealers Act*, deems that service by registered mail to be made on the third day after the day of mailing. Three days after August 3, 2001, is August 6, 2001. However, August 6, 2001 was a civic holiday and both parties agreed that service of the Notice of Proposal is, therefore, deemed made on the next day, August 7, 2001.

Section 7 of the *Motor Vehicle Dealers Act* states that the applicant is entitled to a hearing by the Tribunal if he delivers, within fifteen days after service of the notice (notice of proposal) notice in writing requiring a hearing (Notice of Appeal). August 7, 2001, is the date of deemed service of the Notice of Proposal. August 8, 2001 is the first day "after service", August 9, 2001 is the second day "after service" and so forth to August 22, 2001 which is the fifteenth day "after service". The Tribunal rejects the argument of counsel for the Registrar that August 7, 2001 can be both the day of service and the first day "after service" and that the fifteenth day after service is August 21, 2001.

Mr. Verbeek testified that the door of the Licence Appeal Tribunal was locked when he slid the Notice of Appeal under it on August 21, 2001 and that it was after 4:00 p.m. In accordance with Rule 4.2(2) of the Rules of Practice of the Licence Appeal Tribunal, which states that documents delivered after 4:00 p.m. shall be deemed to have been served on the next day, the Tribunal finds that the Notice of Appeal was served on the Licence Appeal Tribunal on August 22, 2001.

The Tribunal therefore finds that Notice of Appeal was filed on time with the Licence Appeal Tribunal.

B.E. Chandler Co. v. Mor-Flo Industries Inc. (1996) 30 O.R. (3) 139 and Frey v. MacDonald (1989), 33 C.P.C. (2d) 13 (Ont. C.A.), cited by counsel for the Respondent, both concerned situations where an appeal was not filed on time, and, therefore, do not need to be considered in this case.

ORDER:

For the reasons set out above, the Tribunal finds that the Applicants filed their requests for a hearing within the prescribed time.

LICENCE APPEAL TRIBUNAL

John Ort, Member

Released: December 3, 2001